BEFORE THE NATIONAL GREEN TRIBUNAL
PRINCIPAL BENCH
NEW DELHI

EXECUTION APPLICATION NO.50 OF 2023

IN

ORIGINAL APPLICATION NO.60 OF 2014

IN THE MATTER OF:

Society for Protection of Culture, Heritage, Environment, Traditions and Promotion of National Awareness [Also known as 'CHETNA']

...Applicant

Versus

Union of India & Ors.

...Respondents

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Applicant

Date:
Place :New Delhi

(M/s Jhankar Banquet)
Respondent NO.3

Through :

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NEW DELHI
Dated: 01.05.2024

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REPLY ON BEHALF OF THE RESPONDENT NO.3, TO THE ABOVE-CAPTIONED PRESENT EXECUTION APPLICATION OF THE APPLICANT-SOCIETY

MOST RESPECTFULLY SHEWETH:

That the above-captioned present Application has been filed by the Applicant alleging non-compliance (non-adherence) by the respondents of the Judgement dated 10.07.2015 of this Hon'ble Tribunal and seeking due compliance thereof by the respondents.

Preliminary Objections

1. That the present Application is a gross abuse of the process of law and this Hon'ble Tribunal. The present Application is liable to be dismissed for the said short reason alone.

2. That the present Application has been filed for some personal grudge and/or vendetta of the Applicant-Society against the answering respondent No.3. The Application lacks bonafide and is, therefore, liable to be dismissed forthwith.

3. That the Applicant-Society does not raise any issue/ grievance/ complaint of any violation of any environmental laws/provisions by the respondent No.3. In view thereof, the present Application is not tenable.

4. The Applicant SPCHETNA in his Original Application No.60/2014 had sought the following relief :-

(a) Direct the Respondent No.2 to take the possession of the land around the Asiad Tower situated adjacent to Siri Fort Complex admeasuring 18,500 sq.mtrs, along with the remaining area and restore the area to its natural state and maintain the same as green for the purpose of District Park and allow the general public to use the same ;

(b) To quash the letter dated 18.12.1997 along with the site plan wherein the green area/land admeasuring 18,500 sq.mtrs. around the/said Tower was illegally handed over by the Respondent No.2 to Respondent No.3.

In the present execution application, they are seeking relief which were not prayed in the original application inter alia directions for running Tower Restaurant as pre-condition. The said prayer of the applicant in execution application is beyond relief sought by the applicant in his original application. Relief which is not prayed in the Original Application cannot be granted. Reliance is placed on the judgements of Hon'ble Apex Court in the following matters

4.1 In the case of **Messrs. Trojan & Co. Ltd. Vs. Rm. N.N. Nagappa Chettiar, {1953 AIR 235, 1953 SCR 780}, Annexure P/1,** Hon'ble Apex Court considered the issue as to whether relief not asked for by a party could be granted and

that too without having proper pleadings. The Court held as under:-

"It is well settled that the decision of a case cannot be based on grounds outside the pleadings of the parties and it is the case pleaded that has to be found. Without an amendment of the plaint, the Court was not entitled to grant the relief not asked for and no prayer was ever made to amend the plaint so as to incorporate in it an alternative case."

4.2 In the case of **Bharat Amratlal Kothari & Anr. Vs. Dosukhan Samadkhan Sindhi & Ors. {AIR 2010 SC 475}, Annexure P/2,** Hon'ble Apex Court held:

"Though the Court has very wide discretion in granting relief, the Court, however, cannot, ignoring and keeping aside the norms and principles governing grant of relief, grant a relief not even prayed for by the petitioner."

4.3 In the case of **Siddu Venkappa Vs Smt.Rangu S. Devadiga And Ors { AIR 1977 CS 890, (1977)3 SCC 532 }, Annexure P/3,** Hon'ble Supreme Court held:

"The High Court therefore went wrong in ignoring this basic principle of law, and in making entirely new case which was not pleaded and was not matter of the trial."

5. That there is no 'breach' whatsoever of the terms and conditions of the License Deed, signed and executed between the respondent No.2 (DDA) and the answering respondent No.3. Without prejudice thereto, it is submitted that if at all there is any breach of any of the terms and conditions of the License Deed, the respondent-DDA alone would be the concerned aggrieved party to raise any such issue. Pertinently, the respondent-DDA has not alleged any breach of the terms and conditions of the License Deed. In the respectful submission of the respondent No.3, enforcing the contract between the parties is beyond the jurisdiction of this Hon'ble Tribunal. Further, the civil courts would be the proper court of jurisdiction for determining the question of such a contractual breach, if any.

6. Further, there is no 'environmental issue' involved in the matter. Indeed, the respondent No.3 had increased and enhanced the greenery at the said Area/Land. This was admitted by the respondent-DDA and duly accepted, and recorded, by this Hon'ble Tribunal in Para 26 of its Judgement dated 10.07.2015, which has been reproduced in para 15 of its subsequent Order dated 31.07.2017. The relevant portion thereof reads as below:

Quote

15. *The Tribunal has recorded reasons as could be seen from paragraph 26 of the judgment wherein on legal consideration of the grounds urged the bench has concluded:*

"in any event if such violations are effected its is that statutory duty of the respondent No.2 either as a lessor or licensor to take appropriate action. As long as the statutory nature of the Master Plan remains in the appropriate form it is not for this Tribunal to hold that the respondent No.2 is either not entitled to lease or give on license either the Tower Restaurant or the surrounding areas. ***Moreover, there has been a specific finding that during these years, the respondent No.3 has taken steps to make the green area by planting more trees****. Therefore, looking into any angle, we are unable to accept the contentions of the learned senior counsel for the applicant in this regard.*

This would show that ***the first ground urged by the applicant questioning the validity of the license dated 18.12.1997 has been negated****.*

Unquote

7. The present execution application is not maintainable inter alia on the ground mention below:

a) The applicant is seeking execution of the order of this Hon'ble Tribunal dated 10 July 2015 whereas the said order has already been reviewed and modified by this Hon'ble Tribunal vide order dated 31 July 2017 as such this application is not maintainable and is liable to be dismissed on this ground.

b) The applicant seeks directions to Respondent No 2 and 3 to stop using area without running and operating tower restaurant in their relief/ prayer under Clause b of prayer. In original application the applicant did not pray the said relief. It is settled law that relief cannot be beyond the prayer. Now new relief cannot be sought under execution application. Thus, the execution application is liable to be dismissed on this ground.

c) That the applicant is seeking direction to the Respondent No 3 to submit N0C and copies of the bills issued by BSES Rajdhani Power Limited. The said prayer is outside the scope of original application and therefore the execution application is liable to be dismissed on this ground.

d) The applicant in execution application has prayed for placing on record certified copies of Balance sheets submitted to Income Tax department. The said prayer is outside the scope of execution application.

The relief sought by the applicant clearly indicates the execution application has been filed with ulterior motive and to harass the Respondent No 3. The said execution application

is liable to be dismissed with exemplary cost and may please be dismissed.

8. That the answering respondent no.3 made all out sincere efforts to start operations of Tower Restaurant as explained below:

Despite incurring such a huge expense, the respondent No.3 could not commence its business at the 'Tower Restaurant' as there was extensive leakage from the Over-head Water Tank, situated in the Tower. The said leakage was filling the wells of the lifts (elevators) with water making the lifts unusable and, in the process, the 'Tower Restaurant' was completely inaccessible. The respondent No.3 made numerous reminders and representations to the respondent-DDA, but to no avail. As grievances of the respondent No.3 were not being addressed by the respondent-DDA, it (respondent No.3) approached the Hon'ble High Court by way of a Writ Petition [being WP(C) No.4776 of 2000], which was disposed-of on 08.05.2005. A copy of the said Order dated 08.05.2001 is appended hereto as **Annexure-P/4**.

That in the year 2001, the respondent No.3 approached the Delhi Fire Services for NOC, but were informed that the letter should be addressed through DDA (respondent No.2 herein). Accordingly, the respondent-DDA, vide letter dated 26.03.2003, requested the Fire Department for NOC. Pertinently, the respondent No.3 had already installed the fire-fighting System at the 'Tower Restaurant', which was also informed to the Fire Department, vide its letter dated 21.02.2003, a copy whereof is appended hereto as **Annexure-P/5**.

The NOC was declined by the Fire Department on 20.02.2004, stating that the 'Tower Restaurant' did not meet the Building Bye Laws, 1983. Pertinently, the 'Tower Restaurant' building had been constructed by the respondent-DDA, and not the respondent No.3. The respondent-DDA, therefore, should have obtained the requisite Fire NOC before constructing the said Building, which, evidently, was not done. Importantly, the respondent-DDA made no disclosure of the said material fact in the NIT.

Subsequently, the Fire Department, vide communication dated 14.10.2004, addressed to the respondent-DDA, agreed that since the Building was constructed before 1983, the Building Bye Laws, 1967 were to be followed in grant of NOC. It, however, stated that in view of Clause 72 Part (1) of the BBL, 1967, since the width of the Staircase in the present case was less than 4 ft 6 inch, an additional staircase should be

provided. A copy of the said letter dated 14.10.2004 of the Fire Department is appended hereto as **Annexure-P/6**.

The respondent No.3 approached the respondent-DDA for its approval for construction of "additional staircase", in order to obtain NOC from the Fire Department. The respondent No.3 wrote numerous letters, *inter alia*, dated 06.06.2005; 08.08.2005; 17.11.2005; 15.02.2006; 22.02.2006 and 08.05.2006, in that regard. The Screening Committee of the respondent/ DDA in its meeting held on 10.05.2006 agreed to the proposal of modification of the existing staircase. A copy of the Minutes of the Meeting dated 10.05.2006 of the Screening Committee, is appended hereto as **Annexure-P/7**.

Pursuant to the above, the respondent No.3, on 21.07.2006, submitted to the respondent-DDA, a report for widening of the staircase. However, after a delay of about 19 months, the respondent-DDA, on 22.02.2008, informed that widening of existing staircase was not sufficient and an additional staircase would have to be provided in the existing building.

The Fire Department, by its subsequent communications dated 24.04.2009 and 26.05.2009, reiterated its stand (for construction of additional staircase). Copies of the aforesaid communications dated 24.04.2009 and 26.05.2009, of the Fire Department are collectively appended hereto **Annexure-P/8**.

The respondent No.3, again, approached the Hon'ble High Court by way of a Writ Petition [WP(C) No.11984 of 2009], against the arbitrary actions of the Fire Department. The said Petition was disposed off vide Order dated 09.02.2010, holding that the Building Bye Laws, 1962 would be applicable. A copy of the said Order dated 09.02.2010, is appended hereto as **Annexure-P/9**, and the operative portion whereof reads as below:

> **QUOTE**
>
> *15. Accordingly, impugned communications dated 22.02.2008, 24.04.2009 and 26.05.2009 are quashed. It may be clarified that as and when a fresh application is made by the petitioner and / or respondent no.1 for grant of no objection, respondent no.2 will consider the same in accordance with law and if all the conditions are met, the NOC shall be granted.*
>
> **UNQUOTE**

That upon the aforesaid decision (dated 09.02.2010) of this Hon'ble Court, and based on the approval (dated 10.05.2006) of the Screening Committee, the respondent No.3 got prepared the detailed Architectural Drawings for the proposed Staircase and submitted the same on 16.06.2010, for approval of the respondent-DDA.

That, on 28.05.2010, the entire Premises (the 'Tower Restaurant' and the 'Adjoining Area') were abruptly sealed, and it remained sealed for a period of 3 year and 09 months (45 months), till 22.02.2014.

Upon de-sealing of the Premises, the respondent No.3 wrote to the respondent-DDA on 18.05.2014, and re-submitted its proposed Architectural Drawings for conceptual approval of the Scheme. The said Plans/ Drawings, after attending to the observations of the Fire Department, were re-submitted on 19.10.2015. A copy of the petitioner's letter dated 19.10.2015 is appended hereto as **Annexure-P/10**.

The Fire Department, however, refused the same on 16.09.2016, stating "*approval of design of staircase does not fall under the purview of this department*" and asked the respondent No.3 to *approach the DDA* for the same. A copy of the letter dated 16.09.2016 of the Fire Department is appended hereto as **Annexure-P/11**.

The respondent-3 vide letter dated 22.09.2016 asked the respondent No.2 to get the conceptual approval from the Fire Department, before it would proceed on the structural designing. The Fire Department, again, by its letter dated 16.09.2016, informed that "*the approval of design of staircase does not fall under the purview of this department*". A copies of the letters dated 22.09.2016 and 05.10.2016 of the Fire Department are collectively appended hereto as **Annexure-P/12**.

In view of the said conflicting stand, the respondent No.3, on 28.12.2016 requested the respondent-DDA to resolve the long pending issue and to convene a joint meeting of the senior officers of the Fire Department; the Architectural Wing, DDA; and Engineering Wing, DDA; and Land Disposal Department, DDA and the respondent No.3. A copy of the respondent No.3's letter dated 28.12.2016 is appended hereto as **Annexure-P/13**.

That in the Meeting dated 14.07.2017, held under the Chairmanship of the Principal Commissioner (LD&H), DDA, it was agreed in principle that the respondent No.3 would raise construction of the 2nd Staircase at its expense and all concerned were directed to take-up further course of action in terms thereof. A copy of the Minutes of Meeting dated 14.07.2017 is appended hereto as **Annexure-P/14**,

Nothing further, however, was heard from the respondent-DDA for very long period of time, and the respondent No.3, by its letter dated 06.05.2019, informed the respondent-DDA that ever since grant of the Lease of the 'Tower Restaurant', the respondent No.3 has not been allowed to operate the same even for single day. A copy of the letter dated 06.05.2019 is appended hereto as **Annexure-P/15**.

That soon thereafter, however, the entire Premises (the 'Tower Restaurant' and the 'Adjoining Area') were again sealed on 28.05.2019 and it, again, remained sealed for a period of 3 years 9 months (45 months) till 23.02.2023, when the same were de-sealed on the Orders of the Judicial Committee constituted by Hon'ble Supreme Court of India.

Brief factual matrix

A. That the respondent No.2 (DDA) had carried out infra development works required for ASID 1982 games in Delhi during 1980 to 1982. The Tower Restaurant was also constructed by respondent No. 2 as a part of the said development in accordance with the provisions of MPD 1962.

B. That the respondent No.2 (DDA) has granted the lease of the Tower Restaurant to respondent No.3 after following due process of law in year 1997.

C. The respondent-DDA on 18.10.1996, issued an NIT for the **Tower Restaurant***(comprised in an area admeasuring about **916.43 Sqm**)* on lease; and the **Adjoining Area***(comprised of **17,541.07 Sqm**, excluding the 42.50 Sqm area of a Monument)*, the license, for holding marriages and social functions etc., for a period of 30 years.

D. The bid of the respondent No.3 was accepted by the respondent-DDA on 20.11.1996 and physical possession of the above Areas/ Premises was handed-over to the respondent No.3 on 19.07.1997.

E. The respondent No.3 strongly believes that the Applicant-Society is working at the behest of some vested interests and the respondent No.3 is being prevented from undertaking its legitimate business activities in a lawful manner. This also establishes gross abuse of the process of law and this Hon'ble Tribunal.

F. The Applicant-Society had approached this Hon'ble Tribunal with the following allegations and averments:

- that the area around the 'Asiad Tower' admeasuring 18,500 sq. mtr. is a 'District Park' and meant to be used by the general public;
- that the respondent-DDA (respondent No.2) had through a letter dated 18.12.1997 illegally handed over the said Area/Land to the respondent No.2;
- the Applicant-Society had questioned the grant of the possession of the said Area/Land to the respondent No.3, alleging it to be in violation of MPD 1962, 2002 and 2021 and the Zonal Development Plan;
- that the principle of public trust has been breached by the respondent-DDA in granting the license in respect of the said Area/Land to the respondent No.3;
- that the said Area/Land was meant for District park and not earmarked for marriages etc.;
- that by using the said Area/Land for marriages etc., the respondent No.3 was violating the laws;

G. With the above averments, the Applicant-Society had, in the present Original Application (O.A. No.60 of 2014), prayed for the following two reliefs. This Hon'ble Tribunal has taken note of the same in order dated 31.07.2017 in para number 3.

a) Direct the respondent No.2 to take possession of the land around the Asiad Tower situated adjacent to Siri Fort Complex admeasuring 18,500 sq. Mtr. along with the remaining area and restore the area to its natural state and maintain the same as green for the purpose of District Park and allow the general public to use the same;

b) To quash the letter dated 18.12.1997 along with the site plan wherein the green area/land admeasuring 18,500 sq. mtr. around the Asiad Tower was illegally handed over by the respondent No.2 to the respondent No.3.

H. Based on the pleadings of the Parties, this Hon'ble Tribunal framed the following issues:

1. Whether the letter dated 18.12.1997 would confer any right of license on the third respondent in respect of the

green area in the district park to the extent of 18500 sq. mtrs.

2. Whether the issue raised in this case has already attained finality

3. Whether the third respondent is entitled to exclusive use of 18500 sq. mtrs. around Asiad Tower Restaurant for the marriages and parties or the green area is liable to be used by public for recreation also

4. To what other relief the parties are entitled to?

I. This Hon'ble Tribunal had, on 10.07.2015, upheld the grant of the License (in respect of the Adjoining Area/Land) by the respondent No.2 to the respondent No.3. Para 30 of the Judgement dated 10.07.2015 of this Hon'ble Tribunal reads as below:

Quote

*30. For the reasons stated above we answer **Issue No.1** in the affirmative and against the applicant holding that the letter 18.12.1997 would confer a right of license on third respondent in respect of 18500 sq. mtrs in the green area for use for marriages, parties, etc.**Issue No.2** is held in favour of applicant holding that the issue relating to the use of 18500 sq. mtrs in the green area around Tower Restaurant has not attained finality. In respect of **issue No.3**, we hold that the third respondent is not entitled to exclusive use of 18500 sq. mtrs around Asiad Tower Restaurant but entitled to use for conducting marriages not more than 10 days in a month as held by the Hon'ble Supreme Court of India and on the remaining days the public shall be allowed to use the green area however subject to the policies of the DDA in this regard.*

Unquote

J. Thus, while partly allowing the above-captioned main Application, this Hon'ble Tribunal had in para 31 of its Judgement dated 10.07.2015 issued the following directions:

Quote

31. Accordingly while partly allowing the application, we issue the following directions which are to be scrupulously followed by the second and third respondents apart from the SDMC and DPCC and ensure that proper and continuous compliance is carried out and take appropriate actions whenever there are violations and giving liberty to the applicant to move appropriate applications before the Tribunal.

1. *The third respondent shall be entitled to use the green area to the extent of 18500 sq. mtrs around the Tower restaurant for marriages, parties etc. not more than 10 days in a month and subject to the condition that it shall also run the Tower Restaurant and pay all necessary lease and license charges in accordance with the terms and conditions of lease and license to be executed.*

2. *It will be open to the second respondent to execute the necessary license deed in favour of the third respondent regarding the use of 18500 sq. mtrs of green area around Tower restaurant subject to the above conditions and other conditions as may be stipulated by it.*

3. *The second respondent shall ensure that the third respondent complies with all the conditions of lease/license and take appropriate action on violation of the same.*

4. *The third respondent shall be responsible for the conduct of anyone permitted by it to use the green area for any recreational activities regarding the adherence of standards of noise level as prescribed by DPCC both during day and night hours. In the event of the limit being exceeded either by loud speakers or by use of crackers, the SDMC, DPCC and local police shall take immediate action including criminal prosecution. This direction is needed to protect the interest of senior citizens, children and unhealthy persons undergoing medical treatments, as right to life includes decent living with peaceful conditions guaranteed under the constitution of India and repeatedly insisted by the Hon'ble Supreme Court of India.*

5. *The third respondent shall not be permitted to put up any permanent structures in the green area and even the temporary structures erected for recreation shall be removed immediately and while doing so ensure that no damages are caused to trees, green area or land in the surrounding area.*

6. *The second respondent shall permit public including the members of applicant association in the remaining 20/21 days to be used as lung space however with usual conditions as may be imposed by it as the policy.*

7. *The third respondent shall ensure that vehicular parking is regulated properly on the roads adjoining the green area and in the surrounding areas during the times of marriages and parties.*

8. *In the event of failure of the third respondent in ensuring any of the above conditions the second respondent shall take appropriate legal action.*

Unquote

K. At this stage, it may be submitted that in its subsequent Order dated 31.07.2017, this Hon'ble Tribunal has noted that transaction of the respondent-DDA for grant of license for use of Adjoining Area was upheld in the Judgement dated 10.07.2015. Para 17 of the Order dated 31.07.2017, reads as below:

Quote

17. *This would imply that the transaction of the DDA and the respondent No.3 to grant of license for use of green area measuring 18500 sq. mtrs. is upheld.*

Unquote

L. That – as noted above – while upholding the transaction of the respondent-DDA for grant of license for use of Adjoining Area, this Hon'ble Tribunal, by its aforesaid Judgement dated 10.07.2015, put conditions, *firstly*, restricting the use of the said Adjoining Area for a period of 10 days in a month; and, *secondly*, that use of the Adjoining Area shall be subject to the

condition that the respondent No.3 shall also run Tower Restaurant.

M. That the aforesaid stipulations adversely affected the commercial terms of a concluded Contract between the respondent No.2 (DDA) and the respondent No.3 and amounted to re-writing a contract, and/or creating a new contract, for the Parties. Moreover, the same were also beyond the relief claimed by the Applicant in its Original Application.

N. That the respondent No.3 had, therefore, filed an application seeking review of the Judgement dated 10.07.2015, of this Hon'ble Tribunal, wherein it prayed as below:

Quote

(i) Allow the application and review the Judgement dated 10.07.2015 passed by this Hon'ble Tribunal to the extent the present Applicant's use of area in question has been restricted for 10 days in a month and remaining 20-21 days the public, members of the Society have been permitted use of the said area and it is directed that Applicant / Respondent No.3 shall use green area subject to the condition that it shall also run Tower Restaurant.

Unquote

O. The aforesaid application (Review Application No.23 of 2015) of the respondent No.3, was allowed by this Hon'ble Tribunal vide Order dated 31.07.2017, and the relevant portion thereof reads as below:

Quote

*24. As a result while confirming the findings of this Tribunal on various points recorded, we are of the opinion that the ban imposed by this Tribunal by the Judgement under review restricting the use of the land measuring 18500 sq.mtrs by the Respondent No.3 for a limited period of 10 days in a month needs to be modified and **we permit him to utilise the land in terms of the license granted by DDA** un-interrupted.*

Unquote

P The sole grievance of the Applicant-Society in the present Execution Application is that the respondent No.3 is not running the 'Tower Restaurant', and is still using the 'Adjoining Areas' for holding marriages and parties etc.

Q It is again submitted that running/ operating the 'Tower Restaurant' was never a condition for use of the 'Adjoining Area'. No such condition/stipulation was made in the Terms and Conditions, issued by the respondent-DDA at NIT stage. This can be verified from a bare perusal of the Terms and Conditions of the Lease and the License, issued by the respondent-DDA, along with its Notice Inviting Tender [NIT].

R Furthermore, as detailed hereinabove, though this Hon'ble Tribunal had, in its Judgement dated 10.07.2015 imposed the condition that use of the 'Adjoining Area' shall be "*subject to the condition that it shall also run the Tower Restaurant and pay all necessary lease and license charges in accordance with the terms and conditions of lease and license to be executed*". However, by the subsequent Order dated 31.07.2017 of this Hon'ble Tribunal, the said stipulation was modified and the respondent No.3 was permitted to use the 'Adjoining Area' in terms of the license granted by the respondent-DDA. The Order dated 31.07.2017 of this Hon'ble Tribunal expressly records "***we permit him to utilise the land in terms of the license granted by DDA*** *un-interrupted*."

S The respondent No.3 further submits that the terms and conditions of the License Deed were formulated and settled by the respondent-DDA, much prior to the issuance of the NIT for the same in the year 1996. The Tender-bids were invited on the basis of the said Terms & Conditions. The contracts were awarded on the basis of the said Terms and Conditions. Upon award of the Contracts, the said Terms and Conditions were agreed between the Parties (the respondent-DDA and the respondent No.3), way back in the year 1997. Pertinently, the said Terms & Conditions did not stipulate that use of the 'Adjoining Area' would be subject to the running of the 'Tower Restaurant'. Thus, use of the 'Adjoining Area' was not subject to the running of the 'Tower Restaurant'.

T Indeed, even before this Hon'ble Tribunal, it was nobody's case that the 'Adjoining Area/Land' can only be used if the 'Tower Restaurant' was functional. Even the Applicant-Society never pleaded on those line, or to that effect. Moreover, as would be evident from the issues framed in the present matter for determination, no issue with regard to the restrictions to be imposed by this Hon'ble Tribunal for use of the 'Adjoining Area' by the respondent No.3, was framed.

U The Review Order dated 31-07-2017 is very clear that the Respondent No. 3 is permitted to utilise the land in terms of the licence granted by DDA, un-interrupted. Further, the intention of the Hon'ble Tribunal has been firmly expressed in para 25 that the Respondent no. 3 shall also run the Tower restaurant, so that it cannot be separated and the same person i.e., the respondent no. 3 shall pay all the necessary lease and license charges in accordance with the terms and conditions of lease and license to DDA.

V The allotment of the two Premises ('Tower Restaurant' and 'Adjoining Area'), though made under the same auction notice, but their user were independent of each other. The 'Adjoining Area' could be put to use right from the inception, whereas the 'Tower Restaurant' could only be used after obtaining requisite permissions and licenses from various agencies. Therefore, user of the two Premises ('Tower Restaurant' and 'Adjoining Area'), which is independent of each other, could not have been inter-linked.

W Such a stipulation, and/or restriction, being contrary to the commercial terms already agreed between the Parties (the respondent-DDA and the respondent No.3), could not have been introduced/added by this Hon'ble Tribunal. This was extensively submitted and argued before this Hon'ble Tribunal during hearing of the Review Application No.23 of 2015, and, therefore, the said stipulation was whittled down by this Hon'ble Tribunal in its Order dated 31.07.2017.

X Thus, the very basis and/or substratum of the present execution Application of the Applicant-Society, is completely missing and/or flawed. The present Application is, thus, factually misconceived and legally untenable. In the respectful

submission of the respondent No.3, it is a gross abuse of the process of law and this Hon'ble Tribunal.

Y The Petitioner is in gross error by interpretation that if the Tower restaurant is not functional due to whatsoever reasons, respondent 3 cannot use the adjoining area. On the contrary it was the case of the Respondent No. 3 before the respondent DDA, that because of the technical issues, the tower restaurant is not being allowed to operate and therefore, respondent DDA shall take appropriate steps to remove the same and/ or compensate the respondent no. 3.

Z In any event, and without prejudice to the above, the respondent No.3 submits that –

- it has never refused to use, run, and operate the 'Tower Restaurant';
- it is very much in possession of the said Premises (Tower Restaurant) and has bonafide intention of using/operating the same;
- it has paid, in advance, the Lease Rent for the entire Lease duration of 30 years;
- it has regularly paid all the contractual, legal and statutory dues/charges, such as, ground rent etc. in respect thereof;
- the Ground Rent for the same stands paid up to March, 2025;
- it has applied for all the permissions, approvals, and licenses etc.
- the respondent No.3 is not in default in any manner whatsoever for not being able to operate/run the said 'Tower Restaurant';
- there is no default or breach on the part of the respondent No.3 in that regard;
- the NOC from the Fire Department has not been given for the reason that the 'Tower Restaurant Building is not compliant;
- this material fact was concealed from the respondent No.3, when the respondent-DDA issued NIT and also when it accepted the Tender-bid of the respondent No.3; awarded the contract granting lease of 'Tower Restaurant' to the respondent No.3 for a period of 30 years; and also when the respondent-DDA accepted the Lease Rent for the entire Lease Period of 30 years from the respondent No.3;
- this cannot be read against the respondent No.3;

- in fact, the respondent No.3 has even offered to build – at its costs – a separate (2nd) Staircase to address to the concerns of the Fire Department;
- respondent No.3 has submitted Building Plans for the same, which are pending approval of the respondent-DDA, and other concerned Departments.
- respondent No.3 cannot be punished for the defaults of the respondent-DDA, which is a statutory authority.

Z (I) Thus, it would be seen that there is no default on the part of the respondent No.3, in complying with the Terms and conditions of the License Deed. There is no default – muchless a wilful default – on the part of the respondent No.3, in complying with the Orders and directions of this Hon'ble Tribunal. Further the respondent no.3 is a law abiding and has done nothing contrary to law.

Z (I) The Tenders were invited way back in the year 1996 and the contracts (Lease and License) for the same were awarded as early as in December, 1997. Indeed, the Terms and Conditions for grant of the Leasehold rights of the 'Tower Restaurant – as also the Terms of the proposed the Lease Deed and/or the License Deed, to be executed between the DDA and the successful bidder were already determined/decided by the respondent-DDA, which were made known to the bidders in the NIT and the contracts (Lease and License) were awarded on the said terms and conditions. Those terms and conditions could not have been altered by the respondent-DDA, or the successful bidder. Copy of the Notice inviting Tender (NIT) is appended hereto as **Annexure-P/16.** Relevant para of the Terms and Conditions for grant of Lease-hold rights reads as below:

Quote

(vi) *The Accepting Officer shall subject to confirmation of the VC, DDA normally Accept the highest tender provided that it is above the reserve price and found to be competitive enough by him to reflect the market value of the Tower Restaurant tendered for.* ***The successful tenderer shall execute the conveyance deed lease deed and licence deed as prescribed in terms & conditions of the allotment by Tender.*** *The person submitted the tender shall pay as earnest money equal to 25% of*

the tendered premium by bank draft/pay order in favor of DDA payable only at Vikas Sadan, INA, New Delhi branches of Central Bank of India, State Bank of India and shall enclose the draft/pay order with tender form. The tender form not accompanied by the earnest money as above is liable to be outrightly rejected.

4. CONVEYANCE/ LEASE DEED AND OTHER CONDITIONS THEREOF

i) ***The terms and conditions of the conveyance/lease deed/ license deed are contained in the enclosed lease deed/ conveyance deed/ license deed format.*** *The allottee shall be deemed to have agreed to all the terms and conditions contained therein.* ***The allottee shall execute the lease deed/ conveyance deed and license deed in the said format as and when called upon to do so.***

Unquote

AA The respondent No.3 respectfully submits that –

- the aforesaid terms and conditions represent the commercial terms on which the Bids were invited (in the year 1996) by the respondent/DDA, and the contracts were awarded to the respondent No.3 (way back in the year 1997);

- the said contracts (Lease and License) have been operating since the year 1997;

- this Hon'ble Tribunal came into being in the year 2010 and the present Original Application was filed in the year 2014, namely, about 17 years after the contracts had been operating;

BB In fact, since the transaction (grant of the Lease and/or the License) took place in the year 1997, this Hon'ble Tribunal would not have jurisdiction to consider the validity of the same. Indeed, this Hon'ble Tribunal had in para 22 of its Order dated 31.07.2017 held as below:

Quote

21.... ... We must in this regard take into consideration the fact that ***this transaction took place in the year 1997 much***

before the NGT came into force. *It is not in dispute that* ***NGT Act came into force on 18.10.2010 and any order/direction prior to that is not amenable for appeal etc. before this Tribunal***.

22.Similarly, ***the jurisdiction of this Tribunal to consider validity or justification of any transaction under Section 14 may also be not legally permissible if transaction is before 2010***. ... ...

Unquote

CC Equally important to submit here that this Hon'ble Tribunal does not have jurisdiction to re-write the contract for the parties. The courts cannot create a contract for the Parties, nor do they have the power to insert new terms to the contract. The Hon'ble Supreme Court in its recent pronouncement in '*Haryana Power Purchase Centre v. Sasan Power Ltd.*', reported as **2023LAWPACK(SC)68184** (decided on 06.04.2023),has held as below:

Quote

90. *We are not dealing with a case where the exercise of power of the Commission under Section 63 is under review. In a case where, however, the rates are approved under Section 63 and PPA is entered into, the question would undoubtedly arise as to whether there is a power which can be described in a manner of speaking to be plenary power with the Commission under Section 79? Can there be a power which can be christened as omnibus?* ***Can the Tribunal, in other words, disregard the express words of the contract? Can it discover a new change in law which the parties have not contemplated as change in law?*** *In short,* ***can the Tribunal rewrite the contract and create a new bargain?***

91. *We are of the view that the* ***Tribunal cannot indeed make a new bargain for the parties. The Tribunal cannot rewrite a contract solemnly entered into. It cannot ink a new agreement.*** *Such residuary powers to act which varies the written contract cannot be located in the power to regulate.* ***The power cannot, at any rate, be exercised in the teeth of express provisions of the contract.***

92. *We notice this for the reason that the first respondent has a case that what is provided in Article 13.2 (a) (since we are dealing with the case of alleged change in law during the construction period) does not do justice to the parties or that it is incapable of producing a fair result and therefore, the Tribunal would necessarily be clothed with power bearing in mind its regulatory nature.* ***In a matter where the parties have entered into a contract with express provisions, we are unable to agree with the first respondent that the Tribunal would have power to disregard the express provisions of the contract*** *on the score that as it turns out that with passage of time and even change in circumstances, it is found that the contract cannot be worked except at a loss for the contractor.*

Unquote

DD A copy of the aforesaid pronouncement of the Hon'ble Supreme Court, is appended hereto as **Annexure- P/17**.

EE Therefore, the stipulation restricting the use of the 'Adjoining Areas' to 10 days in a month, and/or the stipulation that use of the 'Adjoining Area' would be subject to the running of the 'Tower Restaurant' by the respondent No.3, could not have been introduced and that too after 18 years of the operation of the said contracts. This is in view of the fact that –

- courts are not competent to introduce new terms and conditions, and/or re-write the contract for the parties;

and

- the terms and conditions on which the Lease and License of the said Premises ('Tower Restaurant', and 'Adjoining Area') were granted did not contain any such restriction and/or stipulation.

FF The respondent No.3, further respectfully submits that the aforesaid stipulations were otherwise also beyond the scope of the relief claimed by the Applicant-Society in its Original Application, before this Hon'ble Tribunal. The same could not have been granted, more so, when – upon examining the facts of the case and the relevant legal position – this Hon'ble Tribunal had held that the respondent No.3 was entitled to use the 'Adjoining Area' for holding marriages, parties, etc. and the

said transaction (grant of License for the same by the respondent-DDA) was upheld by this Hon'ble Tribunal.

GG The respondent No.3 submits that the above submissions were made by the respondent No.3 before this Hon'ble Tribunal at the hearing of its Review Application No.23 of 2015 and, on 31.07.2017, this Hon'ble Tribunal was pleased to modify its Judgement dated 10.07.2015. Accordingly, the above stipulations were whittled down by this Hon'ble Tribunal and, in view thereof, the present Execution Application of the Applicant-Society is not maintainable.

HH The respondent No.3, therefore, submits that the present Execution Application of the Applicant-Society deserves no fate other than dismissal forthwith, and it may please be dismissed, accordingly.

PRAYER

In the aforesaid premises, and in the interests of justice, the respondent No.3, most respectfully prays that this Hon'ble Tribunal may graciously be pleased to:

a. Dismiss the above-captioned present Execution Application of the Applicant-Society, in view of the Order 12.04.2023 passed by this Hon'ble Tribunal in the earlier Execution Application No.23/2019.

b. Pass any other, or further Order or directions, as this Hon'ble Tribunal may deem fit and proper in the facts and circumstances of the case and to meet the ends of justice

AND FOR THIS ACT OF KINDNESS, YOUR ANSWERING RESPONDENT NO.3, AS IN DUTY BOUND, SHALL EVER PRAY.

[M/s Jhankar Banquet]

Respondent No.3
through its Partner Mr. Mahesh Kapoor

Through:

[Vivin Kumar Ahuja & Vikas Malhotra]
ADVOCATEs FOR RESPONDENT NO.3
1949 Sector 4 Gurugram,
Gurgaon 122001
9871235758
vivinahuja@gmail.com

New Delhi
Dated: 01.05.2024

VIVIN KUMAR AHUJA
Advocate
Enrolment No.D/2216/2022
1949, Sector-4, Gurugram-122041 (Hr)

BEFORE THE NATIONAL GREEN TRIBUNAL
PRINCIPAL BENCH
NEW DELHI

EXECUTION APPLICATION NO.50 OF 2023

IN

ORIGINAL APPLICATION NO.60 OF 2014

IN THE MATTER OF:

Society for Protection of Culture, Heritage, Environment, Traditions and Promotion of National Awareness [Also known as 'CHETNA']

...Applicant

Versus

Union of India & Ors.

...Respondents

AFFIDAVIT

I, Mahesh Kapoor son of Sh.Som Nath Kapoor, aged about 70 years resident of, G 87 Preet Vihar, Delhi 110092, the deponent herein, do hereby solemnly affirm and declare as under:

1. That I am the Respondent No.3 in the above matter and as such fully conversant with the facts of the case and hence, competent to sear this affidavit.
2. That I have gone through the contents of the accompanying the reply been drafted under my instructions.
3. That the factual averments made in the reply are true and correct to my personal knowledge, information and record whereas legal submissions wherever made are based on the advice received and believed to be correct.

NOTARY
SURAJ KUMAR
Addl. Distt. Court
Tis Hazari, Delhi
Regd. No.-10643
GOVT. OF INDIA

4. That the contents of the reply may please be read as part and parcel to this affidavit which are not being repeated herein for the sake of brevity.
5. That the documents annexed to the reply are true and correct.

DEPONENT

VERIFICATION

Verified at New Delhi on this the day. of 2024 that the contents of the above affidavit are correct and true to the best of my knowledge and belief. No part of it is false and nothing material has been concealed therefrom.

Place : New Delhi

Date :

DEPONENT

NOTARY SURAJ KUMAR Addl. Distt. Court Tis Hazari, Delhi Regd. No.-12643 GOVT. OF INDIA

ATTESTED

NOTARY PUBLIC DELHI

01 MAY 2024

ANNEXURE P-1 29

Supreme Court of India

Trojan & Co. Ltd vs Rm. N. N. Nagappa Chettiar on 20 March, 1953

Equivalent citations: 1953 AIR 235, 1953 SCR 780

Author: M C Mahajan

Bench: Mahajan, Mehr Chand

PETITIONER:
TROJAN & CO. LTD.

Vs.

RESPONDENT:
RM. N. N. NAGAPPA CHETTIAR.

DATE OF JUDGMENT:
20/03/1953

BENCH:
MAHAJAN, MEHR CHAND
BENCH:
MAHAJAN, MEHR CHAND
DAS, SUDHI RANJAN

CITATION:
1953 AIR 235 1953 SCR 780
CITATOR INFO :
R 1964 SC 136 (11)
R 1966 SC 735 (8)
R 1977 SC 890 (8)
D 1980 SC 727 (11)

ACT:
Contract-Damages-Sale of shares-Sale induced by fraud-Measure of damages-Difference between price paid and market price on date of sale-Fluctuations of market and sudden closure of Stock Exchange, effect of--Interest on damages-Practice-Conflict between pleadings and proof-Decree on alternative claim not set up in plaint-Legality.

HEADNOTE:

Where a person is induced to purchase shares at a certain price by fraud the measure of damages which he is entitled to recover from the seller is the difference between the price which he paid for the shares and the real price of the shares on the date on which the shares were purchased. Ordinarily the market rate of the shares on the date when the fraud was practised would represent their real price in the absence of any other circumstance. If, however, the market was vitiated or was in a state of flux or

750

panic in consequence of the very fact that was fraudulently concealed, then the real value of the shares has to be determined on a Consideration of a variety of circumstances, disclosed by the violence led by the parties.

A firm of sharebrokers sold 1,000 shares to the plaintiff who was a constituent of the firm, on the 5th April, 1927, at Rs. 77 and Rs. 77-4as. per share without disclosing to the plaintiff the fact that the shares were owned by one of the partners of the firm and also the fact that they had received telephonic information on that day from a member of the Stock Exchange that there was going to be a sharp decline in the price of the shares. On the 6th April the Stock Exchange Association passed a resolution for closing the Exchange on the 8th and 9th April. The plaintiff had to sell 2,000 shares through the defendants on the 20th April at Rs. 47 to Rs. 42 per share, and 1,000 shares on the 22nd April at Rs. 42-8as. The High Court awarded the difference between the price paid by the plaintiff and the prices fetched on resale as damages. On appeal,

Held, that the prices received at the resale on the 20th and 22nd April could not represent the true value of the shares on the 5th April. The real question for determination was what the market value would have been on the 5th April of these shares if all the buyers and sellers knew that the Stock Exchange was to be closed on the 8th and 9th April.

Held also that the plaintiff was entitled to get interest on the amount awarded as damages from the 5th April till the date of suit on the principle that where money is obtained or retained by fraud a court of equity will order it to be returned with interest.

Johnson v. Rex ([1904] A.C. 817) referred to.

It is well settled that the decision of a case cannot be based on grounds outside the pleadings of the parties and that it is the case pleaded that has to be found. Where the plaintiff based his claim for a certain sum of money on the ground that the defendants had sold certain shares belonging to him without his instructions, but he was not able to prove that the sale was not authorised by him: Held, reversing the decision of the High Court, that the plaintiff could not be given a decree for the sum claimed on the ground of failure of consideration, as he had not set up any such alternative claim in the plaint or even at a later stage when he sought to amend the plaint.

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No..139 of 1962. Appeal from the Judgment and Decree dated the 17th March, 1950, of the High Court of Judicature at Madras (Horwill and Balakrishna Ayyar JJ.) in O.S.A. No. 34 of 1947, arising out of the Judgment and Decree dated the 18th April, 1947, of the said High Court (Clark J.) in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C. S. No. 208 of 1940.

V. Rangachari (K. Mangachary, with him) for the appellant.

K. Krishnaswami Iyengar (K. Parasuram, with him) for the respondent.

1953. March 20. The Judgment of the Court was delivered by MAHAJAN J.-The dispute in this appeal is between a constituent and a firm of stock-brokers. Some time before April, 1936, the plaintiff, then a young man, came into possession of property worth about 2 lakhs of rupees on a partition between him and his brothers. In the hope of getting rich by obtaining quick dividends by speculating on the stock-exchange be, through the defendant firm and certain other stockholders, entered into a series of speculative transactions and it seems he did not fare badly in the beginning. But subsequent events tell a different tale.

In 1937, two iron and steel companies in North India, vie., Indian Iron & Steel Co. Ltd., and the Bengal Iron & Steel Co. Ltd., merged into one concern and a new issue of shares was made. The scheme was that for every five shares which a person held in the Indian Iron Co. Ltd. on 22nd April, 1937, one fully paid up share would be given to him at a price of Rs. 25. The market price at the time this scheme was announced was about Rs. 55 per share. A wave of speculation followed this announcement and there was a boom in the market. Prices of Indian Iron shares were going up to unreal heights. To stabilize the situation thus created by heavy speculation, three members of the Committee of the Calcutta Stock Exchange presented a petition to the Committee on 5th April, 1937, to close the Calcutta Stock Exchange for a while. On the same evening plaintiff's stockbroker Annamalai Chettiar, who was carrying on business in firm name Trojan & Co., had telephonic conversation with one Ramdev Chokani, a member of the Calcutta Stock Exchange, on this subject and from this conversation he gathered that a sharp fall in the prices of Indian Irons was likely. At that time Annamalai Chettiar had on his bands some 5,000 of these shares. Shortly after this conversation and after business hours the same night, between the hours of 7-30 and 8-30, Annamalai Chettiar rang up the plaintiff and suggested to him that it would be a good thing for him to buy these shares. The youthful plaintiff in his anxiety to got rich quickly accepted the suggestion and purchased these shares, some at Rs. 77 and others at Rs. 77-4-0. Another firm of brokers, Ramlal & Co., had also in their hands another 4,000 of these shares. They too found in the plaintiff a ready buyer. They also contacted him on the phone after Annamalai had done so, and sold him 4,000 shares that they held. Out of the lot which the plaintiff purchased from the defendants he sold 1,300 shares to Ramanathan Chetti at cost price. On the 6th April the Committee of the Calcutta Stock Exchange Association passed a resolution closing the Stock Exchange on the 8th and 9th April.

From the 6th April onwards the market sagged and the prices came down, at first gradually and then literally at a, run. The result of it was that the plaintiff had to sell at a very heavy loss.

The defendants made demands on the plaintiff for the price of those shares. Between 5th April and 20th April, 1937, he made payments to defendants of various amounts totalling Rs. 60,000. A lot of 700 shares was sold by the plaintiff to Pilani & Co. and on 19th April, 1937, he instructed the defendants.for sale of the remaining 3,000 shares at the best price obtainable. The defendants sold 2,000 shares on 20th April, 1937, for prices ranging between Rs. 47-4-0 to Rs.44-12-0 per share. The remaining 1,000 shares were sold by him through Messrs. Ramlal & Co. at Rs. 42-8-0 per share on 22nd April, 1937. The result of it was that on 22nd May, 1937, when the accounts between the plaintiff

and the defendants were settled it was found that plaintiff was heavily indebted to them in the sum of Rs. 51,712-7-0 and the credit balance of Rs. 64,000 that he had with the defendants at the end of March, 1937, had been wiped off. For the amount found due he passed a promissory note in favour of defendants, Exhibit P-33. After giving credit for payments received on the promissory note the defendants filed a suit against him (O.S. 150 of 1937) on the Original Side of the Madras High Court and obtained an ex-parte interim order for attachment before judgment and attached plaintiff's movable and immovable properties at Madras, and also at Kottaiyur in Ramnad district. Owing to the attachment proceedings the firm of Ramlal & Co. filed a petition for adjudication of the plaintiff as an insolvent. On 22nd September, 1937, Trojan & Co. also filed a petition for the same relief. An order adjudicating the plaintiff an insolvent was made by the High Court on 5th October, 1937, on the petition of Ramlal & Co.

In the course of the insolvency proceedings defendants tendered proof of their claim on the promissory note, Exhibit P-33. The Official Assignee having acquired knowledge about the telephonic conversation that had passed between Annamalai Chettiar and Ramdev Chokani on the evening of the 5th April, 1937, came to the conclusion that the insolvent had been a victim of a fraud perpetrated by the defendants and dismissed their claim. Defendants-firm was guilty of fraud both in respect of the failure to disclose the fact that the Indian Iron shares or most of them be- longed to one of its partners, Annamalai Chettiar, and also on account of the failure on its part to disclose its knowledge of the likelihood of a slump in the market because of the notice given by its members to close the Stock Exchange.

On an application made to the High Court against the order of the Official Assignee it was set aside by Mockett J. and he directed that the claim of the defendants be disposed of on a court motion, the claim being heard as if it were a suit. In pursuance of this direction Trojan and Co. on 29th September, 1938, filed an application in the High Court, No. 313 of 1938. The Official Assignee representing the estate of the plaintiff denied its liability on the promissory note on the ground of fraud. On 15th March, 1940, Somayya J. dismissed the claim of the defendants. He held the defendants-firm guilty of fraud in both respects. From this there was an appeal which was dismissed on 12th August, 1942. The defendants applied for leave to appeal to His Majesty in Council but leave wag refused. Defendants then applied to the Privy Council for special leave and that application was also dismissed some time in October, 1943.. On the 28th September, 1940, when the appeal from the decision of Somayya J. was still pending, the Official Assignee as representing the estate of the plaintiff filed the suit out of which this appeal arises against Trojan & Co. for an account of the transactions between himself as principal and the defendants as agents and claiming damages for loss sustained by him and for various other reliefs. The suit embraced in particular claims in respect of four transactions. The first related to the 5,000 Indian Iron shares. The second referred to a transaction of Associated Cements. On 22nd March,1937, the plaintiff had sold through the defendants 50 shares in Associated Cements at Rs.180-8-0 per share. On 30th March, 1937, he had similarly sold a further 200 shares in Associated Cements at Rs. 183 per share. The plaintiff did not have on hand even a single share in Associated Cements. It became necessary for him therefore to "cover the sales". On 21st July, 1937, defendants purchased on plaintiff's account 100 shares at Rs. 161-12-0 per share. On 1st September, 1937, they purchased a further 150 shares at Rs. 151 a share. The difference between the prices at which these shares had been sold and bought amounted to Rs. 6,762- 8-0 and for this amount the defendants gave the plaintiff credit by adjusting it towards the promissory note account. In respect of this transaction the case of the Official Assignee was that the purchase which had been made by the defendants was not only unauthorized, but contrary to instructions and was not valid and binding on the plaintiff as it had been made after the commencement of the insolvency. No claim was made in the alternative that if this contention failed, the plaintiff was entitled to recover the amount credited towards the promissory note on the ground of failure of consideration. The third transaction related to 300 shares in Tatas, and the fourth one was in

respect of shares in Ayer Mani Rubber Co. The last claim was abandoned at the trial and the claim on the third transaction was decreed in favour of the plaintiff and the correctness of the order of the trial judge was not canvassed in the appeal before the High Court. The amount decreed as regards these 300 shares was in the sum of Rs. 1,050.

The defendants denied liability for the entire claim and pleaded that they were not guilty of any fraud and that in any case the plaintiff was not entitled to claim any damage, as he could have easily sold away all his shares soon after his purchase without incurring any loss, and that he retained them in order to make profit.

The suit was first heard by Bell J. who decreed the claim of the plaintiff on 9th March, 1943. The defendants appealed. The appellate court set aside the decision of Bell J. and 'remanded the suit for fresh disposal on 26th August, 1944. Meantime, that is to say, on 21st February, 1944, the adjudication of the plaintiff was annulled and on his application he was brought on the record in the place of the Official Assignee and he continued the suit. Clark J. who tried the suit after remand gave a decree in favour of the plaintiff for the sum of Rs. 61,787-9-0 with interest at the court rate of six per cent. per annum from 1st September, 1937, until payment or realization with costs. Against this decree the defendants preferred an appeal. The appellate Bench modified the decree of Clark J., and reduced the amount of the decree by a sum of Rs. 9,100. Each party was made to pay proportionate costs throughout. Leave to appeal to this court against the decree was granted and the appeal is now before us under the certificate so granted. As above stated, the claim in respect of Ayer-Mani Rubber shares was abandoned at the trial and the claim on the third transaction relating to 300 shares in Tatas was decreed for the sum of Rs. 1,050 and the correctness of this order was not caavassed in the appeal before the High Court. The two claims discussed in that court were in respect of the trans- action of 5,000 Indian Iron shares and in respect of the transaction made in Associated Cements. The dispute before us so far as the Indian Iron shares are concerned has narrowed down to the question of quantum of damages in respect of 3,000 out of the 5,000 shares that were transferred by the defendants to the plaintiff on the night of the 6th April, 1937, 1,300 out of these shares having been sold at cost price by the plaintiff the day after the purchase, and 700 having been sold to Pilani & Co., and regarding which the plaintiff's claim was rejected in the High Court and plaintiff preferred no further appeal. The finding of Somayya J., that the defendants firm was guilty of fraud both in respect of the failure to disclose the fact that the Indian Iron shares or most of them belonged to one of its partners, Annamalai Chettiar, and also on account of its failure to disclose its knowledge of the probable slump in the market by reason of the notice given by three members of the Stock Exchange to temporarily close it, was not contested before Clark J., and it was conceded that that finding had become final. The main ques- tion canvassed at this trial was whether the plaintiff had suffered any damage as a consequence of this fraud and if so, how were the damages to be measured. In the plaint plaintiff claimed that he was entitled to be recompensed for all loss and damage which he had suffered. A sum of Rs. 45,042-9-0 was credited in his account in respect of the sale of 3,000 shares made on 20th and 22nd April, 1937. He claimed the whole of this amount as damages on this count; in other words, according to the plaintiff, the damage suffered by him was to be measured according to the difference between the purchase price of the shares and the price for which they were ultimately sold. The shares were bought on 5th April at Rs. 77 and Rs. 77-4-0 and sold at prices ranging between Rs. 42-8-0 and Rs. 47-4-0 on the 20th and 22nd April, 1937. This method of measuring damages was successfully challenged by the defendants before the trial judge. Clark J., in spite of holding that the measure of damages in a case like this could not be as suggested by the plaintiff, estimated the damage suffered by him at the difference between the rate at which the plaintiff purchased the shares and the rate at which he actually sold them, on the ground that the price at which he sold them was more than the fair value of these shares realizable on the 6th April, 1937, between bona fide purchasers and sellers having knowledge of he real state of affairs.

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Before the appeal Bench of the High Court it was contended that the trial judge was in error in his assessment of the real value of these shares on 5th April, 1937, and that in any case they could not be valued at four different rates. It was urged that. damages had been over estimated. This contention was negatived and it was held that in the circum- stances of this case it could not be said that the plaintiff acted unreasonably in holding on to the shares for the time that be did and that the defendants had by their own double dealings placed the plaintiff in a difficult position. The learned-counsel for the appellant reiterated before us the contentious raised by him in the High Court and urged that the true measure of damages in actions like this is the difference between the price paid and the real value of the shares at the time of the transaction, and that any loss caused to the plaintiff by his retaining the shares after that date could not be decreed. It was strenuously contended that had the plaintiff sold the remaining shares like the 1,300 he sold, he would not have suffered any damage whatsoever, as the market price of these shares on the 6th and 7th was not below the cost price. It was said that the loss that the plaintiff suffered was merely due to the circumstance that he retained the shares for a fortnight, and was not as a consequence of the fraud. Lastly, it was contended that even if it could be held that the market on the 6th and 7th was affected by the very fact concealed from the plaintiff, its effect disappeared by the 10th April, when the fact became fully known and damage should have been assessed on the difference between the market price of these shares which ruled at Rs. 62 per share on 10th April, 1937, and their cost price.

Now the rule is well settled that damages due either for breach of contract or for tort are damages which, so far as money can compensate, will give the injured party reparation for the wrongful act and for all the natural and direct consequences of the wrongful act. Difficulty however arises in measuring the amount of this money compensation. A general principle cannot be laid down for measuring it, and every case must to some extent depend upon its own circum- stance. It is, however, clear that in the absence of ,any special circumstances the measure of damages cannot be the amount of the loss ultimately sustained by the representee. It can only be the difference between the price which he paid and the price which he would have received if he had resold them in the market forthwith after the purchase provided of course that there was a fair market then. The question to be decided in such a case is what could the plaintiff have obtained if he had resold forthwith that which he had been induced to purchase by the fraud of the defendants. In other words, the mode of dealing with damages in such a case is to see what it would have cost him to get out of the situation, i.e., how much worse off was his estate owing to the bargain in which he entered into. The law on this subject has been very appositely stated in McConnel v. Wright(1) by Lord Collins in these terms:- "As to the principle upon which damages are assessed in this case, there is no doubt about it now. It has been laid down by several judges, and particularly by Cotton L. J. in Peek v. Derry(2), but the common sense and principle of the thing is this. It is not an action for breach of contract, and, therefore, no damages in respect of prospective gains which the person contracting was entitled by his contract to expect to come in, but it is an action of tort-it is an action for a wrong done whereby the plaintiff was tricked out of certain money in his pocket ; and therefore, prima facie the highest limit of his damages is the whole extent of his loss, and that loss is measured by the money which was in his pocket and is now in the pocket of the company. That is the ultimate, final, highest standard of his loss. But, in so far as he has got an equivalent for that money, that loss is diminished; and I think, in assessing the damages, prima facie the assets as represented are taken to be an equivalent and no more for the money which was paid. So far as the assets are an equivalent, he is not damaged; so far as they fall short of being an equivalent, in that proportion he is damaged."

The sole point for determination therefore in the case is whether the shares handed over to the plaintiff were an equivalent for the money paid or whether they fell short of being the equivalent and if so, to what extent. Ordinarily the market rate of the shares on the date when the fraud wag practised would represent their real price in the absence of any other circumstance. If, however, the market was vitiated

or was in a state of flux or panic in consequence of the very fact that was fraudulently concealed, (1) [1903] 1 Ch. 546. (2) 37 Ch. D. 541.

then the real value of the shares has to be determined on a consideration of a variety of circumstances disclosed by the evidence led by the parties. Thus though ordinarily the market rate on the earliest date when the real facts became known may be taken as the real value of the shares, never- theless, if there is no market or there is no satisfactory evidence of a market rate for some time which may safely be taken as the real value, then if the representee sold the shares, although not bound to do so, and if the resale has taken place within a reasonable time and on reasonable terms and has not been unnecessarily delayed, then the price fetched at the resale may well be taken into consideration in determining retrospectively the true market value of the shares on the crucial date. If there is no market at all or if the market rate cannot, for reasons referred to above, be taken as the real or fair value of the thing and the representee has not sold the things, then in ascertaining the real or fair value of the thing on the date when deceit was practised subsequent events may be taken into account, provided such subsequent events are not attributable to extraneous circumstances which supervened on account of the retaining of the thing. These, we apprehend, are the well settled rules for ascertaining the loss and damage suffered by a party, in such circumstances.

If damages had been measured on the rules above stated by the courts below, this court would have then respected the concurrent finding on this point as the question of assessment of damages primarily is a question of fact and the concurrent findings of the courts below on such points except in very exceptional circumstances are not reviewed by this court. We however find that in spite of the circumstance that the courts below correctly enunciated the rule of measuring damages in such cases, they estimated them on the difference between the cost price and the price realized at the sale on the 20th and 22nd at four different rates. These four rates could obviously not represent the true value of the shares on the 5th.

Moreover the finding that the true value of these shares was lower than what was actually realized on their resale on the 20th and 22nd is not based on any evidence whatsoever. Such a finding could only be arrived at on the basis of evidence on the record and by reference to that evidence, and this has not been done. The High Court did not make an attempt to find out to what extent the value of the 'Shares fell short of being an equivalent for the money taken from the plaintiff. Without determining this crucial issue we think it was not right to estimate the damage on the vague finding that the true value of the shares was lower than the value which they fetched at the resale on the 20th and 22nd. In this situation, we have no alternative but to-arrive at our own finding on this question in spite of the concurrent finding and we have to find as to what could be said to have been the true value of these shares on the relevant date. In other words, the question for our determination is what the market value would have been on 5th April of these shares if all buyers and sellers had information that the market was to be closed on 8th and 9th April to enable settlement of outstanding transactions to be effected, and had appreciated the effect of that decision. In the words of Buckley J. in Broome v. Speak(1), it is indeed a difficult question to answer beat that difficulty is no ground for refusing to answer it as has been done by the court below.

in order to determine the real price of these 3,000 shares sold to plaintiff by concealment of certain facts, the first question that needs decision is whether the market for these shares, the rate prevailing wherein would prima facie be a true index of their value, had been affected by the very fact concealed of which the plaintiff complains. In this case from the proved facts it is clear that the market rate of these shares was seriously affected by reason of the impending decision of the Stock Exchange for closing it to stop the wave of speculation that had taken the frenzy of the market by reason of the merger of the two steel (1) [1931] 1. Ch. 586.

companies doing business in northern India. The market reports for the week ending March 19, show that the Indian Irons were standing at or around Rs. 55. By Satur day the 3rd April after the announcement of the terms of the merger by reason of the keen speculation the shares were being dealt at around Rs. 73. On Monday the 6th April the price was Rs. 77. On Tuesday the 6th, the day when the decision was taken to close the market for two days, these shares touched Rs. 79 but by the close of business fell back to Rs. 72 a sudden drop of Rs. 7. On Wednesday the 7th April in the Calcutta market they closed at Rs. 58, a drop of Rs. 14 in a day. These sudden rises and falls in the market during the course of these two days are sufficient indication of the fact that the drop was due to the decision of the Stock Exchange to close the Exchange for two days. There is no evidence that any other factor was then disturbing the market rate of these shares. The share market report of the defendants themselves issued on 10th April, 1937, amply bears out this fact. In this report it was stated as follows :-

" The outstanding feature of the Indian markets during the week under review was the sudden landslide in Indian Iron and Steel shares, which proved infectious to the other sections of the market. The week opened with a cheerful bullish sentiment and Indian Iron and Steels touched Rs. 80. At this dizzy height, the markets lost their equilibrium and frenzied selling resulted in a sensational decline of about 25 points. The heavy liquidation was due to a predominance of weak holders-that had come into the market at a late stage. Further, selling was accentuated by the decision of Calcutta Stock Exchange to close the Calcutta market on the 8th and 9th April to enable brokers to make deliveries and effect settlements for transactions in Indian Iron and Steel shares. Heavy volume of business has been outstanding between brokers on account of the delay in getting certificates. Prospect of immediate delivery of share certificates scared off weak holders and prices declined on heavy liquidation."

It is clear therefore that the decision of the calcutta Stock Exchange to close the Calcutta market on 8th and 9th affected the market prices considerably. The Calcutta market on the 7th dropped from 72 to 58 as already stated. The decision of the Calcutta Stock Exchange was published in the Hindu of Madras on the evening of the 7th. From the statement of account, Exhibit P-41, filed by Trojan & Co. on 7th, about half a dozen transactions in these shares took place through them. Most of the transactions, it appears, were by small holders of 100 scrips or so, who unloaded their shares between 71 to 60 per share. On the 8th three transactions took place at Rs. 62. No transaction took place between 8th and 14th. There were two transactions on the 14th at Rs. 56, and there was a transaction on the 16th at Rs. 57-8-0. On the 20th Trojan and Co. sold 2,000 of the plaintiff's shares at rates varying between Rs. 44-12-0 and Rs. 47-4-0.

According to the statement of account of another broker, Ramlal & Co., there were about 16 transactions in these shares on the 7th. Most of them were sold in lots of 100 or 200 and the sale price of these shares ranged from Rs. 74 to

64. On the 8th there were a few transactions, the rates varying between Rs. 57 to Rs 66. There was a transaction on the 9th at Rs. 60. There were two or three transactions on the 10th also near about this rate. No transaction after the 10th made by this company has been exhibited on the record. Exhibit P-23 is another weekly share market report of Trojan & Co. issued on 17th April, 1937. It states as follows :-

"In the first place, Indian Irons are very cheap around Rs. 46. The company is doing extremely well and the stage is set for a steady rise to Rs. 70..... Indian Iron and Steels fluctuated between Rs. 55 to Rs. 60 and closed at Rs. 47. The recent hectic speculation has brought its own nemesis."

This report proves that there was really no market as it appears from the evidence on the record in Madras between the 8th and 17th which was a Saturday, and on the 17th the prices seemed to be settling down at Rs. 46. On the 19th the plainti gave to the, defendants an order to sell his 3,000 shares and it was said "Please retain this order till-executed". The defendants were only able to dispose of

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2,000 of these shares on the 20th at prices varying between Rs. 44-12-0 to Rs. 47-4-0. The remaining 1,000 shares the plaintiff was able to sell through Ramlal and Co. at Rs. 42-8-0 on 22nd April, 1937. It is quite possible and probable that had the plaintiff placed an order before the 19th, say on the 16th or 17th, with the defendants or with Ramlal & Co., he might have been able to sell these 1,000 shares also at about the same price as he was able to dispose of his 2,000 shares. No member of the defendants-firm gave evidence in the case. Plaintiff went into the witness box and stated that had he known what the defendants knew, he would not have purchased the shares. The information was withheld from him that these shares were likely to godown. He said that he was told by the defendants to sell the shares but no purchasers were available and in spite of his keenness to liquidate them he was not able to do so before the 20th and 22nd, that he approached Trojan & Co., the defendants-firm for selling them, but they were not able to sell more than 2,000 shares.' Considering the whole of this material, we are satisfied that the market rate prevailing on the 5th, 6th and 7th had been affected by reason of the decision of the Calcutta Stock Exchange to keep the market closed on the 8th and 9th and the market did not settle down till about the 17th or 18th and the prices then ruling can in the circumstances of this case be said to be their true market price. In our judgment, Rs. 46 per share was the real price of these shares when they were put in the plaintiff's pocket and he got Rs. 46 for each share in lieu of what he paid for either at Rs. 77 or at Rs. 77-4-0. He is entitled to commission also which he would have to pay on the sale of these shares. The difference between these two rates is the damage that he has suffered and he is entitled to it. For the reasons given above we modify the order passed by Clark J., and by the appellate Bench of the High Court to the extent indicated above and we estimate the plaintiff's damage at Rs. 93,000 on account of the 3,000 shares at the rate of Rs. 31 per share.

The second question canvassed before the High Court and also before us was in respect of the Associated Cement shares. As above stated, the plaintiff's account was credited in the sum of Rs. 6,762-8-0 on account of the purchase of these shares. Plaintiff had pleaded that the transaction was not authorised by him and that it had been made in contravention of his instructions. He had claimed compensation on the ground of breach of instructions he did not in the alternative claim on the ground of failure of consideration the amount credited by the defendants in the promissory note account and which credit disappeared by reason of the failure of the suit on the promissory note. At the hearing of the case before Bell J. the contention that the purchase was unauthorized was abandoned by counsel and the same position was adopted before Clark J. During cross-examination of the plaintiff it was elicited that he either instructed the defendants to purchase the shares or at any rate ratified the purchase which the defendants had made on his behalf. It was argued before the appellate Bench of the High Court that having pleaded one thing and having led evidence in support of that thing but later on having been forced to admit in the witness box that the true state of things was different the plaintiff had disentitled himself to relief as regards these shares and he could not be granted the relief that he had not asked for. The High Court negatived this contention on the ground that though a claim for damages in respect of a particular transaction may fail, that circumstance was no bar to the making of a direction that the defendants should pay the plaintiff the money actually due in respect of that particular transaction. It also held that the plaintiff's claim in respect of this item of Rs.6,762-8-O was with in limitation. We are unable to uphold. the view taken by the High Court on this point. It is well settled that the decision of a case cannot be based on grounds outside the pleadings of the parties and it is the case pleaded that has to be found. Without an amendment of the plaint the court was not entitled to grant the relief not asked for and no prayer was ever made to amend the plaint so as to incorporate in it an alternative case. The allegations on which the plaintiff claimed relief in respect of these shares are clear and emphatic. There was no suggestion made in the plaint or even when its amendment was sought at one stage that the plaintiff in the alternative was entitled to this amount on the ground of failure of consideration. That being so, we see no valid grounds for entertaining the plaintiff's claim as based on failure of consideration on the case pleaded by him. In disagreement with the courts below we hold that the plaintiff was wrongly granted a decree for the sum of Rs. 6,762-8-0 in respect of the

Associated Cement shares in this suit. Accounts settled could only be reopened on proper allegations. The next point canvassed in the courts below was in respect of the claim of the plaintiff regarding interest on the amount found due to the plaintiff from 5th April, 1937, to the date of the suit. It was contended that no interest could be allowed on damages because to do so would amount to awarding damages on damages which is opposed to precedent and principle. Clark J., however, awarded interest by placing reliance on certain English decisions which enunciate the rule that an agent who receives or deals with the money of his principal improperly and in breach of his duty or who refused to pay it over on demand is liable to pay interest from the time when he so receives or deals with the same or from the time of the demand. We think it is well settled that interest is allowed by a court of equity in the case of money obtained or retained by fraud. As stated in article 423 of Volume I of Halsbury, the agent must also pay interest in all cases of fraud and on all bribes and secret profits received by him during his agency. Their Lordships of the Privy Council in johnson v. Rex(1) observed as follows: --

"In order to guard against any possible misapprehension of their Lordships' views they desire to say that in their opinion there can be no doubt whatever' that money obtained by fraud and retained by fraud can be recovered with interest, whether the proceedings be taken in a court of equity, or a court of law, or in a court, which has jurisdiction both equitable and legal."

The appeal court affirmed the view of Clark J. on this point. The learned counsel for the appellant contended that the decisions relied upon concerned cases where the agent had retained some money of his principal in his hands but that in the present case the claim was merely for damages. This contention is fallacious. By reason of the transaction brought about by fraudulent concealment plaintiff paid to the defendants a sum of Rs. 60,000 in cash which he would not have parted with otherwise and he also lost the money which stood at his credit with the defendants. It is thus clear that the agents had a large sum of the plaintiff with them which they would not have acquired but by reason of the fraud that they practised on him. In this view of the case we see no force in the contention of the learned counsel and we repel it.

The only other point that was argued before us was in respect of future interest. It was not denied that plaintiff was entitled to future interest as allowed to him at the rate of 6% on the amount found due. it was however argued that the plaintiff should not have been allowed interest for the period of one year and six months during which the decree stood satisfied. The facts are that on 9th March, 1943, a decree for Rs. 51,805-1-0 carrying interest at six per cent. was (1) [1904] A.C. 817.

passed in favour of the plaintiff. On the 11th May, 1943, an amount of Rs. 71,000 due under this decree was paid by the defendants to the Official Assignee. This amount was returned by the Official Assignee to the defendants on 12th September, 1944, after that decree had been set aside. Meanwhile the plaintiff's adjudication had been annulled and he had been brought on the record on 16th March, 1944. It was contended that during the period when the money remained with the Official Assignee who was the plaintiff no future interest was payable as the decree stood satisfied during that period. The High Court rejected this contention on the ground that when this money was paid into court, it was coupled with a prayer that it should not be paid out to the creditors of the insolvent's estate pending disposal of the appeal, and therefore as the money was not distributable amongst the insolvent's creditors, interest for this period had been rightly allowed. In our opinion, this view -cannot be sustained. So far as the defendants judgment-debtors are concerned they had done their part and paid the money to the decree-holder and had thus satisfied the decree. It was open to the Official Assignee, the decree-holder, not to take the money on the condition on which it was given to him and if he had not taken the money from the defendants he could then justly have claimed future interest on this amount, but having taken the money and kept it, it could not be said that during this period anything was due to the plaintiff from the defendants. The defendants certainly had paid the decretal amount and whether the plaintiff or his predecessor in interest was able to use it or not was a circumstance wholly

immaterial in considering whether future interest should or should not be allowed. In our judgment, the plaintiff was not entitled to future interest at the rate allowed for one year and six months period, beginning from 9th March, 1943, and ending with 12th September, 1944. The appeal is therefore allowed to the extent indicated above. The decree of the High Court will be modified and plaintiff will be entitled to damages in the sum of Rs. 93,000 on the 3,000 Indian Iron shares. The decree given to the plaintiff in respect of Rs. 6,762-8-0 is set aside over and above the' decree for Rs. 9,100 in his favour set aside by the High Court. In the calculation of future interest the plaintiff will not be allowed interest from 9th March, 1943, to 12th September, 1944. In the result the decree given to the plaintiff in the sum of Rs. 61,787 is reduced to Rs. 42,175. He will get interest at six per cent. per annum from 5th April, 1937, until payment or realization except for a period of one year and six months. Plaintiff will get proportionate costs throughout.

Appeal allowed in part.

Agent for the appellant: Ganpat Rai.

Agent for the respondent: M. S. K. Sastri.

ANNEXURE P-2

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Bharat Amratlal Kothari vs Dosukhan Samadkhan Sindhi & Ors on 4 November, 2009

Equivalent citations: AIR 2010 SUPREME COURT 475, 2009 AIR SCW 7015, (2009) 4 RECCRIR 939, (2009) 4 CURCRIR 522, (2009) 3 ALLCRIR 3370, (2010) 1 UC 98, (2009) 4 DLT(CRL) 673, 2010 CALCRILR 1 315, (2010) 1 GUJ LR 571, (2010) 1 GUJ LH 221, (2010) 3 MAD LJ(CRI) 102, (2010) 45 OCR 157, (2010) 68 ALLCRIC 636, 2010 (1) SCC 234, (2009) 13 SCALE 563, (2010) 1 CHANDCRIC 13, 2010 (1) SCC (CRI) 757, 2010 CRI. L. J. 379, (2009) 81 ALLINDCAS 719 (DEL), 2010 (1) CALCRILR 315, 2010 (3) CHANDCRIC13, (2009) 4 EASTCRIC 538, (2009) 2 DLT(CRL) 1036, (2009) 3 CHANDCRIC 372, (2012) 2 MARRILJ 398, (2010) 1 CRIMES 38, (2009) 160 DLT 385

Author: J.M. Panchal

Bench: Harjit Singh Bedi, J.M. Panchal

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 2020 OF 2009
(Arising out of S.L.P. (Criminal) No. 198 of 2009)

Bharat Amratlal Kothari and another ...
Appellants

Versus

Dosukhan Samadkhan Sindhi & others ...Respondents

JUDGMENT

J.M. PANCHAL, J.

Leave granted.

2. This appeal, by special leave, is directed against judgment dated December 30, 2008, rendered by the learned Single Judge of High Court of Gujarat at Ahmedabad in Special Criminal Application No. 1387 of 2008 by which, while dealing with herein, namely, (a) to declare that the order dated

July 5, 2008, passed by the learned Additional Chief Judicial Magistrate, Deesa, refusing to hand over custody of the live stock to them is illegal and (b) to declare that they are entitled to get custody of the entire live stock, which is in illegal custody of Bharat Kothari, i.e., appellant No. 1 herein and confined in the Panjarapole at Kanth, near Deesa, the learned Single Judge has :-

i) held that each of the respondent Nos. 1 to 6 are guilty under Section 11(1)(d) of the Prevention of Cruelty to Animals Act, 1960 and punished each of them with fine of Rs.50/-;

ii) quashed the FIR No. II-C.R.No. 3131 of 2008, registered with Deesa City Police Station for the alleged commission of offences punishable under Section 279 of Indian Penal Code, Section 11(1)(d) of the Prevention of Cruelty to Animals Act, 1960 and Sections 5, 6 and 8 of Bombay Animal Preservation Act, 1954, at the instance of the appellant No. 1 as well as the proceedings pursuant thereto, including the orders for interim custody of the animals and the revision applications preferred therefrom;

iii) directed the appellant No. 1 to pay, by way of compensation and cost, to each of the respondent Nos. 1 to 6 a sum of Rs.75,000/-, without prejudice to their rights and contentions in the criminal proceedings initiated by way of Criminal Inquiry Case No. 237 of 2008 and pending before the learned Chief Judicial Magistrate, Palanpur, as well as to pay, on behalf of respondent Nos. 1 to 6 the cost of maintenance and treatment of the herein, i.e., Panjarapole Patan in accordance with the provisions of sub-Section (4) of Section 35 of Prevention of Cruelty to Animals Act, 1960, within a period of one month, i.e., latest by January 30, 2009;

iv) directed respondent No. 8, which is entrusted care and custody of the animals under interim order, to hand over the surviving animals to the respondent Nos. 1 to 6 in such proportion as the original number of seized animals bears to the number of surviving animals;

v) directed the State of Gujarat, i.e., respondent No. 7 herein, to take appropriate departmental action for illegal or unauthorized actions, if any, on the part of any police officer and if, upon inquiry it prima facie appears that any police officer has participated in a cognizable offence, to initiate appropriate criminal proceedings against such officer;

vi) directed the Registrar of the High Court to serve copy of the judgment upon the appellant No. 2, i.e., Animal Welfare Board of India, Ministry of Environment and Forests, Government of India, 13/1, Third Seaward Road, Valmiki Nagar, Thiruvamiyr, Chennai; and

vii) directed (a) the respondent Nos. 1 to 6 to take over the custody and care of surviving animals within two weeks and (b) that the Police Officer in-charge of the Police Station at Patan to supervise the delivery of the animals to the respondents by

the appellant or respondent No. 8 in such manner that the animals are not subjected to further cruelty in their transportation within the area of his jurisdiction. The respondent Nos. 1 to 6 are further directed not to commit any offence under the Prevention of Cruelty to Animals Act, 1960 in respect of the surviving animals and submit an undertaking to that effect to the police officer in-

charge of the Police Station at Patan.

3. The facts emerging from the record of the case are as under: -

The appellant No. 1 is an Animal Right Activist. He is also Secretary of Rajpur-Deesa Panjarapole, which is a public trust and involved in preservation of old, infirm and stray cattle. One of the objects of the trust is to prevent illegal and unauthorized transportation and slaughtering of animals. On June 16, 2008 he with others was present at Deesa. He received a message that certain trucks with goats and animals had left from Badmer to go to Ahmedabad via Deesa and Palanpur. In view of this information he and others, i.e., Jivdaya Dharmendra Kokani, Vijaybhai Chauhan, Bherabhai Mali and Shivrambhai Mali kept a watch at Jalaram Cross Road since 11.00 P.M. in the night. At about 2.00 A.M. on 17.6.2008 they noticed that a line of trucks was coming from Gayatri Temple. They waived their hands and search light to stop the trucks but the drivers of the trucks did not stop the vehicles and were found driving trucks speedily towards Palanpur. Therefore, the appellant No. 1 and others sat in an interceptor vehicle bearing registration number GJ-8-A-1294 and followed the trucks. The appellant No. 1 had his mobile phone with him and, therefore, informed the Police Control, Palanpur that trucks loaded with goats and sheep were coming speedily towards Palanpur, whereas he and others were following those trucks and, therefore, necessary action should be taken to halt the trucks at Aroma Circle Check Post. When the trucks reached near Aroma Circle, the drivers spotted the police.

Therefore, they stopped their vehicles and, after leaving the trucks, ran away. On search being made, it was found that in all there were eight trucks and in each truck, goats and sheep were being conveyed in a congested manner. It was also noticed that there was no facility of fodder, water, etc. in any of the trucks and that the drivers had meted out cruelty to the animals. On making the inquiry as to who were driving the trucks, it was found that (1)Ramjanbhai Ibrahimbhai Sindhi, resident of Nilana, Taluka Shiv, District Badmer, (2) Rojakhan Dosukhan Sindhi, resident of Lilasa, Taluka Shiv, District Badmer and (3) Jamalkhan Dinakhan Sindhi, resident of Nimlatada, Taluka Shiv, District Badmer, Rajasthan, were drivers of some of the trucks. They were arrested and on being questioned, it was informed by Ramjanbhai Ibrahimbhai Sindhi that the others were cleaners of the trucks. It was also learnt from Ramjanbhai Ibrahimbhai Sindhi that the goats and sheep loaded in the trucks were brought from Badmer to be taken to Ranip Slaughter House, Ahmedabad. He was called upon to produce permit for loading the goats and sheep, but he could not produce the same. It was further learnt that the goats and sheep were filled in the trucks in an unauthorized and cruel manner. Therefore, the goats and sheep were taken to Deesa from Palanpur in the trucks and

other vehicles. One of such vehicle, i.e., mini truck No. GJ-9-Y-5143, conveying the goats and sheep from Palanpur to Deesa, had overturned on the side of the road as a result of which some animals had died. The truck, which had overturned, was left at the place where it had overturned and other trucks were taken with goats and sheep to Kanth Panjarapole, Deesa. The trucks, which were being driven from Badmer, were also taken to the said Panjarapole. It was further found that in all there were 1974 animals out of which 99 animals had died and that 1875 goats and sheep worth Rs.400/- each were kept in the Panjarapole, Deesa, of which the appellant No. 1 is the Secretary. Under the circumstances the appellant No. 1 filed complaint against Ramjanbhai Ibrahimbhai Sindhi and others for alleged commission of offences punishable under Section 279 of Indian Penal Code, Section 11(1)(d) of the Prevention of Cruelty to Animals Act, 1960 (for short the "Act") and Sections 5, 6 and 8 of Bombay Animal Preservation Act, 1954.

4. The record further shows that another FIR was lodged on June 17, 2008 at 1430 hours with Palanpur Police Station by Govind R. Rabari, mentioning himself as an accused for the commission of the offence punishable under Section 279 of Indian Penal Code and stating that while he was driving mini truck carrying the cattle from Palanpur to Deesa at the instance of the appellant No. 1, he had lost control of the vehicle due to overweight of cattle as a result of which the truck had turned on its side killing six cattle and causing damage to the said vehicle.

5. The case of the respondent Nos. 1 to 6 is that the appellant No. 1 and his associates are headstrong persons who had grabbed the consignment of sheep and goats illegally by stopping the trucks near Palanpur and forcing the trucks to be taken to Deesa. According to the respondent Nos. 1 to 6, not a single sheep or goat had died in any of the trucks, but large number of them were shown to have died in the FIR with a view of have asserted that the appellant No. 1 had planned the entire operation of looting the trucks with the active help and connivance of local police at Deesa. Therefore, one of the respondent Nos. 1 to 6 filed complaint against the appellant No. 1 with Superintendent of Police at Palanpur on June 17, 2008 itself about the forcible and violent taking over of the trucks with cattle and Rs.500/-

in cash. In the complaint filed with Superintendent of Police, Palanpur, nothing was done. Therefore, a criminal complaint was filed in the Court of learned Chief Judicial Magistrate, Palanpur, which is registered as Criminal Inquiry No. 237 of 2008 on June 18, 2008 for the alleged commission of offences punishable under Sections 395, 427, 506(2) read with Section 34 of Indian Penal Code alleging that the persons accused therein, including the appellant No. 1, had, with the help of police, taken over the trucks, beaten the drivers, looted cash of Rs.1,11,000/- and taken away sheep and goats worth Rs.45,48,000/-. The learned Chief Judicial Magistrate made an order below the complaint directing the Deputy Superintendent of Police, Palanpur, to make a report within seven days after conducting investigation into the earlier complaint filed before him on June 17, 2008.

6. The respondent Nos. 1 to 6, claiming to be the owners of goats and sheep, filed an application under Sections 451 and 457 of the Code of Criminal Procedure, 1973 for custody of the cattle. The learned Additional Chief Judicial Magistrate, Deesa, by order dated July 5, 2008, rejected the said application and further directed the Investigating Officer Mr. Lakhubhai Amubhai to take

possession of all goats and sheep from Rajpur-Deesa Panjarapole and to hand over the same within two days to the Panjarapole of the nearest district, except the District of Banaskantha at Government cost and thereafter to submit a report to the Court.

7. Feeling aggrieved by the above mentioned order, the respondent Nos. 1 to 6 invoked extraordinary jurisdiction of the High Court under Article 226 of the Constitution, by filing Special Criminal Application No. 1387 of 2008. It may be mentioned at this stage that the State Government, through Police Inspector Dauljibhai Savjibhai Asari, challenged order of the trial court refusing to hand over custody of goats and sheep to the respondent Nos. 1 to 6 before the learned Additional Sessions Judge, Banaskantha at Deesa by filing of Criminal Revision Application No. 41 of 2008.

8. The Special Criminal Application filed by the respondent Nos. 1 to 6 was placed for preliminary hearing before the learned Single Judge, who after hearing the parties, by an interim order dated October 24, 2008, directed the appellant No. 1 to shift 1325 sheep and goats in proper manner to Panjarapole at Patan under the supervision and in presence of the Investigating Officer of Deesa City Police Station before October 31, 2008.

9. The learned Single Judge, by the impugned judgment, has convicted the respondent Nos. 1 to 6 under Section 11(1)(d) of the Act and imposed fine as well as given other directions referred to above giving rise to the instant appeal.

10. This Court has heard the learned counsel for the parties at length and in great detail. This Court has also considered the documents forming part of the instant appeal as well as documents forming part of the Special Criminal Application No. 1387 of 2008, which was filed by the respondent Nos. 1 to 6 before the High Court.

11. This Court notices that the respondent Nos. 1 to 6 in the instant appeal had filed Special Criminal Application No. 1387 of 2008 under Article 226 of the Constitution before the High Court stating that they were owners of the goats and sheep seized by the police pursuant to FIR No. II-C.R. No. 3131 of 2008, registered with Deesa City Police Station for alleged commission of offence under Section 279 IPC, Section 11(1)(d) of the Act and Sections 5, 6 and 8 of Bombay Animal Preservation Act, 1954 and claimed custody of the cattle. The names of the respondent Nos. 1 to 6 are as under: -

1. Dosukhan Samdakhan Sindhi, at Village Gudamalani, District Barmer, Rajasthan

2. Amirkhan Sadikkhan Sindhi, at Village Ramsar, District Barmer, Rajasthan

3. Razakkhan Noorkhan Sindhi, at Village Badau, District Barmer, Rajasthan

4. Bherakhan Hamidkhan Sindhi, at Village Bamgol, District Barmer, Rajasthan

5. Sadikkhan Wagahkhan Sindhi, at Village Jalikheda, District Barmer, Rajasthan

6. Chanesar Alakhan Sindhi, at Village Sarupekatla, District Barmer, Rajasthan.

It is an admitted position that II-C.R. No. 3131 of 2008 is not registered with Deesa City Police Station against any of the respondent Nos. 1 to 6. Admittedly, II-C.R. No. 3131 of 2008, for the alleged commission of offences punishable under Section 279 IPC, Section 11(1)(d) of the Act and Sections 5, 6 and 8 of the Bombay Animal Preservation Act, 1954, is filed against following persons: -

1. Rajakbhai Ibrahimbhai Sindhi

2. Sherubhai Dosubhai Sindhi

3. Ramkha Nurkha Sindhi

4. Jamalkhan Dinakha Sindhi All residents of Nikla Tada, Taluka Shiv, District Barmer (Rajasthan).

This Court notices with surprise that though the respondent Nos. 1 to 6 herein, who were original petitioners before the High Court, are not accused of commission of any offence even remotely, even then the learned Single Judge of the High Court has convicted them under Section 11(1)(d) of the Prevention of Cruelty to Animals Act, 1960 and imposed a fine of Rs.50/- on each of them. It hardly needs to be emphasized that those, who are not even remotely alleged to have committed offence/offences, cannot be convicted at all either at the trial or while exercising so called wide jurisdiction under Article 226 of the Constitution. The four accused named above were not parties to the petition filed by the respondent Nos. 1 to 6 nor they had approached the High Court for custody of goats and sheep seized. Therefore, conviction of the respondent Nos. 1 to 6 under Section 11(1)(d) of the Prevention of Cruelty to Animals Act, 1960 and imposition of fine of Rs.50/- on each of them will have to be regarded as without jurisdiction, unauthorized, unwarranted and illegal and will have to be set aside.

12. From the final directions, given by the High Court in the impugned judgment, it is evident that the learned Single Judge has quashed the FIR registered as II-C.R. No. 3131 of 2008 with Deesa City Policy Station and the proceedings pursuant thereto including the orders for interim custody of the animals and the Revision Application preferred therefrom. The respondent Nos. 1 to 6, who had filed writ petition before the High Court, are not accused. Therefore, they could not have prayed for and, in fact, have not prayed to quash the FIR registered as II-C.R. No. 3131 of 2008 with Deesa City Police Station and the proceedings pursuant thereto. Prayer for quashing the FIR could have been made only by the accused, who have been named above. But none of them had chosen to invoke jurisdiction of the High Court either under Section 482 of the Code of Criminal Procedure or under Article 226 of the Constitution to get quashed the FIR registered as II-C.R. No. 3131 of 2008 with Deesa City Police Station against them and the proceedings pursuant thereto. The quashing of FIR at the instance of third parties is unknown to law. Further, it is well settled that neither power under Section 482 of the Code of Criminal Procedure, 1973 nor jurisdiction under Article 226 of the Constitution can be exercised by the High Court to quash the complaint if prima facie commission of

offences is made out. The complaint lodged by the appellant No. 1 is on the record of this appeal. A perusal of the same indicates that the appellant No. 1 has averred in his complaint that close to 2000 goats and sheep were being transported in eight trucks, in a cramped manner, denying them even food and water in the process. It is asserted by the appellant No. 1 in his complaint that carrying of more than 200 animals in a truck is cruelty by itself. The other averments made in the complaint could not have been ignored while deciding the question whether the complaint deserves to be quashed. The complaint has been quashed without taking into account the contents thereof or discussing them. The examination of prima facie indicates commission of offences mentioned therein by the accused. Even before the investigation could be completed and report submitted to the competent court by the Investigating Agency, the High Court arrived at a pre-mature conclusion that no offences under Section 279 IPC and under Sections 5, 6 and 8 of the Bombay Animal Preservation Act, 1954 were made out against the accused and quashed the criminal proceedings. Such a relief to the accused, who had not approached the High Court for quashing the FIR, could not have been granted in a petition filed by the owners of goats and sheep seeking custody of the live stock notwithstanding wide amplitude of power available under Article 226 of the Constitution. What is astonishing is that the learned Single under Section 11(1)(d) of the Act, though none of them is alleged to have committed any offence either under the Act or under I.P.C. or under the Bombay Act of 1954 and on the other hand quashed the complaint. The scrutiny of the judgment impugned shows that the State had not filed any counter to the petition filed by the respondent Nos. 1 to 6 but the Additional Public Prosecutor for the State had submitted before the Court to quash the complaint filed by the appellant No. 1 if the complaint was found by the Court to be untenable and commission of cognizable offence was not made out. The Additional Public Prosecutor had requested the Court to quash the complaint in exercise of inherent jurisdiction of a High Court under Section 482 of the Criminal Procedure Code. Probably, these submissions of Additional Public Prosecutor had prompted the learned Single Judge to examine the question whether the complaint filed by the appellant No. 1 should be quashed. The learned Single Judge has concluded in para 11 of the judgment that the offences as alleged in the FIR registered as II-C.R. No. 3131 of 2008 under Section 279 of IPC and Section 11(1)(d) of the Act or Sections 5, 6 and 8 of the Bombay Animal Preservation Act were not made out and also recorded another finding that excessive number of animals were carried in the vehicles due to which they were subjected to unnecessary pain and suffering. These findings are contradictory to each other in terms. Having held that no offence under Section 11(1)(d) of Act was made out, why the respondent Nos. 1 to 6, who are not shown as accused at all, are convicted under Section 11(1)(d) of the Act, could not be explained by any of the learned counsel appearing for the parties. Also the grievance made by the appellant No. 1 in ground I of the memorandum of Special Leave to Appeal that by overstepping its jurisdiction and giving a go-bye to the regular trial, the High Court has quashed criminal proceedings without hearing the complainant/appellant No. 1 cannot be ignored by this Court in view of peculiar facts of the case. The learned Single Judge has quashed the complaint of the appellant No. 1 contrary to the well settled principles governing quashing of a complaint. Quashing of the complaint in part should not have been ordered after convicting the respondent Nos. 1 to 6 for the offence punishable under Section 11(1)(d) of the Act and, therefore, for all these reasons, the impugned judgment is liable to be set aside.

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13. What is noticed by this Court is that by filing Special Criminal Application No. 1387 of 2008, the respondent Nos. 1 to 6, who claim to be owners of the goats and sheep seized, had prayed for the following reliefs, which are enumerated in paragraph 8 of the petition: -

> "8. In the aforesaid facts and circumstances and the grounds, the petitioners pray that Your Lordships will be pleased to issue a writ of certiorari or mandamus or any other appropriate writ, order or direction;
>
> (A)declaring that the impugned order dated 5.7.2008 passed by learned Additional Chief Judicial Magistrate, Deesa is illegal to the extent that learned trial court has refused to hand over custody of the live stock to the petitioners and further be pleased to quash and set aside the same to that extent;
>
> (B)be pleased to declare that the petitioners are entitled to get the custody of the entire live stock which is in illegal custody of Shri Bharat Kothari -

respondent No. 1 herein and confined in the Panjarapole at Kanth, near Deesa; (C)pending admission and final disposal of this petition, be pleased to direct the respondents to forthwith handover entire live stock of 1515 sheep and goats as mentioned in the application of the petitioners before learned Additional Chief Judicial Magistrate, Deesa in health and saleable condition;

(D)such other and further relief that is just, fit and expedient in the facts and circumstances of the case may be granted."

A bare glance at the prayers made makes it clear beyond pale of doubt that the respondent Nos. 1 to 6 had not prayed that the appellant No. 1 be directed to pay compensation and cost to each of them. The grievance made by the appellant No. 1 in the instant appeal is that without putting the parties to notice that the Court was inclined to determine and direct the appellant No. 1 to pay by way of compensation and cost, the learned Single Judge has determined the amount of compensation and cost at Rs.75,000/- and directed him to pay such amount to each of the respondent Nos. 1 to

6. It may be mentioned that Criminal Inquiry Case No. 237 of 2008 referred to in the direction (iii), is the sequatter of the complaint filed by one of the aides of the respondent Nos. 1 to 6 alleging therein that the police personnel as well as the appellant No. 1 and other persons had robbed the accused of goats and sheep on the trucks along with an amount of Rs.1,11,000/- in cash. After hearing the complainant in that case, the learned Chief Judicial Magistrate, Palanpur, passed an order on June 19, 2008 directing the complaint to be registered in the Criminal Inquiry Register and that is how Criminal Inquiry No. 237 of 2008 is registered in the Court of the learned Chief Judicial Magistrate, Palanpur. Further by the said order the D.S.P., Palanpur was also directed to report within seven days before the court and submit a progress report every seventh day till the completion of the investigation, after which the court was to pass further orders.

14. The approach of the High Court in granting relief not prayed for cannot be approved by this Court. Every petition under Article 226 of the Constitution must contain a relief clause. Whenever

the petitioner is entitled or is claiming more than one relief, he must pray for all the reliefs. Under the provisions of the Code of Civil Procedure, 1908, if the plaintiff omits, except with the leave of the court, to sue for any particular relief which he is entitled to get, he will not afterwards be allowed to sue in respect of the portion so omitted or relinquished. Though the provisions of the Code are not made applicable to the proceedings under Article 226 of the Constitution, the general principles made in the Civil Procedure Code will apply even to writ petitions. It is, therefore, incumbent on the petitioner to claim all reliefs he seeks from the court. Normally, the court will grant only those reliefs specifically prayed by the petitioner. Though the court has very vide discretion in granting relief, the court, however, cannot, ignoring and keeping aside the norms and principles governing grant of relief, grant a relief not even prayed for by the petitioner. In Krishna Priya vs. University of Lucknow [(1984) 1 SCC 307], overlooking the rule relating to grant of admission to Postgraduate course in medical college, the High Court in the exercise of powers under Article 226 of the Constitution directed the Medical Council to grant provisional admission to the petitioner. This Court set aside the order passed by the High Court observing that "in his own petition in the High Court, the respondent has merely prayed for a writ directing the State or the College to consider his case for admission yet the High Court went a step further and straightway issued a writ of mandamus directing the College to admit him to M.S. course and thus granted relief to the respondent which he himself never prayed for and could not have been prayed for". Again, in Om Prakash vs. Ram Kumar [(1991) 1 SCC 441], this Court observed, "A party cannot be granted a relief which is not claimed, if the circumstances of the case are such that the granting of such relief would result in serious prejudice to the interested party and deprive him of the valuable rights under the statute". Though a High Court has power to mould reliefs to meet the requirements of each case, that does not mean that the draftsman of a writ petition should not apply his mind to the proper relief which should be asked for and throw the entire burden of it upon the court. It is relevant to notice that the High Court was not exercising powers under Article 226 of the Constitution suo motu but was examining the validity of order passed by the Additional Chief Judicial Magistrate refusing to grant custody of goats and sheep to the respondent Nos. 1 to 6, in the Special Criminal Application, which was filed by them under Article 226 of the Constitution through a were represented by a senior counsel practicing in the Gujarat High Court and having regard to the facts of the case, the learned lawyer was justified only in claiming those reliefs to which reference is made earlier. The respondent Nos. 1 to 6 were seeking a writ of certiorari or mandamus to declare that order dated July 5, 2009, passed by the learned Chief Judicial Magistrate, Deesa, refusing to hand over custody of the goats and sheep seized to them, was illegal and were also seeking quashing of the said order. At no point of time, the learned advocate for the respondent Nos. 1 to 6 had moved any application seeking permission of the Court to amend the prayer clause contained in the petition so as to enable the respondent Nos. 1 to 6 to claim compensation from the appellant No. 1. A fair reading of the petition makes it more than clear that no factual data whatsoever was laid by the respondent Nos. 1 to 6 for claiming compensation from the appellant No. 1. No facts were mentioned as to in which manner they or any of them had suffered damage or loss because of the handing over of custody of goats and sheep to the appellant No. 1 and ultimately to the respondent No. 8 Panjarapole situated at Patan nor the appellant No. 1 was permitted to controvert that in fact no damage or loss was suffered by the respondent Nos. 1 to 6 or any of them. There is no manner of doubt that the High Court was too indulgent in this matter. After all, it was not a petition from a person languishing in jail or from a bonded labourer or a party in person or public spirited citizen seeking to bring a gross injustice to

the notice of the court. Here, the High Court had before it the respondent Nos. 1 to 6 as petitioners. The question whether the respondent Nos. 1 to 6 suffered damage or loss because of handing over of goats and sheep to the appellant No. 1 and/or to the respondent No. 8, depends upon facts to be proved. Normally, such an exercise cannot be undertaken in a writ filed under Article 226 of the Constitution. This Court further finds that the appellant No. 1 is not only directed to pay, by way of compensation and cost, to each of the respondent Nos. 1 to 6 a sum of Rs.75,000/- but is further directed to pay on behalf of respondent Nos. 1 to 6 the cost of maintenance and treatment of the animals in question to respondent No. 8 in accordance with the provisions of sub-Section (4) of Section 35 of the Act. To mention the least, it is evident that the respondent Nos. 1 to 6 are not parties to Criminal Inquiry Case No. 237 of 2008, which is pending before the learned Chief Judicial Magistrate, Palanpur. As observed earlier, the said inquiry has been initiated at the instance of one of the aides of the accused. In the said inquiry the question posed for determination of the learned Chief Judicial Magistrate, Palanpur, would be whether the appellant No. 1 and others with police personnel had committed loot of trucks with goats and sheep and also cash amount of Rs.1,11,000. The said inquiry is not concluded as on today nor any finding is rendered that the appellant No. 1 and others with the aid of police personnel had committed loot of the articles mentioned in the complaint of that case. Therefore, the appellant No. 1 could not have been directed to pay compensation and cost to 6 without prejudice to their rights and contentions in the criminal proceedings initiated by way of Criminal Inquiry Case No. 237 of 2008. Moreover, no claim was advanced by the respondent No. 8 herein that the appellant No. 1 should be directed to pay, on behalf of the owners, i.e., the respondent Nos. 1 to 6, the cost of maintenance and treatment of the animals in question in accordance with the provisions of sub-Section (4) of Section 35 of the Act. Normally, cost of maintenance and treatment of the animals in such cases would be payable by one who claims custody or who are the owners of the live stock but not by the complainant. In the instant case the assertion made by the appellant No. 1 is that he was handed over custody of goats and sheep by the police after registration of FIR seems to be that the appellant No. 1 had taken possession of the live stock and trucks illegally before the FIR was lodged and had acted in a high handed manner. The dispute whether appellant No. 1 was handed over custody of goats and sheep after filing of the complaint or whether he had obtained custody of goats and sheep illegally before the complaint was lodged, will have to be adjudicated upon evidence to be lead by the parties. Such a highly contentious dispute cannot and could not be resolved in a petition under Article 226 of the Constitution. Having regard to the totality of the facts and circumstances emerging from the record of the case, this Court is of the firm opinion that there was no justification at all in directing the appellant No. 1 to pay a sum of Rs.75,000/- towards compensation and cost to each of the respondent Nos. 1 to 6 and to pay to the respondent No. 8 herein the cost of maintenance and treatment of the animals in question on behalf of the respondent Nos. 1 to 6. Therefore, this direction is also liable to be set aside.

15. This Court further finds that the learned Single Judge has directed the State of Gujarat to take appropriate departmental action for illegal or unauthorized actions, if any on the part of any police officer and if upon inquiry it prima facie appears that any police officer has participated in a cognizable offence, appropriate criminal proceedings be initiated against such officer. It is true that while dealing with entitlement of custody of goats and sheep the learned Additional Chief Judicial Magistrate, Palanpur has come to the conclusion that the seizure of goats and sheep was not in

accordance with law. During the course of hearing of the appeal, the learned counsel for the appellant No. 1 has referred to several admissions made by the respondent Nos. 1 to 6 which would indicate that the custody of the goats and sheep seized was handed over to the appellant No. 1 by the police. However, it is not necessary to make a detailed reference to them. What is important to be noticed is that in the order passed by the learned Additional Chief Judicial Magistrate no officer has been named at all. Whether search and seizure of the goats and sheep is illegal or not can be effectively gone into only at the stage of final disposal of the trial and not at interim stage when the court hears an application under Section 451 read with Section 457 of the Code of Criminal Procedure, 1973 for interim custody of the muddammal. Direction to the State Government to initiate appropriate departmental action for illegal or unauthorized actions at the interim stage is harsh as well as not called for on the facts of the case. Therefore, the said direction, which is contained in clause (5) of paragraph 14 of the impugned judgment, also deserves to be set aside.

16. This Court further notices that the learned Single Judge has directed the Registrar of the High Court to serve a copy of the judgment impugned in the appeal upon the appellant No. 2, i.e., Animal Welfare Board of India, Ministry of Environment and Forests, Government of India, 13/1 Third Seaward Road, Valmiki Nagar, Thruvamiyr, Chennai. As this Court is inclined to set aside most of the directions given by the learned Single Judge in the impugned judgment, the direction to serve a copy of the judgment on the appellant No. 2, i.e., Animal Welfare Board of India becomes redundant and, therefore, the same is also liable to be set aside.

17. This takes the Court to answer the question whether respondent Nos. 1 to 6 are entitled to relief of interim custody of goats and sheep seized pursuant to filing of complaint No. II-C.R. 3131 of 2008 registered with Deesa City Police Station. The fact that respondent Nos. 1 to 6 are owners of the goats and sheep seized is not disputed either by the appellant No. 1 or by the contesting respondents. Though the respondent No. 8 has, by filing counter reply, pointed out that the officials of Panjarapole at Patan are taking best care of the goats and sheep seized in the instant case, this Court finds that keeping the goats and sheep in the custody of respondent No. 8 would serve purpose of none. Admittedly, the respondent Nos. 1 to 6 by vocation trade in goats and sheep. Probably a period of more that one and half years has elapsed by this time and by production of goats and sheep seized before the court, the prosecution cannot prove that they were subjected to cruelty by the accused because no marks of cruelty would be found by this time. The trade in which respondent Nos. 1 to 6 are engaged, is not prohibited by any law. On the facts and in the circumstances of the case this Court is of the opinion that respondent Nos. 1 to 6 would be entitled to interim custody of goats and sheep seized in the case during the pendency of the trial, of course, subject to certain conditions.

18. For the foregoing reasons the appeal partly succeeds. The directions Nos. 1 to 6, contained in paragraph 14 of the impugned judgment, are hereby set aside. The Special Criminal Application No. 1387 of 2008 is accepted in part by directing the respondent No. 8 to hand over custody of goats and sheep seized in the instant case to the respondent Nos. 1 to 6, who are owners thereof, in such proportion as the original number of seized animals bears to the number of surviving animals, on each of them depositing a sum of rupees fifty thousand with the trial court and each furnishing two sureties of Rs.50,000/- to the satisfaction of the trial court. The respondent Nos. 1 to 6 be handed

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over custody of goats and sheep in the presence of Police Officer in-charge of the Police Station at Patan, who shall supervise delivery of the animals to the respondent Nos. 1 to 6 in such manner that the animals are not subjected to further cruelty in their transportation within the area of his jurisdiction. The respondent Nos. 1 to 6 are directed to see that no cruelty is meted out to the surviving animals and submit an undertaking to that effect to the trial court within a period of two weeks from today.

19. Subject to abovementioned directions regarding handing over interim custody of goats and sheep, the appeal is allowed.

.....J. [Harjit Singh Bedi] .....J. [J.M. Panchal] New Delhi;

November 04, 2009.

Siddu Venkappa Devadiga vs Smt. Rangu S. Devadiga And Ors. on 6 January, 1977

Equivalent citations: AIR1977SC890, (1977)3SCC532, 1977(9)UJ101(SC), AIR 1977 SUPREME COURT 890, 1977 3 SCC 532, 1977 2 SCJ 52, 1977 U J (SC) 101, 1977 RENTLR 877

Author: P.N. Shinghal

Bench: M.H. Beg, Chief Justice, P.N. Shinghal

JUDGMENT

P.N. Shinghal, J.

1. This appeal of the defendant, by certificate, is directed against the appellate judgment of the High Court of Bombay dated June 27/28, 1968. As the appeal must succeed on a short point of law, it will be enough to state those facts that bear on it. It is a matter of regret that a voluminous paper book should have been prepared in this case and its bearing delayed for so long.

2. Shivanna Devadiga, husband of plaintiff No. 1 and father of the remaining plaintiffs, had a hotel known as Krishmananda Upahar Graba in Bombay. Defendant Siddu Venkappa Devadiga was his sister's son. According to the plaintiffs, Shivanna started another hotel known as Purshottam Restaurantat a distance of about a furlong from Krishnanda Upahar Graba. As the parties were governed by Aliya Santhana Law, Shivanna looked after the defendant, his mother and her other children. The plaintiffs pleaded that the defendant was brought to Bombay by Shivarna and was employed by him in Purshoftam Restaurant upto about 1955. He then went to his place in South Kanara, and did not return to Bombay until after Shivanna's death on September 8, 1958. The plaintiffs further pleaded that as the defendant gave assurance that he would look after the interested of Shivannia's widow (plaintiff No. 1)and her children, they made over the key of Purshottam Restaurant to him. It was also the case of the plaintiffs that the defendant began to claim that the Purshottam Restaurant belonged to him, and refused to deliver possession there of to them when they returned to Bombay after performing the obsequies Shivanna. The plaintiffs accordingly instituted the suit which has given rise to this appeal on February 14, 1961, claiming possession of Purshottam, Restaurant,a sum of Rs. 7000/- as damages and/or compensation from September 9, 1958 upto the date of the suit, with interest, and any further amount as damages which the court deemed just and proper.

3. The defendant controverted the claim of the plaintiffs and claimed that he had always been the sole and exclusive owner of Purchottam Restaurant ever since 1940 when it was started, that he had

taken the premises of the restaurant on lease from the landlord in his own name, had, obtained the municipal licensees, the police licences and authorisations in his own name from the very inception, and that he had always been in custody and possession of that business.

4. The trial court found that there were several circumstances which negatived the claim of the plaintiffs, and dismissed the suit by its judgment. dated September 30, 1963. The plaintiffs went in appeal to the High Court and as it has been allowed and the suit has been decreed, the defendant has come up in appeal to this Court.

5. It has been argued by counsel for the appellant that the High Court committed a serious error of law in setting up a new case for the plaintiffs, in its impugned judgment, by holding that the Purshottam Restaurant was a 'Benami' transaction of Shivanna, who was its real owner, when it found that there could be no other ground for interfering with the finding of the trial court about the defendant's ownership and possession of the business. It has accordingly been urged that the judgment and decree of the trial court were wrongly set aside, and should be restored. As we shall show, there is justification for this argument.

6. We find that the High Court took several "circumstances" into consideration while examining the competing claims of the parties to the restaurant. It found that some of the circumstances were in favour of the plaintiffs, but it was faced with a "Difficulty" which has been stated by it as follows ?

The difficulty in the present case has been created because the Municipal licences, Police licences and authorizations are in the name of the defendant. To this aspect we will have to revert a little later. At this stage it is sufficient to say that the mere fact that the business is run in the name of particular person would be presumptive of the fact that the business belongs to him. However it is well known that a large number of persons in this country do business in names other than their own, and if circumstances are established, which are consistent with the case that it belongs to some one else the Court cannot hesitate to draw that inference, since the presumption then would be rebutted.

The High Court again made a reference to the circumstances in favour of the plaintiffs and held as follows:

> In the light of all these the circumstances of the tenancy of the premises being in defendant's name and the licence and authorisations in his name, should be considered. In this country it is not unknown that people carry on business in the names of others, viz. dependents upon them. If it is accepted that Shivanna was the real owner of the hotel and that the name of the defendant was used for purposes of licence and authorization, all these facts fall in a pattern and fit in.

7. It is thus apparent that the High Court set aside the finding of the trial court, and gave its decision in favour of the plaintiffs, because it reached the conclusion that the Purshottam Restaurant was the 'benami' business of Shivanna, and not of the defendant. The High Court adopted that course of reasoning because there were a number of facts and circumstances which were heavily in favour of

the defendant e.g. the tenancy of the restaurant was in the name of the defendant from the very beginning, the rent bills showed that it was the defendant who was paying for the lease, the licenses issued by the Commissioner of Police and the Bombay Municipal Corporation were in the name of the defendant from the very beginning, the permits and cards for the use of food grains and milk in the restaurant Were in the name of the defendant from the commencement of the business, and it was the defendant who had filed several other applications in connection with the transaction of the business of the restaurant. Moreover Shivanna, who had executed a will on August 30, 1958, about a year before his death, made a reference to only one tea shop, before his death, made a reference to only one tea shop, and not to the other in the will, which also showed that he claimed to be the owner of the other restaurant known as Krishnananda Upahar Graha & of not the purshottam Restaurant. These were very important facts and circumstances which had weighed in favour of the defendant, and formed the basis of the trial court's judgment in his favour. But the High Court was swayed by the impression that the transaction was 'benami' and that was held to be the reason why those facts and circumstances came into existence. The question however is whether any such pleaded been taken by the plaintiffs and, if not, whether it was permissible for the High Court to interfere with the finding of the trial court by setting up a plea which had never been taken in the plaint?

8. We have examined the plaint and we find that it was clearly pleaded there that Shivanna was the absolute owner of the purshottam Restaurant until his death on September 8, 1938, that the defendant was "employed" by him in that business, that the defendant came to Bombay soon after the death of Shivanna passing to be a friend and well-wisher of the plaintiffs and that possession of the purshottam Restaurant was given to him on his assurance that he would lookafter the interests of the plaintiffs and would carry on the business on their behalf. The plaintiffs pleaded further that when the defendant refused to render accounts and totally excluded them from the control and management of the businese, it became necessary for them to take action against him. It was further stated in the plaint that the plaintiffs first filed a criminal complaint against the defendant but it was dismissed for want of appearance, & thereafter filed the present suit alleging that Shivanna was the absolute owner of the restaurant and was the tenant of the premises where it was being carried on. As has been stated, the defendant traversed that claim in his written statement and pleaded that the business always belonged to him as owner. There was thus no plea that the business was 'benami' for Shivanna. We also find that the parties did not join issue on the question that the business was 'benami'. On the other hand, the point at issue was whether Shivanna was the owner of the business and the tenancy rights of the premises where it was being carried on. It is well-settled, having been laid down by this Court in Trejan and Co. Ltd. v. PW. N.H. Nagappa Chettiar (1956) SCR 789 and Baraba Singh ns. Achal Singh AIR 1961 SC 1097 that the decision of a case cannot be based on grounds outside the plea of the parties, and that it is the case pleaded which has to be found. The High Court therefore went wrong is ignoring this basic principle of law, and in making out an entirely new case which was not pleaded and was not the subject matter of the trial.

9. The appeal is allowed, the impugned judgment and decree of the High Court are set aside, and the decree of the trial court is restored with costs.

ANNEXURE P-4

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IN THE HIGH COURT OF DELHI AT NEW DELHI

C.W.P. No. 4776 OF 2010

IN THE MATTER OF:

SMT. USHA KAPOOR & ANR. ... PETITIONERS

VERSUS

DELHI DEVELOPMENT AUTHORITY
THROUGH ITS VICE CHAIRMAN & ANR. ... RESPONDENTS

MEMO OF PARTIES

1. SMT. USHA KAPOOR
WIFE OF SHRI MAHESH KAPOOR

2. SH. MAHESH KAPOOR,
S/O LATE SHRI S.N. KAPOOR,

BOTH PARTNERS OF
M/S. JHANKAR BANQUETS
G-87, PREET VIHAR,
DELHI-110092 ... PETITIONERS

VERSUS

1. DELHI DEVELOPMENT AUTHORITY
THROUGH ITS VICE CHAIRMAN,
INA MARKET, VIKAR SADAN, NEW DELHI

2. DELHI JAL BOARD,
THROUGH ITS CHIEF EXECUTIVE OFFICER,
NEW DELHI.

... RESPONDENTS

PETITIONERS

Through

TRUE COPY
EXAMINER

(NANDINI SAHNI)(SUMIT BANSAL)
ADVOCATES FOR THE PETITIONERS
204, LAWYER'S CHAMBER
DELHI HIGH COURT
NEW DELHI-110003

NEW DELHI,

DATED:

CAN

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55 (a)

IN THE HIGH COURT OF DELHI AT NEW DELHI

C W.P NO 4776 OF 2000

SEAL OF THE COURT

IN THE MATTER OF:

SMT. USHA KAPOOR & ANR. ... PETITIONERS

VERSUS

DELHI DEVELOPMENT AUTHORITY

THROUGH ITS VICE CHAIRMAN & ANR... RESPONDNETS

MEMO OF PARTIES

1. SMT. USHA KAPOOR
   WIFE OF SHRI MAHESH KAPOOR
2. SH. MAHESH KAPOOR
   S/O LATE SHRI S.N. KAPOOR

BOTH PARTNERS OF
M/S. JHANKAR BANQUETS
G-87, PREET VIHAR,
DELHI-11092 ... PETITIONERS

VERSUS

1. DELHI DEVELOPMENT AUTHORITY
   THROUGH ITS VICE CHAIRMAN
   INA MARKET, VIKAS SADAN, NEW DELHI
2. DELHI JAL BOARD,
   THROUGH ITS CHIEF EXECUTIVE OFFICER
   NEW DELHI ... RESPONDENTS

PETITIONERS

Through

(NANDINI SAHNI) (SUMIT BANSAL)
ADVOCATES FOR THE PETITIONERS
204, LAWYER'S CHAMBER
DELHI HIGH COURT
NEW DELHI-110024

NEW DELHI,

DATED:

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56

6

LHI AT NEW DELHI

C.D.-(ia) Continuation Sheet

Sl. No.	Date	Orders
		08.05.2001 Present: Mr.Ravinder Sethi,Sr.advocate with Mr.Sumit Bansal for the petitioner. Mr.Rajeev Sharma for the respondent/DDA. CM No.4776 in CW 7390/2000 Learned counsel for the respondent submits that repairs have since been effected. The letter written by the Executive Engineer, DDA dated 28.4.2001 is taken on record. In view of this development, no further orders are called for in this writ petition. The writ petition is disposed of as satisfied. -Sd- Manmohan Sarin, J May 08, 2001 aka True Copy Examiner

56 (a)

IN THE HIGH COURT OF DELHI AT NEW DELHI

SEAL OF THE COURT

Orders

08.05.2001

Present: Mr. Ravinder Seth, Sr. Advocate with

Mr. Sumit Bansal for the petitioner.

Mr. Rajeev Sharma for the respondent/DDA.

CW: NO: 4776 & CM: 7390/2000

Learned counsel for the respondent submits that repairs have since been effected. The letter written by the Executive Engineer, DDA dated 28.04.2001 is taken on record.

In view of this development, no further orders are called for on this writ petition.

The writ petition is disposed of as satisfied.

May 08, 2001

aka,

-Sd-

Manmohan Sarin, J

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Typed Copy At Page 57(A)
in Annexure P-5

(57)

ASIAD TOWER BANQUET & RESTAURANT
A UNIT OF JHANKAR BANQUETS

KHEL GAON, NEW DELHI 110 049 TEL 6492181-84 FAX : 6492373

21-03-2002

The Chief Fire Officer
Delhi Fire Services
Connaught Place
NEW DELHI

FIRE FIGHTING & FIRE ALARM SYSTEM FOR RESTAURANT AT ASIAD TOWER, ASIAN GAMES VILLAGE SIRI FORT ROAD, NEW DELHI.

Dear Sir,

With reference to our earlier letter dated 27-09-2001, may we inform you that Fire Fighting System consisting of Wet Riser System and Automatic Sprinkler System and Fire Alarm System has been completed in all respect.

As the System is comissioned, you are now requested to carry out inspection of the system and issue us N.O.C. for the same.

Thanking you

Yours faithfully

for Jhankar Banquets
Authorised Signatory.

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57 (a)

KHEL GAON, NEW DELHI 110049 TEL: 6492181-84 FAX: 6492373

21.03.2003

The Chief Fire Officer

Delhi Fire Services

Connaught Place

NEW DELHI

FIRE FIGHTING & FIRE ALARM SYSTEM FOR RESTAURANT AT

ASIAD TOWER,

ASIAN GAMES VILLAGE SIRI FORT ROAD, NEW DELHI.

Dear Sir,

With reference to our earlier letter dated 27-09-2001, may we inform you that Fire Fighting System consisting of Wet Riser System and automatic Sprinkler System and Fire Alarm system has been completed in all respect.

As the system is commissioned you are now requested to carry out inspection of the system and issue us N.O.C for the same.

Thanking You

Yours Faithfully

TYPED COPY

For Jhankar Banquets

Authorised Signatory

ANNEXURE P-6

58

GOVERNMENT OF NATIONAL CAPITAL TERRITORY OF DELHI
HEADQUARTERS: DELHI FIRE SERVICE, NEW DELHI – 110001

NO 14/01/DP/2004/2440 DATE 14/x/04

To

The Deputy Director (CE)
Delhi Development Authority
Commercial Estate Branch
Vikas Sadan, INA,
New Delhi.

Sub - NOC from fire safety point of view in r/o Asiad Tower Banquet & Restaurant.

Sir,

Kindly refer to the letter No. U.O. NO 47(11) 2004-RN/1194/4332 dated 09.08.2004 on the above subject from OSD to LG on the above subject. In this regard, it is intimated that this building was constructed before 1983 and that time the norms laid down in BBL-1967 are to be followed. As per Clause No. 72 Part – II of BBL - 1967 the width of staircase should be 4'6" for public building if less than 200 persons are to be accommodated but in this specific case width of staircase is only 70 cm to 100 cm approximately (A copy of the norms is enclosed herewith for your ready reference). Accordingly you are requested to provide an additional staircase to meet the requirement of BBL-1967.

A meeting was also convened by principal commissioners/DDA on 28.07.2004 in his chamber on the same issue and it was decided in the meeting that the possibilities should be explored to comply the norms as required under Law and then only NOC should be requested from the fire department.

Submitted for your kind information please.

Yours faithfully

Encl- as above

Chief Fire Officer
Delhi Fire Service

Copy to -

1 Shri Alok Swarup
OSD to LG, Raj Niwas, Delhi. For Kind Information Please.

2 Sh. Mahesh Kappor (M.D.)
Asiad Tower Banquet & Restaurant
Khel Gaon, New Delhi. – 49 For Necessary Action Please.

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ANNEXURE P-7 (47)

Following items were discussed in the 248th Screening Committee meeting held on 10.05.2006

44:2006 **Part Development of LSC Plot, Pkt.6 at Jasola No. SA/SZ/HUPW/F-12/98/Pt.**

Presented by: Sr. Architect (SZ)

Proposal for consideration: The approval is sought for shops to be developed by DDA part of LSC site, the rest of which has already been disposed off by auction.

Decision of the screening committee: The proposal was approved with the condition that a public toilet block may also be provided which can either be on BOT Basis or can be constructed by DDA.

Follow up action: As projected in the Agenda.

45:2006 **Proposed additional firescape staircase for Tower Restaurant at Asian Games Village Complex No.SA/SZ/HUPW/F-56/2000.**

Presented by: Sr. Architect (SZ)

Proposal for consideration: Proposal for additional firescape staircase for Tower Restaurant as per the requirement of the Chief Fire Officer vide their letter No.F6/MS/DFS/2004/1148 dated 28.5.04.

Decision of the screening committee: Senior Architect (SZ) informed that another proposal has been received from the licensee of Tower Restaurant informing that Fire Department is ready to give fire clearance for the overhead restaurant provided that the existing staircase is widened to a width of 1350mm (4'6") with 150mm risers and 300 wide tread. The licensee has further submitted that he is prepared to modify the existing staircase to these specifications on his own cost. He will also submit to DDA necessary structural certificates etc. which will be proof-checked by C.E. CDO

The Committee approved the proposal of modification of internal staircase by the licensee subject to:

(i) The cost being completely borne by the licensee.
(ii) The modification of staircase should not create any additional rights for the licensee.

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Follow up action: The possibility of widening the existing road may be examined by Engineering/Planning/Architecture Wing.

64:2006 **EWS Housing at Kondli-Gharoli adjoining NOIDA.**
No.F.43/SA/EZ/06/HUPW/DDA

Presented by: Sr. Architect (EZ)

Proposal for consideration: Approval of 1350 EWS Houses (5-Storeyed) instead of 703 Nos. resettlement plots because the site is low-lying and requires deep filling. It will be expensive for the individual plot holder to construct their houses.

Decision of the screening committee: The proposal be revised by planning mix of HIG/MIG type of (multi-storeyed housing) and LIG type (5-storeyed housing) by achieving optimum FAR and density as per MPD norms. The revised layout can be put up on file for approval.

Follow up action: As reflected in the agenda.

The meeting was ended with a vote of thanks to the Chair.

These minutes are issued with the approval of the Vice-Chairman, DDA.

31/8/06

(L. Gopan)
Dy. Director (Arch.) Coordn.

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ANNEXURE P-8

61

GOVERNMENT OF NATIONAL CAPITAL TERRITORY OF DELHI
HEADQUARTERS: DELHI FIRE SERVICE, CONNAUGHT PLACE
NEW DELHI-110 001

No. F.6/DFS/ MS /2009/ 1116 Dated: 24/4/09

To,

The Addl. Secretary to L.G
Raj Niwas
Delhi-54

Subject: **Regarding DDA Tower restaurant, khelgaon, New Delhi**

Sir,

With reference to U.O. No. 100(3) 2009/RN/686/8263 dated 30.03.09., it is to inform you that this department has already submitted its observations to OSD to Hon'ble L.G vide letter of even No. 2440 dated 14.10.04, No. 1782 dated 29.08.05 and No. 515 dated 22.02.08 (copy enclosed for ready reference). The referred Sub Clause 3 of clause no. 72 of BBL-1967 is mandatory as well as necessary for emergency evacuation point of view. Further as per existing building Bye Laws, single staircase is not sufficient to meet the evacuation requirement in case of emergency .If considered appropriate, this matter may be referred to legal department of GNCT of Delhi, for legal opinion in view of the applicability of law in this case. Moreover the power of relaxation in rules is not vested in Chief Fire Officer.

Yours faithfully

Chief Fire Officer
Delhi Fire Service

Copy to :

1. The Dy Secretary (Home), GNCT of Delhi, 5th floor, Delhi Sectt. for information and necessary action w.r.t letter No. F.5 (30)/2007/H-III/679 dated 07.11.08
2. Sh. Mahesh Kapoor, Jhankar banquets, Asiad Tower, Khelgaon, New Delhi-49 for information pl.

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GOVERNMENT OF NATIONAL CAPITAL TERRITORY OF DELHI
HEADQUARTERS: DELHI FIRE SERVICE, CONNAUGHT PLACE
NEW DELHI-110 001

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No. F.6/DFS/ MS /2009/ 1478 Dated: 26/5/09

To,

The Dy Director (CE)
Delhi Development Authority
A-Block, 1st floor
Vikas Sadan, INA
New Delhi-23

Subject: **Regarding DDA Tower restaurant, khelgaon, New Delhi**

Sir,

With reference to letter No. F.25(32)/CE/Vol. VI/DDA/1312 dated 08.05.09. it is to inform you that this department has examined the issue and observed that the Sub Clause 3 of clause no. 72 of BBL-1967 is mandatory as well as necessary for emergency evacuation point of view. Further as per existing building Bye Laws, single staircase is not sufficient to meet the evacuation requirement in case of emergency for high rise buildings.

Moreover this is a building approved and constructed by DDA and DDA is the authority to get the BBL implemented/ interpretated for all buildings in Delhi. Therefore DDA may take appropriate action decision w.r.t the requirement of staircases.

This is for your information and necessary action please.

Yours faithfully

Chief Fire Officer
Delhi Fire Service

Copy to :

1. The Dy Secretary (Home), GNCT of Delhi, 5th floor, Delhi Sectt. for information pl.
2. Sh. Mahesh Kapoor, Jhankar banquets, Asiad Tower, Khelgaon, New Delhi –49 for information pl.

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ANNEXURE P-9

63

IN THE HIGH COURT OF DELHI AT NEW DELHI

(EXTRAORDINARY CIVIL WRIT JURISDICTION)

WRIT PETITION (CIVIL) NO. 1984 OF 2009

"MEMO OF PARTIES"

IN THE MATTER OF:

M/S. JHANKAR BANQUET
[A PARTNERSHIP FIRM]
HAVING ITS REGISTERED
OFFICE AT G-87, PREET VIHAR
DELHI – 110 092.

MR. MAHESH KAPOR
PARTNER
M/S. JHANKAR BANQUET
AT G-87, PREET VIHAR
DELHI – 110 092.

Mrs. USHA KAPOOR
PARTNER
M/S. JHANKAR BANQUET
AT G-87, PREET VIHAR
DELHI – 110 092.

.. PETITIONERS

VERSUS

DELHI DEVELOPMENT AUTHORITY
THROUGH ITS VICE CHAIRMAN
VIKAS SADAN – I. N. A.
NEW DELHI

GOVT. OF NCT OF DELHI
THROUGH ITS CHIEF FIRE OFFICER
DELHI FIRE SERVICE
CONNAUGHT PLACE
NEW DELHI – 110 001

... RESPONDENTS

PETITIONERS

THROUGH:

PAWANJIT S. BINDRA
ADVOCATE
A-428, FF, DEFENCE COLONY
NEW DELHI

DELHI:
DATED: 24/9/09

For Private Use
Examiner Judicial Department
High Court of Delhi

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10

* IN THE HIGH COURT OF DELHI AT NEW DELHI

\+ W.P.(C) 11984/2009

% [redacted] 09.02.2010

M/S JHANKAR BANQUET AND ANR ..... Petitioner
Through: Mr.Ravi Gupta, Sr. Advocate with
Mr.Pawan Bindra and Mr.Ankit Jain, Advs

versus

DDA AND ANR ..... Respondent
Through: Ms.Sobhna Takiar, Adv. for DDA.
Mr.Nazmi Waziri and Mr.Shoaib Haider,
Advocates for respondent/GNCTD

CORAM:
HON'BLE MR[redacted]

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to Reporter or not?
3. Whether the judgment should be reported in the Digest?

G.S.SISTANI, J. (ORAL)

1. By the present petition, petitioner seeks quashing of the impugned communications dated 22.02.2008, 24.04.2009 and 26.05.2009 issued by respondent no.2. Petitioner also prays for issuance of a writ of mandamus, directing respondents to forthwith issue a no objection certificate for running a restaurant from the Tower Restaurant, Asian Games Village, without insisting on any structural alteration of the petitioner's restaurant and/or providing a new staircase.

2. The facts as set out in the writ petition are that respondent/ DDA constructed a building at the Asian Games Village Complex, Khel Gaon, New Delhi in the year 1982. The height of the building which is a tower on which the restaurant was constructed is 53 meters with the floor of the restaurant starting only at the height of 45 meters and that too over a water tank. The first stop of the lift installed is at the level of petitioner's restaurant. The tower has

been provided with two lifts and a staircase. After constructing the building and restaurant, the DDA advertised in the month of June, 1982 for leasing out the restaurant. The DDA leased out the restaurant to a well known hotelier. It is the case of the petitioner that respondent no.1 leased out the restaurant to M/s.Chatwal Hotels & Restaurants, who operated the restaurant between 1984 and 1989 as 'Bombay Place Tower', after obtaining the necessary NOC from respondent no.2. Between the period 1989 and 1996 the said restaurant premises remained vacant and after a gap of seven years on 14.10.1996 respondent/DDA issued tender inviting bids for taking on lease the premises tower for a period of thirty years. The petitioner participated in the tender and was declared successful. The tower premises was allotted to the petitioner in the year 1997. The lease deed of the tower was executed in favour of the petitioner on 24.12.1999. As per the terms thereof petitioner was required to pay advance lease money for 30 years. The petitioner is stated to have paid more than 2.21 crores to the DDA. The petitioner could not commence business due to water leakage from the overhead tank and had to undertake extensive renovation work. The petitioner is stated to have incurred expenses to the tune of Rs.2.5 crores on renovation, including furnishing and installation of two new lifts. The petitioner is also stated to have paid Rs.30.0 lacs towards the stamp duty in addition to ground rent @ 3.30 lacs per year, which was to be enhanced by 20% every three years. During renovation, petitioner also installed fire safety measures, as per the requirement of respondent no.2. The petitioner is stated to have spent Rs.40.0 lacs and constructed a water tank of 2.0 lacs liters in the basement to meet the safety requirements. In the year 2001 petitioner approached respondent no.2 for necessary approval/ NOC. Petitioner was informed by respondent no.2 that the letter should be addressed through the DDA and accordingly, DDA vide communication dated 26.03.2003 requested Fire Department to consider the case of the petitioner for grant of NOC

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after completing the requisite formalities. Petitioner is stated to have completed installation of fire fighting systems in the restaurant and by letter dated 21.03.2003 informed the respondent of the same. The petitioner also addressed various communications to respondent no.2 requesting them to take steps for grant of NOC to the petitioner. The respondent no.2 by letter dated 20.02.2004 declined the request of the petitioner as the petitioner did not meet the Building Bye-laws, 1983. The respondent no.1 addressed a communication to respondent no.2 on 12.04.2004 with regard to issuance of NOC which letter was received by respondent no.2 stating *"that issuance of NOC cannot be considered, at this stage, as even the norms laid down in BBS - 1967 were not complied with"*.

3. The respondent no.2 vide communication dated 14.10.2004 addressed to the respondent/DDA with a copy marked to the petitioner agreed that since the building was constructed before 1983, the then applicable norms laid down i.e. Building Bye-laws, 1967 were to be followed in deciding the application of the petitioner for the NOC. It was also stated in the communication that the petitioner would be bound by clause 72 Part (1) of the Building Bye-laws 1967, according to which width of the staircase should be 4 ft. 6 inch for public building if less than 200 persons are to be accommodated. Respondent no.2 however, insisted that an additional staircase to be provided as the width of the stair case was less than required /prescribed width of 4 ft. 6 inches, as per the Building Bye Laws, 1967. The petitioner is stated to have made efforts for obtaining necessary approval for providing additional staircase or increasing the width of the existing staircase from respondent no.1 DDA through various communications, which were written including letters dated 6.6.2005, 8.8.2005, 17.11.2005, 15.2.2006, 20.2.2006 and 8.5.2006. The proposal of the petitioner was placed before the Screening Committee of respondent no.1 in its meeting held on 10.05.2006, and the Committee agreed to the proposal of

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rectification /modification of the existing staircase. The operative portion of the Minutes of the Meeting held on 10.05.2006 are reproduced below:

> "Senior architect (SZ) informed that another proposal has been received from the licensee of Tower Restaurant informing that Fire Department is ready to give fire clearance for the overhead restaurant provided that the existing staircase is widened to a width of 1350 mm (4'6'') width with 150 mm raisers and 300 wide tread. The licensee has further submitted that he is prepared to modify the existing staircase to these specifications on his own cost. He will also submit to DDA necessary structural certificates etc. which will be proof checked by C.E. CDO.
>
> The committee approved the proposal of modification of internal staircase by the licensee subject to :
>
> (i) The cost being completely borne by the licensee
>
> (ii) The modification of staircase should not create any additional rights for the licensee."

4. The petitioner is stated to have submitted the necessary report for widening the staircase to respondent no.1 on 21.07.2006. The approval of the Screening Committee was brought to the notice of respondent no.2. The petitioner is stated to have received a response from respondent no.2 vide impugned communication dated 22.2.2008 wherein respondent no.2 brought to the notice of the petitioner that widening of existing staircase as suggested by them was not sufficient compliance to meet the evacuation requirement and in addition one more staircase of the increased width has to be provided in the existing building.

5. Respondent no.2 by subsequent communications dated 24.4.2009 and 26.5.2009 have reiterated their stand. Faced with this situation, petitioner has filed present petition.

6. Learned senior counsel for petitioner submits that pursuant to an advertisement in the newspaper, as far back as in the year 1995

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petitioner had paid a sum of Rs.2.5 crores for lease of the tower for 30 years. Besides the said payment, petitioner has spent approximately Rs.3.0 crores on renovation, which included providing new lifts and also paid the ground rent which is Rs.3.0 lacs per year. It is also stated that petitioner has also spent large amounts for providing necessary fire fighting equipments at the tower as well as constructed an underground water tank of 2 lacs liters as per the requirement. Counsel for petitioner submits that bare reading of the advertisement would show that the purpose of running of the tower was for the business of a restaurant.

7. Counsel for petitioner relies on the notice inviting tender, copies of the advertisement as well as lease deed and plan annexed with the lease deed, to show that the tower was given on lease for running a restaurant. Counsel also submits that in spite of making the entire payment from 1997 and also despite the heavy expenditure incurred on renovation, including on lease money for 30 years and various other expenses, the petitioner has not been able to carry out his trade and business as the NOC has not been granted by fire department. He also submits that Screening Committee of the DDA convinced by the stand of the petitioner and has granted permission to the petitioner to increase the width of the staircase to bring the same in conformity with the fire safety norms, which is not being accepted by the respondent no.2 in an arbitrary manner.

8. Counsel for respondent no.2 submits that NOC was not granted to the petitioner as the petitioner failed to comply with clause 72 (2) of the Building Bye-laws, 1967 as stated in the communication dated 22.02.2008, 24.04.2009 and 26.05.2009. It is further submitted that in case a fresh application is made, the fire department will consider the same in accordance with law

9. Mr.Nazmi Waziri, counsel for GNCTD further submits that in fact request for grant of NOC was rejected as the building did not meet the requirements of means of escape as per the Building Bye-laws, 1983. He also submits that as and when fresh application

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for grant of NOC is made, the same shall be considered in accordance with law. Counsel for DDA submits that DDA has granted a lease to the petitioner for 30 years as per lease signed in the year 1997, the DDA has no objection to the petitioner running the restaurant, provided it meets all the safety requirements. It would be useful and necessary to reproduce letter dated 22.02.2008, 24.04.2009 and 26.05.2009 (the impugned letters):

"GOVERNMENT OF NATIONAL CAPITAL TERRITORY OF DELHI HEAD QUARTERS : DELHI FIRE SERVICE : NEW DELHI -110001

NO.F.6/DFS/MS/2008/515 Dated 22/2/2008

To,

The Sr. Architect (SZ)
DDA, Architecture Section,
Vikas Minar, I.P. Estate,
New Delhi.

Sub: Regarding Proposed additional fire escape staircase for Tower Restaurant at Asian Games Village Complex, New Delhi.

Sir,

This has reference to letter dated 29/10/2007 received from Authorised Signatory, Jhankar Banquets, Asiad Tower Banquet Complex on the subject noted above. In this regard, it is to inform you that the DDA has approved the proposal to increase the width of existing staircase up to 4'6" in the Asiad Tower and owner has also agreed to increase the width of existing staircase up to 4'6" as required vide Clause No.72 of BBL – 1976. But nothing has been mentioned about implementation of Sub Clause No.3 of Clause 72 (Regulation for staircases) with regard to number of staircase in the said BBL. The Sub Clause 3 states that two numbers staircase of 4'6" each are required for the said building (Photocopy enclosed). Delhi Fire Service does not have any powers to relax the Rules and this may looked into by DDA who has constructed the restaurant, if considered appropriate.

In view of above, you are requested to look into the matter at your end and provision of second staircase may also be made having same width. We are of the opinion in that single staircase is not sufficient to meet the evacuation requirement in case of emergency.

Yours faithfully,

Dy.Chief Fire Officer

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For Chief Fire Officer,
Delhi Fire Service

Copy to :-

The Authorized Signatory,
Jhankar Banquets,
Asiad Tower Banquet Complex,
Khel Gaon, New Delhi"

"GOVERNMENT OF NATIONAL CAPITAL TERRITORY OF DELHI HEAD QUARTERS : DELHI FIRE SERVICE : NEW DELHI -110001

NO.F.6/DFS/MS/2009/1116 Dated 24/4/2009

To,

The Addl. Secretary to L.G.
Raj Niwas,
Delhi-54

Sub: **Regarding DDA Tower restaurant, Khelgaon, New Delhi**

Sir,

With reference to U.O. No.100(3) 2009/RN/686/8263 dated 30.03.09, it is to inform you that this department has already submitted its observation to OSD to Hon'ble L.G. vide letter of even No.2440 dated 14.10.04, No.1782 dated 29.08.05 and No.515 dated 22.02.08 (copy enclosed for ready reference). The referred Sub Clause 3 of clause no.72 of BBL – 1967 is mandatory as well as necessary for emergency evacuation point of view. Further as per existing building Bye Laws, single staircase is not sufficient to meet the evacuation requirement in case of emergency. If considered appropriate, this matter may be referred to legal department of GNCT of Delhi, for legal opinion in view of the applicability of law in this case. Moreover the power of relaxation in rules is not vested in Chief Fire Officer.

Yours faithfully,

Chief Fire Officer,
Delhi Fire Service

Copy to :-

1. The Dy. Secretary (Home), GNCT of Delhi, 5th floor, Delhi Sectt. For information and necessary action w.r.t. letter No.F.5(30)/2007/H-III/679 dated 07.11.08
2. Sh.Mahesh Kapoor, Jhankar banquets, Asiad Tower, Khelgaon, New Delhi-49 for information."

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"GOVERNMENT OF NATIONAL CAPITAL TERRITORY OF DELHI HEAD QUARTERS : DELHI FIRE SERVICE : NEW DELHI -110001

NO.F.6/DFS/MS/2009/1478 Dated 26/5/2009

To,"

The Dy Director (CE)
Delhi Development Authority,
A-Block, 1st floor,
Vikas Sadan, INA,
New Delhi

Sub: **Regarding DDA Tower restaurant, Khelgaon, New Delhi**

Sir,

With reference to letter No.F.25(32)/CE/Vol. VI/DDA/1312 dated 08/05/09, it is to inform you that this department has examined the issue and observed that the Sub Clause 3 of clause no.72 of BBL – 1967 is mandatory as well as necessary for emergency evacuation point of view. Further as per existing building Bye Laws, single staircase is not sufficient to meet the evacuation requirement in case of emergency for high rise buildings.

Moreover this is a building approved and constructed by DDA and DDA is the authority to get the BBL implemented/ interpreted for all buildings in Delhi. Therefore, DDA may take appropriate action decision w.r.t. the requirement of staircase.

This is for your information and necessary action please.

Yours faithfully,

Chief Fire Officer,
Delhi Fire Service

Copy to :-

1. The Dy. Secretary (Home), GNCT of Delhi, 5th floor, Delhi Sectt. For information pl.
2. Sh.Mahesh Kapoor, Jhankar banquets, Asiad Tower, Khelgaon, New Delhi-49 for information pl."

10. A careful reading of the three letters would show that the consistent stand of the Delhi Fire Department has been that although the DDA has approved the proposal to increase the width of the existing staircase upto 4 ft. 6 inches, as required vide clause No.72 of Building Bye-laws, 1967, but nothing has been

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mentioned about implementation of sub-clause 3 of Clause 72 of BBL, 1967, with regard to number of staircase as mentioned in the said building Bye-laws. It has been the consistent objection of respondent no.2 that sub-clause 3 of Clause 72 of BBC 1967 states that two numbers staircase of 4 ft 6 inches each are required for the said building and the Delhi Fire Service does not have any power to relax the rules. Accordingly, DDA was advised that a single staircase is not sufficient. The rule relied upon by respondent no.2 is reproduced below:

> "72. **Regulations for staircases, internal corridors and passage ways etc. in a public building** : - (1) In a public building no staircase, internal corridor or passage-way intended for the use of the public shall be less than 6 feet wide; provided that where not more than two hundred persons are to be accommodated in any public building, any staircase, internal corridor or passage-way intended for the use of the public may be of any width not less than 4 feet 6 inches.
>
> (2) In a public building every staircase, internal corridor or passage-way which is intended for the use of the public and communicates with any portion of the building intended for the accommodation of more than four hundred persons shall be wider than 6 feet by 6 inches for every hundred persons over four hundred, subject to a maximum width of 9 feet.
>
> (3) Notwithstanding anything contained in clause (1) and (2), instead of a single staircase, corridor or passage-way of the width prescribed by clause (2) there may be two staircases, corridors or passage-ways each of a width of 4 feet 6 inches."

11. Mr.Nazmi Waziri, learned standing counsel for respondent/GNCTD submits that as per sub-clause of Clause 72 (3), two staircases are mandatory.

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12. Counsel for petitioner submits that two stair cases are mandatory only in case where a building intends to accommodate more than 400 persons. Mr.Ravi Gupta, on instructions from his client submits that petitioner undertakes to file an affidavit in the form of undertaking that the restaurant shall not house at any given point of time more than 200 persons, which number shall include

guests and staff of the petitioner. He also submits that this has been the consistent stand of the petitioner and thus petitioner would be governed by Clause 72 (1) and not clause 72 (2) or (3). As per Sub-clause 1 of clause 72 any public building no staircase internal corridor or passage way is to be not less than 6 ft wide; and as per the proviso where not more than 200 persons are to be accommodated, the internal corridor or passage way intended for the use of public may be of any width not less than 4 ft. 6 inches. Counsel for petitioner submits that petitioner will comply with this requirement. He submits that sub-clause 3 of Clause 72 deals with the former portion of the regulations 72 (1) and not with the proviso thereto, which provides that a staircase should not be less than 4 ft. 6 inches in width.

13. I have heard counsel for the parties and given my thoughtful consideration to the matter. The basic facts are not in dispute that the DDA constructed a building at the Asian Games Village Complex in the year 1982 and at the tower of which a restaurant was constructed and was given on lease pursuant to an advertisement to M/s.Chatwal Hotels & Restaurants, who operated the restaurant between the year 1984 and 1989 as 'Bombay Place Tower'. The respondent no.2 had granted permission for running of this restaurant. The petitioner had participated in an auction and was declared successful and thus the tower was allotted to the petitioner in the year 1997. A lease was executed in favour of the petitioner on 24.12.1999 and as per the terms, petitioner was required to advance lease money for 30 years. Petitioner has paid more than Rs.2.21 crores to the DDA and also carried out renovation, but has not been able to derive the benefit of his investments on account of the fact that respondent no.2 had not granted a no objection certificate. The Chief Fire Officer, respondent no.2 has declined the request of the petitioner made through respondent no.1-DDA, which is evident from the communications dated 22.02.2008, 24.04.2009 and 26.05.2009 on the ground that Sub clause 2 of Rule 72 of BBL, 1967 which is

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mandatory has not been complied with. The bone of contention between the parties is the interpretation of Rule 72 of the Building Bye-laws, 1967. Rule 72 of the BBL has been reproduced above.

14. A careful reading of Rule 72(1) would show that in no public building a stair case, internal corridor or passage way intended for the use of public shall be less than 6 ft. wide. However, in case where not more than 200 people are to be accommodated the staircase, internal corridor or passage way may be of a width not less than 4 ft. 6 inches. As per the stand taken by the petitioner in the present petition and the statement made by counsel in court on instructions, petitioner relies on the latter portion of sub rule (1) of Rule 72 wherein in case the number of persons to be accommodated are less than 200, the width of the staircase, internal corridor or passage way intended for the use may be of any width not less than 4 ft. 6 inches, thus the requirement in the case of the petitioner based on the undertaking that the number of persons to be accommodated which would include guests and staff would not be more than 200 persons, the width of the stair case cannot be less than 4 ft. 6 inches. Sub Rule (2) of Rule 72 deals with a situation where any portion of the building is intended for accommodating more than 400 persons in which case as per the Rule the staircase shall be wider than 6 ft. by 6 inches and for every 100 persons over 400 persons, subject to a maximum width of 9 ft. A joint reading of Rule 1 and 2 would show that in any building where the number of people to be accommodated are less than 200 the width of the staircase shall be not less than 4 ft. 6 inches, however, in case in an building more than 200 people are to be accommodated, the staircase shall not be less than 6 ft. wide and in case more than 400 people are to be accommodated for 100 persons, the staircase shall be wider than 6 ft. by 6 inches for every 100 persons, subject to a maximum width of 9 ft. According to sub-rule 3 notwithstanding anything contained in clauses 1 and 2 instead of a single stair case, corridor or passage way of the width prescribed by clause 2, there may be two

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staircases, corridor or passage way each of a width of 4 ft. 6 inches, the respondent no.2 while considering the application of the petitioner forwarded by respondent no.1 has rejected the same, while relying on this clause and have called upon the petitioner to provide two staircases. In my view this is an incorrect interpretation of Rule 72 for the reason that the petitioner has undertaken to accommodate not more than 200 persons in the restaurant and therefore, according to sub-Rule (1) of Rule 72, the width of the staircase cannot be less than 4 ft 6 inches, the requirement of providing 2 staircases, is mandatory for a building where more than 200 persons are to be accommodated and in case between 200 – 400 people are to be accommodated the staircase has to be 6 ft wide and in case of more than 400 persons for each 100 persons staircase shall be wide by 6 ft. and 6 inches.

15. Accordingly, impugned communications dated 22.02.2008, 24.04.2009 and 26.05.2009 are quashed. It may be clarified that as and when a fresh application is made by the petitioner and / or respondent no.1 for grant of no objection, respondent no.2 will consider the same in accordance with law and if all the conditions are met, the NOC shall be granted.

16. Petition is disposed of in above terms.

CM.No.12177/2009 (STAY)

17. In view of order passed in the writ petition, application stands disposed of.

G.S. SISTANI, J.

February 09, 2010
'ssn'

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ANNEXURE P-10

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Asiad Tower
BANQUET & RESTAURANT COMPLEX
A UNIT OF JHANKAR BANQUETS

Khel Gaon, New Delhi - 110049. T : +91-11-46126600. F : +91-11-26492373. E : info@jhankarhotels.com. W : www.jhankarhotels.com

DELHI FIRE SERVICE
HEAD QUARTERS
Govt. of NCT of DELHI
Connaught Place, New Delhi
19 OCT 2015

Date: 19/10/2015

To,
The Director
Delhi Fire Service
Connaught Place,
New Delhi-110001

Sub: Issue of Fire NOC

Sir,

With due respect it is request that we have complied all the formalities like fire lighting system and other requirements. So you are requested to inspect the premises and issue the fire NOC.

Thanking you,

For Jhankar Banquets

USHA KAPOOR

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ANNEXURE P-11

77

GOVERNMENT OF NATIONAL CAPITAL TERRITORY OF DELHI
HEADQUARTERS: DELHI FIRE SERVICE
Connaught Place: New Delhi-110001

No. F 6/DFS/MS/2016/2192 Dated 16/09/16

To,

Sh. Mahesh Kapoor
Asiad Tower
Banquets & Restaurant Complex
Khel Gaon, New Delhi-49

Subject: Regarding issue of "Fire Safety Certificate" from fire safety point of view in r/o M/s Tower restaurant (A unit of Jhnakar Banquets) at Asiad Tower, Khel Gaon, New Delhi

Sir,

This has a reference to your letter dated 05.08.2016 on the subject cited above. In this connection it is to inform you that the matter was examined and to say that the approval of design of staircases does not fall under the purview of this department. You may therefore approach DDA, the Buidling Sanctioning Authority for the approval of same.

Accordingly the case is returned for necessary action at your end please.

Yours faithfully

16/9/16

(Virendra Singh)
Dy. Chief Fire Officer
011- 23412025

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ANNEXURE P-12

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Asiad Tower

BANQUET & RESTAURANT COMPLEX
A UNIT OF JHANKAR BANQUETS

Khel Gaon, New Delhi - 110049. T : +91-11-[illegible]. E : info@jhankarhotels.com. W : www.jhankarhotels.com

DELHI FIRE SERVICE
HEAD QUARTERS
Govt. of NCT of Delhi
Connaught Place, New Delhi
22 SEP 2016

Date : 21/09/2016

The Dy. Dir - I (Comm.)
HUPW, Commercial Unit
8th Floor Vikar Minar
New Delhi.

Sub : Carrying out modification in the staircase in the Asiad Tower, at Asiad Village New Delhi.

Sir,

This is with refrence to your office letter no F.44/SA(Comm.)/HUPW/DDA/016/232 dt 10.06.2016 and dt 31.08.2016 regarding subject cited above. Before proceeding to structual designing it is desirable to have conceptual approval of Architectural setup of the proposed drawing from DFS, otherwise the entire exercise would be futile. Kindly confirm the same has been obtained from DFS. In case it is not there kindly process the same at your end. We have already made a request to Dy. Chief Fire Officer vide our letter dt 05.08.2016, Copy of which is enclosed for ready reference.

Thanks & Regards
For *Jhankar Banquets*

Mahesh Kapoor
(partner)

Copy to :

1. *Dy Dir. (CE), DDA Vikas Sadan, New Delhi with a smilar request.*
2. *Dy. Chief Fire Officer, DFS (HQ) New Delhi. In continuation to our letter dated 05.08.2016 reiterating our request to convey conceptual approval to the staircase drawings to DDA with a copy to us at the earliest.*

Thanks & Regards
For *Jhankar Banquets*

Mahesh Kapoor
(partner)

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GOVERNMENT OF NATIONAL CAPITAL TERRITORY OF DELHI
HEADQUARTERS: DELHI FIRE SERVICE
Connaught Place: New Delhi-110001

No. F 6/DFS/MS/2016 /2076 Dated: 05/10/16

To,

The Dy. Dir-I (Comm.),
HUPW, Commercial Unit,
8th floor, Vikas Minar, New Delhi

Subject: Regarding carrying out modification in the staircase of the M/s Tower restaurant (A unit of Jhankar Banquets) at Asiad Tower, Khel Gaon, New Delhi

Sir

This has a reference to letter dated 22.09.2016 submitted by M/s Jhankar Banquets, on the subject cited above. In this connection it is to inform you that the matter was examined and observed that the approval of design of staircases does not fall under the purview of this department. This has already been intimated to the party vide letter of even No. 2192 dated 16.09.2016(copy enclosed).

In view of above, the case is forwarded to you for taking necessary action being competent authority in the matter.

Encl: as stated

Yours faithfully

5/10/16
(Virendra Singh)
Dy. Chief Fire Officer
011- 23412025

Copy for kind information to:

1. The Dy. Director, (CE), DDA Vikas Sadan, New Delhi
2. Sh. Mahesh Kapoor, Asiad Tower,Banquets & Restaurant Complex, Khel Gaon New Delhi-49

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ANNEXURE P-13

दिल्ली विकास प्राधिकरण
(Receipt & Despatch Cell)
प्राप्ति और प्रेषण कक्ष

www.dda.org.in

80

Acknowledgement
प्राप्ति सूचना

Receipt Number रसीद संख्या	REC / LD / 16 / 44,881	Date:	28/12/16 2:43:00PM
Letter Date पत्र की तिथि	28.12.16		
Subject विषय	SUBMISSION		
DDA file Number डी डी ए फिसेल संख्या	FILE NO XII		
Received From से प्राप्त	ASIAD TOWER		
Addressed To को संबोधित	LD COMMISSIONER LAND DISPOSAL		

Enclosures Attached :-
संलग्न

Serial no. क्रम संख्या	code कोड	Copy प्रतिलिपि	Description विवरण
1	24	5	MISCELLANEOUS

Total Pages
कुल पृष्ठ

1.The correctness of the above enclosures are subject to verification by the concerned Department
उपर्युक्त संलग्नों की परिशुद्धता संबंधित विभाग द्वारा सत्यापन के अधीन है।

2.Visiting Hours for general public to visit various departments on Public Dealing Days i.e. every working Monday, Tuesday and Thursday.

(i) 2.30 p.m. to 3.30 p.m.:Only allottees/applicants having prior appointment in writing from the concerned branches of Housing, Lands, etc. will be allowed.

(ii) 3.30 p.m. to 5.00 p.m.:All (without appointment) will be allowed.

Received By : AMIT
प्राप्त कर्ता

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Asiad Tower
BANQUET & RESTAURANT COMPLEX
A UNIT OF JHANKAR BANQUETS
Khel Gaon, New Delhi - 110049. T +91-11-46126600. F +91-11-26492373. E info@jhankarhotels.com W www.jhankarhotels.com

Dated:- 28/12/16

To,

The Vice Chairman,
Delhi Development Authority,
Vikas Sadan,
New Delhi - 110023

Sub : **Request for Approval of Carrying Out Modification in the existing staircase or Approving the External Staircase for Fire Escape in Tower Restaurant, Khelgaon**

Reference:
1) Dy Chief Fire Officer Letter No. F.6/DFS/MS/2016/2192 dated 16.09.2016 (Copy Enclosed)
2) Our Letter No. NIL dated 22.09.2016 addressed to Dy Dir - I (Comm), HUPW, DDA (Copy Enclosed)

R/Sir,

This is to bring to your kind notice that the Tower Restaurant was allotted to us on 30 years lease (as H1) and possession given to us in July 1997 on payment of Rs 2.21 Crore on account of Lease Money. We have spent more than Rs 2.50 Crore on renovation, upgradation, installation of Fire Fighting Equipments etc since 1997. **Still, after almost Two Decades, we could not start the Tower Restaurant in want of NOC from Fire Department due to the existing staircase of the Tower Restaurant is of varying width ranging from 800 to 1000 mm and tread and riser also not conforming to Building Bye Laws 1967.**

The Screening Committee of DDA vide its item No. 45:2006 had also approved a proposal of modification of internal staircase, subject to the cost being completely borne by the licensee, in its 248th meeting held on 10.05.2006 (Copy Enclosed).

Fire Department did not agree with this decision and wrongly interpreted the Sub Clause 3 of Clause 72 of BBL 1967 and maintained its stand of having two staircases for evacuation purpose.

The matter was referred to Hon'ble High Court, Delhi under W.P. (C) No. 11984 of 2009 for proper interpretation of the Clause 72 of BBL 1967. The Hon'ble High Court provide relief to us by clarifying the Clause 72 of BBL 1967 and passed the order that in instant case there is no requirement of Two Staircase as the petitioner has undertaken to accommodate not more than 200 persons in the restaurant and one staircase of size not less than 4 Ft 6 Inches is required as per rules. It was also directed by the court that "*as and when a fresh application is made by the petitioner (i.e. M/s Jhankar Banquets) and /or Respondent No. 1 (i.e. DDA) for grant of No Objection, Respondent No. 2 (i.e. DFS) will consider the same in accordance with law....*"

Since then a number of times, we have submitted copies of detailed Architectural Drawings for the proposed modification of Staircase to Chief Architect, DDA for approval and to Chief Fire Officer, DFS for consent. A number of correspondence have been sent to DDA and DFS but no decision is being taken either by the Architectural wing of DDA or by DFS.

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However, as per the constraints of the premises even after modifications of the existing staircase, the staircase could not be extended up to 4 Ft 6 Inches as required by HBL 1967.

It is pertinent to mention here that during a recent meeting with officials of DFS, we have gathered that there is no policy of giving NOC on the basis of a SPIRAL STAIRCASE by Delhi Fire Service Department. The existing internal staircase is a Spiral one which was built by DDA in 1980s. And if there was no policy of DFS to give NOC on the basis of Spiral Staircase, then it should have been brought to the notice at quite an early stage of correspondence and also to be brought on record of Hon'ble High Court, Delhi under W.P. (C) No. 11984 of 2009. We have also been informed by DFS that in case we want to correspond with DFS, then we should route our correspondence through DDA (being the Lessor) and no direct correspondence shall be entertained by DFS from us.

In case the NOC could not be given by DFS on the basis of Spiral Staircase/existing modified staircase, we are ready to provide an external staircase for Fire Escape purpose. Given the permission, we undertake to provide the external staircase conforming to the norms of DFS completely at our own cost.

This is our humble submission that to resolve this long pending issue and to enable us to derive the benefit of our crores of rupees investment, a joint meeting may be convened which may include senior officials of DFS, Architectural Wing DDA, Engineering Wing DDA, Land Disposal Department DDA and us.

You are requested to kindly look into the matter and resolve this long pending issue with your personal intervention.

Yours sincerely,

(Mrs.) Usha Kapoor)
M/s Jhankar Banquets

Copy for information & necessary action to :-
1.Pr.Commissioner(LD), DDA.
2.Chief Architect, DDA.
3.Director(Delhi Fire Service), Delhi.

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ANNEXURE P-14

Minutes of the Meeting held on 14.07.2017

83

A Meeting was held on 14.07.2017 at 3.00 pm under the Chairmanship of Pr.Comm (LD&H) in his Chamber for resolving the long standing issue in respect of DDA's Tower Restaurant presently leased to M/s Jhankar Banquet at Khel Gaon, New Delhi. The following Officers attended the meeting :

1.Shri J. P. Agrawal, Pr.Commissioner(LD&H) In Chair
2.Shri J. K. Behl, Ex.Engineer, SED 11, DDA.
3.Shri Sumit Kumar, Architects, DDA.
4.Shri Parveen K. Dhamija, Dy.Director(Bldg.), DDA.
5.Shri Ashok Gholeshwar, ACA-I(SZ), DDA
6.Shri Khush Dalbir, Dy.Director(CL), DDA
7.Shri R. S. Meena, Dy.Director(CE), DDA.
8.Shri Mahesh Kapoor, (M.D.) Tower Restaurant/Jhankar Banquet.

2. During the meeting, PC (LD) was briefed about the proceedings of the last meeting held on 02.03.2017, wherein it was decided that the Lessee should not only provide the external staircase rather create super structure of the external staircase which looks like identical twin towers so as to maintain and enhance the aesthetic beauty of the property. It was also deliberated in the above said meeting that in case a twin tower has to be constructed, the cost involved in the entire project may be borne by M/s Jhankar Banquets on terms and conditions which may be decided at a later stage. The representatives of M/s Jhankar Banquets were advised to submit a detailed proposal in this respect along with the drawings and the financial implications & requisite clearances, etc. within 15 days which will be examined by the Competent Authority and a decision will be arrived at in a time bound manner.

3 It was briefed to the Chair that M/s Jhankar Banquets vide their letter dated 10.04.2017 have stated that they are ready to execute the project at their own cost. But construction of an additional tower adjacent to the existing one involves huge investment. In case, they have to invest, they need sufficient time to retrieve their capital investment. To substantiate this, MD of M/s Jahnkar Banquets stated that they have invested more than Rs 2 crore in 1996 to get the leasehold rights of this property, which was built by DDA. It was presumed at that time that this Built-up property would be built as per norms to run the tower restaurant. He further stated that they have invested more that Rs 2 crore, in addition to the premium paid to DDA, on the maintenance of the building and for setting up the structure for Tower Restaurant but could not start the Tower Restaurant till date due to faults in the staircase constructed by DDA.

4. The Architects engaged by M/s Jhankar Banquet showed the detailed drawings of proposed Twin-Identical-Towers which may come up as approved by Delhi Fire Services Department (DFS) and the DDA. They informed that the second tower will have Staircase conforming to the norms of Delhi Fire Service Department and Two Lifts. The external facade of both the towers shall be encaged with structure made of Steel having greenery oozing out of the entire structure. The same was appreciated by all the participants and the Chair.

5. The aspect of additional FAR was also discussed. The Additional Chief Architect I (SZ) and Dy. Dir. (Bldg), C&I, DDA inforated that there may not be any additional FAR involved in the construction of second identical Tower as it is purely for the Fire Escape Purpose.

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83 (a)

Minutes of the Meeting held on 14.07.2017

A meeting was held on 14.07.2017 at 3.00 pm under the Chairmanship of Pr.Commr(LD&H) in his chamber for resolving the long pending issue in respect of DDA's Tower Restaurant presently licensed to M/s Jhankar Banquet at Khel Gaon, New Delhi. The following Officers attended the meeting:-

1. Shri J.P. Agrawal, Pr.Commissioner(LD&H) In Chair
2. Shri J.K. Behl, Ex.Engineer, SED-11,DDA.
3. Shri Sumit Kumar, Architects, DDA.
4. Shri Parveen K. Dhamija, Dy. Director(Bldg.), DDA.
5. Shri Ashok Ghodeshwar, ACA-I(SZ), DDA.
6. Shri Khush Dalbir, Dy.Director(CL), DDA.
7. Shri R.S. Meena, Dy.Director(CE), DDA.
8. Shri Mahesh Kapoor, (M.D.) Tower Restaurant/ Jhankar Banquet.

2. During the meeting, PC (LD) was briefed about the proceedings of the last meeting held on 02.03.2017, wherein it was decided that the Lessee should not only provide the external staircase rather create super structure of the external staircase which looks like identical twin towers so as to maintain and enhance the aesthetic beauty of the property. It was also deliberated in the above said meeting that in case a twin tower has to be constructed, the cost involved in the entire project may be borne by M/s Jhankar Banquets on terms and conditions which may be decided at later stage. The representatives of M/s Jhankar Banquets were advised to submit a detailed proposal in this respect along with the drawings and the financial implications & requisite clearances, etc within 15 days which will be examined by the Competent Authority and a decision will be arrived at in a time bound manner.

3. It was briefed to the Chair that M/s Jhankar Banquets vide their letter dated 10.04.2017 have stated that they are ready to execute the project at their own cost. But construction of an additional tower adjacent to the existing one involves huge investment. In case, they have to invest, they need sufficient time to retrieve their capital investment. To substantiate this MD of M/s Jhankar Banquets stated that they have invested more than Rs 2 crore in 1996 to get the leasehold rights of this property, which was built by DDA. It was presumed at that time that this Built-up property would be built as per norms to run the tower restaurant. He further stated that they have invested more that Rs 2 crore, in addition to the premium paid to DDA, on the maintenance of the building and for setting up the structure for Tower Restaurant but could not start the Tower Restaurant till date due to faults in the staircase constructed by DDA.

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6. It was stated the following issues:

i) Who will construct the tower, Lessee or DDA?
ii) Who will provide funding for the same, Lessee or DDA?

7. With respect to Point No. (i) & (ii) above, it was informed by the MD of M/s Jhunjhunwala Hospitels that they are ready to fund the entire project and ready to execute the project at their own, provided they are given extension of lease time which has already lapsed due to ways of NOC from DFS which resulted in non operation of the Tower Restaurant since 1st dispute regularly paying all the Ground Rent and other relevant dues; DDA will given the Freehold Rights of the Property after completion of codal formalities in this regard. It was desired that this issue will be decided subsequently with approval of Finance & Law Departments, and if required by seeking approval of the Authority of the DDA.

8. Regarding the process, it was further informed that at the first stage, the concurrence from Delhi Fire Service Department will be required. After getting concurrence from DFS, the case will be examined by Architectural Wing, DDA with respect to Control Norms of that area and the matter will be put up in Screening Committee for necessary change in Layout Plan of the property. Then, the Administrative Approval and Financial Approval will be sought from the Competent Authority based on the facts and circumstances of the case.

9. All the participants and PC(LD&H) agreed in-principle for taking the project forward and directed all concerned to take up further course of action as mentioned in above paragraphs.

10. The meeting ended with thanks to the chair and the participants.

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84 (a)

4. The Architects engaged by M/s Jhankar Banquet showed the detailed drawings of proposed Twin-Identical-Towers which may come up if approved by Delhi Fire Service Department (DFS) and the DDA. They informed that the second tower will have Staircase conforming to the norms of Delhi Fire Service Department and Two Lifts. The external facade of both the towers shall be engaged with the structure made of Steel having greenery oozing out the entire structure. The same was appreciated by all the participants and the Chair.

5. The aspect of additional FAR was also discussed. The Additional Chief Architect-I (SZ) and the Dy. Dir. (Bldg), C&I, DDA informed that there may not be any additional FAR involved in the construction of second identical Tower as it is purely for the Fire Escape Purpose.

6. PC(LD) raised the following issues:-

I. Who will construct the tower, Lessee or DDA?
II. Who will provide funding for the same, Lessee or DDA?

7. With respect to Point No. (i) & (ii) above, it was informed by the MD of M/s Jhankar Banquets that they are ready to fund the entire project and ready to execute the project at their own, provided they are given extension of lease time which has already lapsed due to want of NOC from DFS which resulted in non-operation of the Tower Restaurant since 1997 despite regularly paying all the Ground Rent and other relevant dues or if given the Freehold Rights of the Property after completion of codal formalities in this regard. It was desired that this issue will be decided subsequently with approval of Finance & Law Departments, and if required by seeking approval of the Authority of the DDA.

8. Regarding the process, it was further informed that at the first stage, the concurrence from Delhi Fire Service Department will be required. After getting concurrence from DFS, the case will be examined by Architectural Wing, DDA with the respect to Control Norms of that area and the matter will be put up in Screening Committee for necessary change in Layout Pan of the property. Then, the Administrative Approval and Financial Approval will be sought from the Competent Authority based on the facts and circumstances of the case.

9. All the participants and PC(LD&H) agreed in-principle for taking the project forward and directed all concerned to take up further course of action as mentioned in above paragraphs.

10. The meeting ended with thanks to the chair and all the participants.

ANNEXURE R15

Asiad Tower
BANQUET & RESTAURANT COMPLEX
A UNIT OF JHANKAR BANQUETS
Kirti Gaon, New Delhi - 110049. T (91-11-26126600) F (91-11-26402321) E mail@jhankarbanquets.com W www.jhankarbanquets.com

Date: 6 May 2019

The Vice Chairman
Delhi Development Authority,
VikasSadan
New Delhi

Subject: Request for facilitating functioning of Tower Restaurant at Asian Games Village Complex, New Delhi

Sir,

It is to introduce ourselves as M/s Jhankar Banquets, the Lessee of Tower Restaurant near Asian Games Village. At the time of Asian Games in 1982, a water tank containing a Restaurant on top of it was constructed and is known as Tower Restaurant.

1. After the commencing of Asian Games, it was leased to a Bombay Palace to run a restaurant.They functioned up to theyear 1989. After they vacated it, DDA decided to give it on Lease along with surrounding open area, for using as Social and Marriage Functions. It was advertised thrice in 1993, 1995 and in 1996.,We were the highest bidderin 1996 and were declared successful. The possession of the Tower Restaurant was thus handed over to us on 19th July, 1997 after completing all formalities and taking all due payments.The Lease was executed later, accordingly.

2. After taking the Possession we tried to put it to use but found that due to excessive leakage of water from the tank, both the lifts installed were damaged and were grossly out of order. We requested DDA repeatedly to repair the leakage but nothing much was done. Therefore we took shelter of **Honb'le High Courtof Delhi** and vide **Order no. CW 4776/2000 & CM 7390/2000**, the direction by the honb'le High Court was given and then the repair work was undertaken by DDA with the help of Jal Board and was completed in April, 2001.

3. After the repair of leakage work the we renovated the Tower, installed new lifts, constructed underground water tank and made all other provision of all firefighting equipments as per the requirements of Delhi Fire Service (DFS), spending crores of rupees and then applied for approval for seeking the required permissions i.e. Fire Safety etc. To our surprise, the Fire Department rejected our request and said that since the Tower Building has one staircase of width of only 0.70m to 1.00m width.

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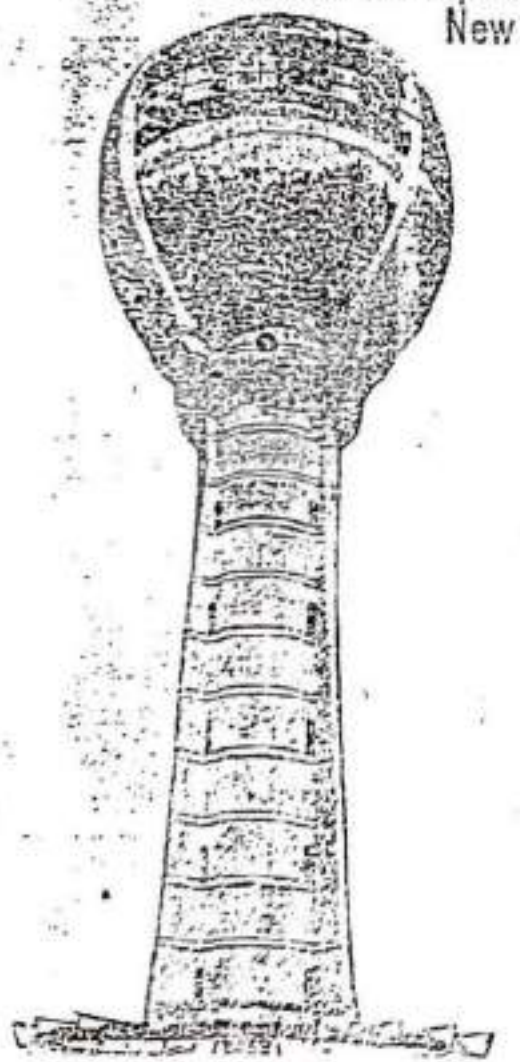
DDA'S TOWERING BUSINESS OPPORTUNITY

Tenders for disposal of Tower Restaurant at Asian Games Village Complex, New Delhi on 30 years lease-cum-licence basis

HINDUSTAN TIMES Oct 18, 1996



PRESTIGIOUS LOCATION

Ideally located in the heart of South Delhi having close proximity to elite residential colonies of Panchsheel, Greater Kailash, Gulmohar Park, South Extension and Hauz Khas, and the prestigious sports complex at Siri Fort.

SALIENT FEATURES

1. Height of the Tower with 3 floors	—	53 mtrs.
2. First Floor area	—	155.75 sq. mtrs.
3. Second Floor area (Restaurant)	—	88.48 sq.mtrs.
4. Third Floor Area (Viewing Gallery)	—	147.04 sq.mtrs.
5. Viewing Gallery height	—	48 mtrs.

TERMS & CONDITIONS

DDA will allow use of 13491.16 sq. mtrs. land around and infront of the Tower Restaurant for Marriages, Parties etc. on annual licence fee as may be fixed by DDA.

Temporary tents etc. for Parties, Marriages etc. shall be permissible. No permanent structures shall be allowed. Temporary construction maximum to the extent of 10% of the Tower Restaurant plot area of 1673 sq. mtrs. for catering shall be permissible. The structures shall be in the form of wooden steel station with the covering of water proof shamianas, Garden umbrellas shall be allowed to be put up in the green area.

1. All expenditure in respect of electricity and water connection etc. will be borne by the lessee.
2. The maintenance of lifts provided in the Tower-Restaurant, including expenditure of capital nature will be the responsibility of the lessee.
3. DDA/MCD and its authorised agency will have the right to enter overhead tank pumping station as and when required.
4. The Tower Restaurant would be disposed of through tender on lease hold basis for a period of 30 years.
5. The tenderer would have to provide his own Electric Sub-station. However in order to enable functioning of the restaurant he would be provided with electricity & water from existing E.S.S. for a period not exceeding one year on payment basis.
6. The Tower Restaurant will be disposed of alongwith green areas measuring 13491.16 sq. mtrs. around the restaurant.
7. Space measuring 1450 sq. mtrs. approximately for soft car parking.

TENDER FORMS

1. Application Tender Form: The application/tender form alongwith terms and conditions of allotment by tender and the format of lease deed can be purchased on payment of Rs. 500/- in cash from the Forms Sale Counter, DDA, Vikas Sadan, I.N.A. New Delhi between the hours of 11.00 A.M. to 1.00 P.M. and from 2.00 P.M. to 3.30 P.M. everyday except Saturday, Sunday and Public holidays with effect from 22.10.1996.
2. Last Date of Receipt of Tender: 20.11.1996 upto 2.30 P.M.
3. Date of Opening of Tender: 20.11.1996 at 3.00 P.M.
4. The reserve price and annual licence fee payable to DDA shall be given in the tender form alongwith the terms and conditions.
5. Bank Draft to be enclosed with the Tender Form: The earnest money equal to 25% of the tendered amount/premium shall be deposited alongwith the tender form by way of Bank Draft/Pay order in favour of DDA payable only at Vikas Sadan I.N.A., New Delhi Branch of Central Bank of India and each tender shall be in sealed cover superscribed Tender for the purchase of Tower Restaurant. The application/tender form, terms and conditions of allotment as contained in the format of the lease deed shall also be signed by the tenderer.

For further details contact:
B. L. MAKHIJA
Dy. Director (Commercial Estate),
2nd Floor, Block 'N', Vikas Sadan (Near INA Market),
New Delhi - 110 023 Phone: 4674344

ANNEXURE P-16

TRUE COPY

86

86 (a)

DDA's Towering Business Opportunity

Tenders for disposal of Tower Restaurant at Asian Games Village Complex, New Delhi on 30 years lease-cum-license basis.

Prestigious Location

Ideally located in the heart of South Delhi having close proximity to elite residential colonies of Panchsheel, Greater Kailash, Gulmohar Park, South Extension and Hauz Khas, and the prestigious sports complex at Siri Fort.

SALIENT FEATURES

1 Height of the Tower with 3 floors - 53 mtrs

2 First Floor area - 155.75 sq.mtrs

3 Second Floor area (Restaurant) - 89.48 sq.mtrs

4 Third Floor Area (Viewing Gallery) - 147.04 sq.mtrs

5 Viewing Gallery Height - 48 mtrs.

TERMS & CONDITIONS

DDA will allow use of 13491.16 sq.mtrs land around and in Front of the Tower Restaurant for Marriages, Parties etc on annual license fee as may be fixed by DDA. Temporary tents etc, for parties, marriages etc shall be permissible. No permanent structure shall be allowed. Temporary construction maximum to the extent of 10% of theTower Restaurant plot area of 1673 sq .mtrs for catering shall be permissible. The structures shall be in the form of wooden steal skalton with the covering of water proof shamianas, Garden umbrellas shall be allowed to be put in the green area.

6 The Tower Restaurant will be disposed of alongwith green areas incurring 13491.16 sq mtrs around the restaurant.

7 Space measuring 1450 sq. mtrs approximately for soft car parking.

TINDER FORMS

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2 Last Date of Receipt of Tender 20.11.1996 upto 2.30 PM.

3 Date of opening of Tender on 20.11.1996 at 3.00 PM.

TYPED COPY

86 (b)

1 All expenditure is respect of electricity and water connection etc. will be borne by the Lessee.

2 The maintenance of lifts provided in the Tower Restaurant including expenditure of capital nature will be the responsibility of the lessee.

3 DDA/MCD and its authorised agency will have the right to enter overhead tank pumping Station as and when required.

4 The Tower Restaurant would be disposed of through lender on lease hold basis for a Period of 30 years.

5 The tenderer would have to provide his own electric Sub-station. However in order to enable functioning of the restaurant he would be provided with electricity & water from Existing E.S.S. for a period not exceeding one year on payment basis.

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5 Bank Draft to be enclosed with the tender form. The earnest money Equal to 25% of the tender amount/ premium shall be deposited alongwith the tender form by way of Bank Draft/ pay order in favor of DDA payble only at Vikas Sadan, I.N.A, New Delhi Branch of Central Bank of India and each tender shall be in sealed cover superscribed Tender for the purchase of Tower Restaurant. The application / tender form, terms and conditions of allotment as contained in the format of the lease deed shall also be signed by the tenderer.

For Further details Contact:
B.L.MAKHIJA
DY. Director (Commerical Estate)
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New Delhi 110023 Phone 24624044

TYPED COPY

87

DDA's TOWER BUSINESS OPPORTUNITY

(1)

Tenders for disposal of Tower Restaurant at Asian Games Village Complex New Delhi on 30 years lease-cum-license basis

Prestigious Location
Ideally located in the heart of South Delhi having close proximity to elite residential colonies of Panchsheel, Greater Kailash, Gulmohar Park, south Extension and Hauz Khas, and the prestigious sports complex at Siri Fort.

Salient Features

1	Height of the Tower with 3 floors	-	53 mtrs.
2	First Floor area	-	155.75 sq. mtrs
3	Second Floor Area (Restaurant)	-	88.48 sq. mtrs
4	Third Floor Area (Viewing Gallery)	-	147.04 sq. mtrs
5	Viewing Gallery height	-	48 mtrs

Terms and Conditions :
DDA will allow use of 13491.16 sq. mtrs. land around and infront of the Tower Restaurant for Marriages, Parties etc. on annual license fee as may be fixed by DDA.

Temporary tents etc, for Parties, Marriages etc. shall be permissible, No permanent structures shall be allowed. Temporary construction maximum to the extend of 10% of the Tower Restaurant plot area of 1673 sq. mtrs for catering shall be permissible. The structures shall be in the form of wooden steel skelton with the covering of water proof shamianas, Garden umbrella shall be allowed to be put up in the green area.

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6. The Tower Restaurant will be deposited of alongwith green areas measuring 13491.16 sq. mtrs around the restaurant.
7. Space measuring 1450 sq. mtrs. approximately for soft car parking.

Tender Terms

1. Application Tender Form : The application/tender form alongwith terms and condition of allotment by tender and the terms of lease deed can be purchased on payment of Rs. 500/- in cash from the Forms Sale Counter, DDA, Vikas Sadan, INA, New Delhi between the hours of 11:00Am to 01:00 Pm and from 02:00 PM to 03:30 P.M everyday except Saturday, Sunday and Public holidays will effect from 22/10/1996.

2. Last Date of Receipt of Tender : 20/11/1996 upto 02:30 P.M.

2. Date of Opening of Tender : 20/11/1996 at 03:00 P.M
4. The :.....price and annual license fee payable to DDA shall be given in the tender form alongwith the terms and conditions.

5. Bank Draft to be enclosed with the Tender From : The earnest money equal to 25% of the tendered annual premium shall be deposited alongwith the tender from by way of Bank Draft/Pay Order in favour of DDA payable only at Vikas Sadan, INA, New Delhi Branch of Central Bank of India and each tender in a sealed cover superscribed Tender of the purchase of Tower Restaurant. The application /tender form terms and conditions of allotment as contained in the format the lease deed shall also be signed by the tenderer.

For further details contact :
B L. Makhija
Dy. Director (Commercial Estate)
IInd floor, Block A, Vikas Sadan (Near INA Market)
New Delhi - 110023, Phone 4624844

TRUE COPY

87 (a)

DDA"s TOWER BUSINESS OPPORTUNITY

Tenders for disposal of Tower Restaurant at Asians Games Village Complex

New Delhi on 30 years lease-cum-license basis

Prestigious Location

Ideally located in the heart of South Delhi having close proximity to elite residential colonies of Panchsheel , Greater kailash, Gulmohar Park, South Extension and Hauz Khas, and the prestigious sports complex at Siri Fort.

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TYPED COPY

87 (b)

TINDER TERMS:

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5 Bank Draft to be enclosed with the tender form. The earnest money Equal to 25% of the tender amount/ premium shall be deposited alongwith the tender form by way of Bank Draft/ pay order in favor of DDA payble only at Vikas Sadan, I.N.A, New Delhi Branch of Central Bank of India and each tender shall be in sealed cover superscribed Tender for the purchase of Tower Restaurant. The application / tender form, terms and conditions of allotment as contained in the format of the lease deed shall also be signed by the tenderer.

For Further Details Contact:

B.L.MAKHIJA

DY. Director (Commerical Estate)

2nd floor Block A Vikas Sadan, (Near I.N.A Market)

New Delhi 110023 Phone 24624844

TYPED COPY

ANNEXURE P-17 P-17

88

Haryana Power Purchase Centre vs Sasan Power Ltd on 6 April, 2023

Author: K. M. Joseph

Bench: B.V. Nagarathna, K.M. Joseph

'REPORTABLE'

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 11826 OF 2018

HARYANA POWER PURCHASE CENTRE Appellant(s)

VERSUS

SASAN POWER LTD & ORS. Respondent(s)

WITH

CIVIL APPEAL NO. 11927 OF 2018

CIVIL APPEAL NO. 12190 OF 2018

CIVIL APPEAL NO. 1670 OF 2019

CIVIL APPEAL NO. 12232 OF 2018

CIVIL APPEAL NO. 1742 OF 2019

J U D G M E N T

K. M. JOSEPH, J.

(1) The six appeals with which we are concerned have been filed under Section 125 of the Electricity Act, 2003 (hereinafter referred to as 'Act' for CIVIL APPEAL NO. 11826 OF 2018 etc. brevity). The appeals are directed against the order passed by the Appellate Tribunal for Electricity (hereinafter referred to as 'Tribunal' for brevity) in an appeal carried by the first respondent under Section 111 of the Act. (2) The appeal before the Tribunal, in turn, was lodged against the order passed by the

Central Electricity Regulatory Commission (hereinafter referred to as 'Commission' for brevity). The Commission passed the order purporting to be one under Section 79(b) inter alia of the Act in a petition filed by the first respondent. F A C T S (3) It was decided to set up an Ultra Mega Power Project. Towards this end, the Power Finance Corporation Limited of India was to be the nodal agency. It incorporated a Special Purpose Vehicle, which is the first respondent. The idea was to set up the Ultra Mega Power Project which would be operated by the successful bidder selected through CIVIL APPEAL NO. 11826 OF 2018 etc. an international competitive bidding. The power generated by the successful bidder was to be supplied through procurers (the appellants before us), who can be described also as the distribution licensees under the Act. The appellants were to supply the power so procured finally to the consumers.

(4) Since what was contemplated was seeking shelter under Section 63 of the Act, we must refer to the guidelines which have been issued by the Central Government purporting to act under Section 63. Guidelines were issued on 19.01.2005. We deem it appropriate to set out the following guidelines:

> "2.1 These guidelines are being issued under the provisions of Section 63 of the Electricity Act, 2003 for procurement of electricity by distribution licensees (Procurer) for:
>
> (a) long-term procurement of electricity for a period of 7 years and above;
>
> (b) Medium term procurement for a period of upto 7 years but exceeding 1 year.

2.2 The guidelines shall apply for procurement of base-load and seasonal power requirements through competitive bidding, through the following mechanisms:

> i. Where the location, technology, or fuel is not specified by the procurer (Case 1);
>
> CIVIL APPEAL NO. 11826 OF 2018 etc. ii. For hydro-power projects, load center projects or other location specific projects with specific fuel allocation such as captive mines available, which the procurer intends to set up under tariff based bidding process (Case 2)." (5) The guidelines are binding on the procurers.

Guideline 3.2 which is related to preparation for the invitation of bids would assume relevance. It reads as follows:

> "3.2 For long-term procurement from hydro electric projects or for projects for which pre-identified sites are to be utilized (Case
>
> 2), the following activities should be completed by the procurer or authorized representative of the procurer, before commencing the bid process:
>
> - Site identification and land acquisition required for the project

- Environmental clearance

- Fuel linkage, if required (may also be asked from bidder)

- Water linkage

- Requisite Hydrological, geological, meteorological and seismological data necessary for preparation of Detailed Project Report (DPR), where applicable.

The bidder shall be free to verify geological data through his own sources, as the geological risk would lie with the project developer.

The project site shall be transferred to the successful bidder at a declared price.

CIVIL APPEAL NO. 11826 OF 2018 etc. Provided that for the projects from which more than one distribution licensees located in different States intend to procure power and if the preparations for such projects are being facilitated by the Central Government, the activities referred to above shall be initiated before the bidding process and should be completed before signing the power purchase agreement with the selected bidder.

(6) Under the guidelines, tariff structure is contemplated which consists of capacity charges and energy charges which are dealt with in detail. It also deals with bidding process. The bidding process itself is divided into two stages, viz., a determination of the qualification by a pre-

qualification system and thereafter submission and consideration of essentially what consists of the financial bid. There is a guideline which deals with arbitration and it was contained in guideline 5.17:

"5.17 The procurer will establish an Amicable Dispute Resolution (ADR) mechanism in accordance with the provisions of the Indian Arbitration and Conciliation Act, 1996. The ADR shall be mandatory and time-bound to minimize disputes regarding the bid process and the documentation thereof.

If the ADR fails to resolve the dispute, the same will be subject to jurisdiction of the appropriate Regulatory Commission under the CIVIL APPEAL NO. 11826 OF 2018 etc. provisions of the Electricity Act 2003." (7) It is, accordingly, purporting to act in terms of the guidelineS that a Request for Qualification (for short RFQ) came to be issued on 31.03.2006.

Reliance Power Limited was one of the bidders which was pre-qualified in terms of the RFQ. On 18.08.2006, there was a change notified in the guidelines. It brought about the following changes in the guidelines 5.17 besides guideline No. 4.7. The unamended and the amended guidelines 4.7 and

5.17 read as follows:

S. No.	CBG as on 19.01.2005	CBG as amended on 18.08.2006
1.	4.7 Any change in tax on electricity cost or revenue from the business as a result of any change in law impacting generation or sale of selling electricity to the with respect to that applicable procurer with respect to the law on the date of bid submission applicable on the date which is 7 shall be adjusted separately. days before the last date of RFP bid [Pg. 345,CC-I] submission shall be adjusted separately. In case of any dispute regarding the impact of any change in law, the decision of the Appropriate Commission shall apply.	4.7 Any change in law impacting generation or sale of electricity cost or revenue from the business as a result of any change in Law of the date of bid submission applicable on the date which is 7 shall be adjusted separately. days before the last date of RFP bid [Pg. 345,CC-I] submission shall be adjusted separately. In case of any dispute regarding the impact of any change in law, the decision of the Appropriate Commission shall apply.
2.	Arbitration Arbitration 5.17 The procurer will establish an Amicable Dispute Resolution (ADR) mechanism in regarding determination of the accordance with the provisions tariff or any tariff related matters, CIVIL APPEAL NO. 11826 OF 2018 etc. of the Indian Arbitration and or which partly or wholly could Conciliation Act, 1996. The result in change in tariff, such ADR shall be mandatory and dispute shall be adjudicated by the time-bound to minimize Appropriate Commission.	5.17 Where any dispute arises claiming any change in or determination of the tariff or any tariff related matters, and which partly or wholly could result in change in tariff, such dispute shall be adjudicated by the Appropriate Commission.

disputes regarding the bid process and the documentation by thereof. All other disputes shall be resolved arbitration under the Indian Arbitration and Conciliation Act, 1996.

(8) On 21.08.2006, a Request for Proposal, for short RFP, came to be issued. We deem it appropriate to refer to the following provisions of the RFP.

"4. While this RFP has been prepared in good faith, neither the Procurers, Authorised Representative and Power Finance Corporation Limited (PFC) nor their directors or employees or advisors/consultants make any representation or warranty, express or implied, or accept any responsibility or liability, whatsoever, in respect of any statements or omissions herein, or the accuracy, completeness or reliability of information contained herein, and shall incur no liability under any law, statute, rules or regualations as to the accuracy, reliability or completeness of this RFP, even if any loss or damage is caused to the Bidder by any act or omission on their part.

1.3 The objective of the bidding process is to select a SuccessfulBidder for development of the Project as per the terms of the RFP. The Project will have a Contracted Capactiy of minimum of 3500 MW and maximum of 3800 MW in accordance witht he terms of the PPA. The Selected Bidder shall purchase the entire shareholding of the Authorised Representative CIVIL APPEAL NO. 11826 OF 2018 etc. from PFC and its nominees in accordance with Share Purchase Agreement and cause the Seller to enter into the RFP Project Documents. The Selected Bidder shall be responsible for ensuring that the Seller undertakes development, finance, ownership, design, engineering procurement, construction, commissioning, operation and maintenance of the Project as per the terms of the RFP Project Documents. The Selected Bidder shall also ensure:

(i) All equipment and auxiliaries shall be suitable for continuous operation in the frequency range of 47.5 to 51.5 Hz (-5% to +3% of rated frequency of 50.0 Hz).

(ii)The plant shall be capable of delivering contracted capacity continously at 47.5 Hz grid frequency.

1.4 The Procurers through the Authorised Representative, have initiated development of the Project at Sasan, District Sidhi, Madhya Pradesh and shall complete the following tasks in this regard by such time as specified hereunder:

iv. Allocation of main Captive Coal Mine(s) and providing geological report (GR) for the same; at least ninety (90) days prior to Bid Deadline. Allocation of other Captive Coal Mine(s) and available information regarding quality and quantity of coal (GR related information) would be made available at least thirty (30) days prior to Bid Deadline. The Seller shall pay the final cost of geological reports (Grs). The Indicative Cost of geological reports (Grs), would be made available at least thirty (30) days prior to bid Deadline;

CIVIL APPEAL NO. 11826 OF 2018 etc. v. Tying up water linkage for the Project requirement along with approval of Central Water Commission, at least thirty (30) days prior to Bid Deadline;

Water intake study report and Project Report including geo-technical study, topographical survey, area drainage study, socio-economic study and EIA study (rapid) would be made available at least ninety (90) days prior to Bid Deadline;

vi. issue of certificate by Ministry of Power, Government of India extending the benefits to power generation projects under Mega Power Policy upto the Scheduled COD of the Power Station by Government of India at least thrity (30) days prior to Bid Deadline;

It may be noted that noe of the Procurers, Authorised Representative and PfC, nor their directors, employees or advisors/consultants make any representation or warranty, express.or implied, or accept any responsibility or liability, whatsoever, in respect of any statements or omissions made in the water intake study report and Project Report, or the accuracy, completeness or reliablility of information contained therein, and shal incur no liability under any law, statute, rules or regualtions as to the accuracy, reliability or completeness of such water intake study report and Project Report, even if any loss or damage is caused to the Selected Bidder by any act or omission on their part. The Ministry of Power and the State Government of Madhya Pradesh have expressed their support to the Seller, on best endeavour basis, in enabling the Seller to develop the Project.

CIVIL APPEAL NO. 11826 OF 2018 etc.

2.7.2.1 The Bidder shall make independent enquiry and satisfy itself with respect to all the required information, inputs, conditions and cirumstances and factors that may have any effect on his Bid. In assessing the Bid, it is deemed that the Bidder has inspected and examined the site conditions and its surroundings, examined the laws and regulations in force in India, the transportation facilities available in India, the grid conditions, the conditions of roads, bridges, ports, etc. For unloading and/or transporting heavy pieces of material and has based its design, equipment size and fixed its price taking into account all such relevant conditions and also the risks, contingencies and other circumstances which mayh influence or affect the supply of power. 2.7.2.2 In their own interest, the Bidders are requested to familiarize themselves with the Electricity Act, 2003, the Income Tax Act 1961, the Companies Act, 1956, the Customs Act, the Foreign Exchange Management Act, IEGC, the regulations framed by regulatory commissions and all other related acts, laws, rules and regulations prevalent in India. The procuers shall not entertain any request for clarifications from the Bidders regarding the same. Non-awareness of these laws or such information shall not be a reason for the Bidder to request for extension of the Bid Deadline. The Bidder undertakes and agrees that before submission of its Bid all such factors, as generally brought out above, have been fully investigated and considered while submitting the Bid.

ANNEXURE 5 SITE DETAILS ALONG WITH SITE MAP The Site is located near Sasan village in Singrauli Tehsil in District Sidhi of Madhya CIVIL APPEAL NO. 11826 OF 2018 etc. Pradesh. The nearest Railway Station is Shakti Nagar (18km) and nearest Airport is Varanasi (250 km). The site is situated at 23°58'30"N latitude and 82°37'03"E longtitue. About 3500 acres of land has been identified for the project covering villages of Sidhikala, Harhawa, Tiara, Jhanjitola and Sidhikhud. Out of this, about 2000 acres of land has been identified for main plant, about 1100 acres for ash disposal/dyke and 400 acres for colony.

Water source for the project is Govind Ballabh Pant Sagar (Rihand Reservoir), which is about 6-7 km from the main plant site. Water will be brought to site by suitable pumping arrangement and pipelines. Coal blocks (mines) in Singrauli area with reserves of about 700-800 million tons will be allocated as Captive Coal Blocks (mines) for this Project. The Project will require the development of a coalmine with production of 18-20 million tons per annum (MTPA) Vicinity map of Site is enclosed.

Further details are provided in the Project Report."

(9) We may, at this juncture, notice also that the Special Purpose Vehicle which was put in place for carrying out the activities also, commissioned a study by WAPCOS (a public sector body of the Central Government). It was tasked with the project to CIVIL APPEAL NO. 11826 OF 2018 etc. ascertain about the availability of water inter alia. Water is an indispensable factor for the successful running of the power plant which was contemplated. WAPCOS made available its report on 03.08.2006.

(10) Reliance Power Limited applied pursuant to the RFP. Though, initially, its bid was not the lowest, but on account of the fact that the lowest bidder was found to be not eligible, Reliance Power Limited emerged as the lowest bidder. In keeping with the conditions, Reliance Power Limited

acquired 100 per cent share holding of the first respondent and it was favoured with the Letter of Intent on 01.08.2007. It entered into a Power Purchase Agreement (hereinafter referred to as 'PPA') on 07.08.2007. In the second week of December, 2007, it would appear that the first respondent which now stood transformed as a fully owned company of the successful bidder Reliance Power Limited, commissioned a new Study by WAPCOS. WAPCOS submitted its report on 04.04.2008. We must at this juncture notice that '21.07.2007' has been CIVIL APPEAL NO. 11826 OF 2018 etc. determined as the cut off date, the relevance of which will be unfolded in the later part of the judgment.

(11) The PPA contemplated two phases. The first phase was the construction of the power plant. The second was the operation of the power plant. The PPA was to be enforced for a period of 25 years. Therefore, we can safely characterise it as a long term agreement to purchase power. Since this was a case of competitive bidding, leading to the finding out of the lowest bidder, but faced with the regime under Section 63 of the Act which stood attracted, after the PPA was entered into, a petition was moved before the Commission for adopting the rates as contemplated in the PPA. By order dated 17.10.2007, the Commission after considering the relevant matters, adopted the rates in accordance with the PPA. It is, thereafter, that the present petition was moved by the first respondent on 19.02.2013. It is relevant at this stage to set out certain portions of the petition. The petition has been filed under Section 79 of the Act read with the CIVIL APPEAL NO. 11826 OF 2018 etc. statutory framework governing procurement of power through competitive bidding and articles 13 and 17 of the PPA between the parties for compensation due to change in law 'during the construction period'. After setting out the facts which we do not consider relevant to advert to, the following is noticed.

"5. It is submitted that the following Changes in Law have occurred during the Construction Period of the Project which have caused the Capital Cost of the Project to increase substantially:

a) Increase in Declared price of Land for the Project which includes the land for the Power Station, the Moher, Moher-Amlohri Extension and Chhatrasal captive coal blocks;

b) Increase in cost of implementation of the Resettlement and Rehabilitation Plan ("R&R Plan") for the Moher, Moher-Amlohri Extension and Chhatrasal captive coal blocks;

c) Increase in cost of Geological Reports for the Moher, Moher-Amlohri Extension and Chhatrasal captive coal blocks;

d) Increase in cost of compensatory afforestation for the Moher, Moher-Amlohri Extension and Chhatrasal captive coal blocks;

e) Increase in cost of Water Intake system due to an incorrect assessment of conditions in the original report supplied to the bidders at the RFP stage;

f) Levy of excise duty on cement and steel used in the Project; and

g) Levy of Customs Duty on mining equipment CIVIL APPEAL NO. 11826 OF 2018 etc. imported for the Project." (12) Since, in this case, we are concerned only with two aspects, namely claims under clause(e) and clause(g) we deem it appropriate only to refer to the pleadings of the first respondent in regard to the same.

Increase in cost of Water Intake System "65. As per Clause 1.4(v) of RFP for Sasan UMPP, the Procurers through the Authorized Representative had to provide water intake study report. WAPCOS (a premier Government of India agency) was appointed to conduct the water intake study. WAPCOS, as the expert agency identified the water intake pump house location and the pipeline route from the intake pump house to the power plant in its Report. This report was made available to all the bidders before bid submission so that the bidders could factor in the cost of the water intake system in preparation of their financial bid i.e., the tariff at which power would be supplied to the Procurers. The total estimated cost for the construction of water intake system for the location and route indicated in the report by WAPCOS was estimated to be approximately Rs.92 Crores. The WAPCOS Report along with the estimated cost are annexed herewith and marked as Annexure P- 24 (Colly)." "66. After RPower acquired the Petitioner, WAPCOS was appointed to confirm the CIVIL APPEAL NO. 11826 OF 2018 etc. technical feasibility as part of detailed engineering exercise. During this process, it was discovered that the water intake location as finalized by WAPCOS before the bidding was not an appropriate location and does not ensure reliable supply of water to the power plant. It was also found that the water intake at the original location indicated by WAPCOS in the pre-bid report would have resulted in shutdown of power plant for a considerable period during the lean season." "67. Thereafter, WAPCOS conducted detailed bathymetric studies and recommended a new location for water intake, which was 23 km from the power plant as against 12.5 km initially indicated at the time of bidding (original location). It was highlighted that new location would ensure reliable water supply to the power plant. Due to increase in distance, submergence area along the route and construction time, there has been considerable increase in the cost of the water intake system as detailed below. The report of WAPCOS recommending the revised location is annexed herewith and marked as Annexure p-25." "68. The cost for the construction of water system for the new location is Rs. 244 Cr. Out of the aforesaid amount, a sum of Rs.185 Crores has already been incurred and balance of Rs. 59Crores is to be spent. The estimated increase in cost of the water intake system due to the change in location of the water intake system is Rs.152 Crores. Since this increase is directly attributable to the error in the WAPCOS report provided to the bidders at the pre- bid stage, the Petitioner is required to be compensated for the same. The cost break up CIVIL APPEAL NO. 11826 OF 2018 etc. for the new/appropriate location which will ensure reliable water supply is annexed herewith and marked as Annexure P-26." "75. It is submitted that the UMPP Policy envisages domestic coal based UMPPs as integrated projects where the power station and the captive coal mines are treated as an integrated unit. This is also recognized in the PPA as well as other project documents like the RFQ and the RFP." "76. As per Notification 21 of 2002-Customs dated 01.03.2002 issued by the Ministry of Finance, Government of India, the customs duty on goods required for setting up mega power projects has been prescribed as nil meaning thereby that no customs duty will be levied on goods imported for setting up a mega power project. A copy of Notification 21 of 2002-Customs is annexed herewith and

marked as Annexure P-32." "77. Sasan UMPP was accorded in-principle mega power project status as per Ministry of Power's letter no. F.No. 12/18/2006-P&P dated 20.10.2006. The final certificate was issued on 21.09.2007." "78. Sasan UMPP is an integrated power project with captive coal mines viz. Moher, Moher Amlohri Extension and Chhatrasal Coal Blocks. The captive coal mines allocated for Sasan UMPP form an integral and essential part of the Project and any equipment imported in relation to the captive coal mines would therefore be treated as goods imported for setting up the Project." CIVIL APPEAL NO. 11826 OF 2018 etc. "79. The Petitioner was required to import mining equipment for setting up the captive coal mines from which coal will be sourced for the Project since the required mining equipments were not available in India." "80. On 05.05.2011, the Petitioner applied to the Energy Department, Government of Madhya Pradesh for recommendation letter to import mining equipments for Sasan UMPP under nil custom duty as is applicable for the other equipment such as power plants of the Project. This application was premised on Notification 21 of 2002-Customs. However, vide an Office Memorandum dated 17.06.2011, the Ministry of Power has intimated that the exemption for customs duty for UMPPs is given only with respect to power equipment, which was forwarded to Petitioner by Government of Madhya Pradesh on 20.06.2011. Copies of letters dated 05.05.2011 and 17.06.2011 are annexed herewith and marked as Annexure P-33(Colly)" "81. Based on Ministry of Power's Office Memorandum's, the Energy Department, Government of Madhya Pradesh declined to issue the recommendation letter which was required by the Petitioner to claim nil customs duty. In view of the refusal by Energy Department, Government of Madhya Pradesh and in the interest of the Project and power consumers, Petitioner had to seek recommendation letter from Energy Department, Government of Madhya Pradesh to import mining equipments at project import rate of 20.94%, which is now reduced to CIVIL APPEAL NO. 11826 OF 2018 etc. 16.85% with effect from 17.03.2012." "82. The decision of the Ministry of Power detailed in its office memorandum dated 17.06.2011 and refusal by Energy Department, Goverment of Madhya Pradesh to provide recommendation letter to import mining equipments for Sasan UMPP under nil custom duty amounts to a Change in Law under Article 13.1 of the PPA and Petitioner is entitled to be compensated for the same." "83. The total amount of customs duty paid by the Petitioner on mining equipments imported for Sasan UMPP is Rs. 361.47 Crores till date. The total custom duty for mining equipments is estimated to be about Rs. 531 Crores. The details of the custom duty paid on mining equipments and estimated to be paid in future are annexed herewith in Annexure P-34 (Colly)." "84. It is submitted that the Petitioner has already surpassed the indicative costs provided by the Procurers and in certain instances as indicated hereinabove, the Petitioner will be required to pay the increased Capital Cost in the future. In this regard, the Petitioner is claiming the following reliefs:

> (a) In relation to the Changes in Law where the additional Capital Cost has already been incurred, this Hon'ble Commission may direct the Procurers to compensate the Petitioner for such increase in Capital Cost; and
>
> (b) In relation to the Changes in Law for CIVIL APPEAL NO. 11826 OF 2018 etc. which the liability is yet to be incurred, the Petitioner is seeking a declaration from this Hon'ble Commission that the increased expenditure amounts to Change in Law. The actual payment will be claimed as and when it falls due." "89. From the above discussions and facts, it is clear that:-

(a) One of the objectives of the National Electricity Policy and the Tariff Policy is to secure commercial viability of electricity sector while ensuring fair pricing and quality of supply.

(b) Power procurement under Section 63 of the Act is governed by the statutory framework comprising (i) Section 63 of the Act, (ii) Government of India's Guidelines and (iii) standard documents being RFP and PPA.

(c) In terms of Section 63 of the Act the successful bid must be selected consistent with the guiding principles under Section 61 of the Act meaning thereby that while adoption of tariff under Section 63 of the Act, the principles as laid down under Section 61 need to be complied.

(d) Power procurement pursuant to the statutory framework constitutes a statutory contract in terms of the pre-approved and finalized PPA governed by provisions of the Act as well as the Guidelines.

(e) The PPA envisages the adjustment of CIVIL APPEAL NO. 11826 OF 2018 etc. tariff by this Hon'ble Commission to restore/restitute the party adversely affected (the Petitioner in the present case)." "90. It is also pertinent to note that under Section 79(1)(b) of the Act, this Hon'ble Commission has been given the power to regulate the tariff of generating companies like the Petitioner which have a composite scheme for generation and sale of electricity in more than one state." "91. The present Petition has been filed for compensation on account of Changes in Law which have impacted the Capital Cost of the Project as well as for compensation for costs incurred in excess of the indicative costs provided by the Procurers, which were the basis for formulation of the financial bid of Rpower." "92. The Petitioner had approached the Procurers for an amicable resolution.

However, all efforts made by the Petitioner to seek an amicable resolution to the unforeseen and undeserved commercial implication with the Procurers have proved fruitless. In this backdrop, it has become imperative and necessary for the Petitioner to invoke jurisdiction of this Hon'ble Commission to issue appropriate orders as prayed for in the Petition." "93. It is submitted that the present Petition has been filed invoking:-

(a) Section 79(1)b) of the Act under which CIVIL APPEAL NO. 11826 OF 2018 etc. this Hon'ble Commission has the power to regulate the tariff of the Petitioner.

(b) Section 79(1)(f) of the Act which gives this Hon'ble Commission the power to adjudicate upon disputes involving the Petitioner.

(c) Regulations 82, 92 and 113 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999.

(d) Article 13 of the PPA read with Article 17 and Paragraph 5.17 of the Competitive Bidding Guidelines in terms of which this Hon'ble Commission has the power to adjudicate upon any dispute that arises claiming any change in or regarding determination of the tariff or any tariff related matters, or which partly or wholly could result in change in tariff." "104. As detailed in Paragraphs 75-83 above, Notification 21 of 2002-Customs issued by the Ministry of Finance, Government of India granted 100% exemption from Customs duty to goods required for setting up mega power projects. The Petitioner was required to import equipment for operation of the coal mine which is an integral part of the Project." "105. It is submitted that as per the said Notification, any entity which intended to claim the customs duty exemption was required to apply to the Sponsoring Authority for an exemption certificate. This was essential to claim the customs duty CIVIL APPEAL NO. 11826 OF 2018 etc. exemption. In this regard, the Petitioner wrote to the Government of Madhya Pradesh to recommend the Petitioner's case to the Commissioner of Customs on 5.5.2011 for nil custom duty on mining equipments." "106. It is submitted that vide an Office Memorandum dated 17.06.2011, the Ministry of Power intimated Government of Madhya Pradesh that the exemption for customs duty for UMPPs is given only with respect to power equipment. The total amount of customs duty paid by the Petitioner on mining equipments imported for Sasan UMPP is Rs.361.47 Crores till date. Total custom duty for mining equipments is estimated to be about Rs. 531 Crores." "107. It is submitted that the decision of the Ministry of Power amounts to a Change in Law under Article 13.1 of the PPA and the Petitioner is entitled to be compensated for the same. It is further submitted that the Petitioner not being allowed to import mining equipment under nil customs duty as is granted for the other equipment such as power plants of the Project qualifies as Change in Law under Article 13.1 of the PPA." "108. It is submitted that as per RFP for Sasan UMPP, the Procurers had to provide water intake study report. This study was conducted by WAPCOS and the report was made available to all the bidders before bid submission. The cost of the water intake system as per the report was approximately Rs.92 Crores. This estimation was factored CIVIL APPEAL NO. 11826 OF 2018 etc. into the bid at the time of submission of the financial bid." "109. It is submitted that after Rpower acquired the Petitioner, WAPCOS was tasked with confirming the technical feasibility during the detailed engineering exercise.

During this process, it was discovered that the water intake location as intimated in the pre-bid report was not appropriate. After, conducting another detailed study, WAPCOS determined that a new location would be suitable. The new location is 23 km from the power plant as against 12.5 km initially indicated at the time of bidding (original location)." "110. It is submitted that due to the increase in distance, submergence area along the route and construction time there has been considerable increase in cost of the water intake system. The cost for the construction of water system for the new location is Rs. 244 Cr. The estimated increase in cost of the water intake system due to the change in location of the water intake system is Rs.152 Crores." "111. It is submitted that the increase in cost of the water intake system is on account of the errors in the report provided by the Procurers and therefore, the Procurers are obligated for compensating the Petitioner for the

difference in cost. It is further submitted that since the water pipeline corridor is part of the Power Station Land and the water intake pipeline CIVIL APPEAL NO. 11826 OF 2018 etc. is an integral part of the Power Station, any change in the indicative cost of the water intake system will be covered under Change in Law." "120. Section 79 of the Act, inter alia, empowers the Hon'ble Commission to:-

> (a) Regulate the tariff of generating companies other than those owned or controlled by the Central Government if such generating companies entered into or otherwise have a composite scheme for generation and sale of electricity in more than one State; and
>
> (b) To adjudicate upon the disputes involving the distribution companies or transmission licensees with regard to the matters connected with regulation of tariff of generating companies." "128. It is submitted that the present case involves a situation where the compensatory mechanism under the PPA for compensation for Change in Law has failed. It does not meet the objective of restoring an affected party to the same economic condition as if the change in law had not occurred. Therefore, this is a fit case for this Hon'ble Commission to exercise its powers under Section 79 and devise a mechanism to uphold the objective and purpose of Article 13 – to provide economic restitution." "129. It is further submitted that PPA envisages a scenario where this Hon'ble CIVIL APPEAL NO. 11826 OF 2018 etc. Commission can interfere with the issues relating to the claim made by a party for any change and/or determination of the tariff or any matter relating to the tariff or claims made by any party which partly or wholly related to any change in the tariff or determination of any such claim which can result in change in the tariff. In this context, Articles 13 and 17 are noteworthy.

While Article 13 of the PPA envisages tariff adjustment in the event of "Change in Law", Article 17 of the PPA provides for dispute resolution, by the Hon'ble Commission in case of claim made by any party for any change in or determination of tariff or any matter related to tariff or claims made by any party, which partly or wholly relate to any change in the tariff or determination of any of such claims could result in change in tariff." "142. The Petitioner therefore most humbly and respectfully prays that this Hon'ble Commission be pleased to adjudicate upon the present Petition to:-

> (a) Declare that the items set out in Paragraph 5 above as Change in Law during Construction Period and/or changes which has led to an increase in the Capital Cost of the Project;
>
> (b) Restitute the Petitioner to the same economic condition as if the said Changes in Law had not occurred and devise a mechanism by which the Petitioner is compensated for the aggregate financial impact and increase CIVIL APPEAL NO. 11826 OF 2018 etc. in capital cost of account of the Changes in Law, the details of which are set out in Paragraph 113 above; and

(c) Pass any such other and further reliefs as this Hon'ble Commission deems just and proper in the nature and circumstances of the present case." (13) After exchange of pleadings, the Commission passed the order dated 04.02.2015. Since we are in these appeals to be detained only by two aspects, we notice the following findings:

"30. The petitioner has submitted that as per Clause 1.4(V) of RFP for Sasan UMPP, the Procurers through the Authorized Representative had to provide water intake study report. WAPCOS (a premier Government of India agency) was appointed to conduct the water intake study. WAPCOS, as the expert agency identified the water intake pump house location and the pipeline route from the intake pump house to the power plant in its Report. This report was made available to all the bidders before bid submission so that the bidders could factor in the cost of the water intake system in preparation of their financial bid i.e. the tariff at which power would be supplied to the Procurers. The total estimated cost for the construction of water intake system for the location and route indicated in the report by WAPCOS was estimated to be approximately 92 Crore.

CIVIL APPEAL NO. 11826 OF 2018 etc. After RPower acquired the project, WAPCOS was appointed to confirm the technical feasibility as part of detailed engineering exercise. During this process, it was discovered that the water intake location as finalized by WAPCOS before the bidding was not an appropriate location and does not ensure reliable supply of water to the power plant. It was also found that the water intake at the original location indicated by WAPCOS in the pre-bid report would have resulted in shutdown of power plant for a considerable period during the lean season. Thereafter, WAPCOS conducted detailed bathymetric studies and recommended a new location for water intake, which was 23 km from the power plant as against 12.5 km initially indicated at the time of bidding (original location). It was highlighted that new location would ensure reliable water supply to the power plant. Due to increase in distance, submergence area along the route and construction time, there has been considerable increase in cost of the water intake system as per following details (Annexure P-26 of the petition) and as per the earlier report of WAPCOS:-

S. No.	Cost Item	As per earlier WAPCOS Report (Crore)	Current estimate (Crore)
1	Cost of Pump House	21.00	62.97
2	Cost of Bridge	10.50	
3	Supply of Pipe line	30.50	73.91

CIVIL APPEAL NO. 11826 OF 2018 etc. 4 Laying of pipe 16.70 57.97 line 5 Mechanical 10.20 20.32 6 Electrical 3.50 4.02 7 Dredging for Pump 25.13 House 8 Total 92.40 244.32

31. MPPMCL has submitted that it is an expense incurred by the petitioner but is not covered under "Change in Law" under Article 13.1.1 of the PPA. However, it is concluded that the cost has been incurred by the petitioner and exceeds the estimates given by the procurer's authorized representative prior to bid submission. HPCC has submitted that the price and other details given in the bidding document were by way of information and it was for the bidders to conduct independent enquiry and verify the information and details. There is no misrepresentation by the procurers or by the Bid Process Coordinators at the time of bidding in relation to water intake for the project. In view of the specific disclaimer and the requirement to conduct independent enquiry, the petitioner was required to make appropriate enquiries into the matter before bidding and the bidders were not entitled to proceed only on the basis indicative information given by the Bid Process Coordinator.

32. We have considered the submission of the petitioner and respondent. As against the indicative cost of 92.40 crore, the cost for the construction of water system for the new CIVIL APPEAL NO. 11826 OF 2018 etc. location is 244 crore out of the aforesaid amount, a sum of 185 crore has already been incurred and balance of 59 crore is to be spent. The estimated increase in cost of the water intake system due to the change in location of the water intake system is 152 crore. The petitioner has submitted that since this increase is directly attributable to the error in the WAPCOS report provided to the bidders at the pre-bid stage, the petitioner is required to be compensated for the same.

33. In our view, the claim is not covered under any of the provisions of Article 13.1.1 of the PPA. The petitioner being aware that the cost of water intake system being indicative in nature and being not covered under the "Change in Law" under Article 13 should have informed itself fully with the actual site conditions before preparing the bid and accordingly factored the possible estimates of water intake system while quoting the bid instead of relying on the indicative cost. In this connection, para 2.7.2.1 of the RfP document provides as under:

> "2.7.2.1 The Bidder shall make independent enquiry and satisfy itself with respect to all the required information, inputs, conditions and circumstances and

factors that may have any effect on his Bid. In assessing the Bid, it is deemed that the Bidder has inspected and examined the site conditions of roads, bridges, ports etc. for CIVIL APPEAL NO. 11826 OF 2018 etc. unloading and/or transporting heavy pieces of material and has based its design, equipment size and fixed its price taking into

account all such relevant conditions and also the risks, contingencies and other circumstances which may influence or affect supply of power." Further para 4 of the RfP document provides that the pricing and other details given in the bidding documents are by way of information only and it was for the bidders to conduct independent enquiry and verify the details and information. Para 4 are extracted as under:

"4. While the RFP has been prepared in good faith, neither the Procurers, Authorised Representative and Power Finance Corporation (PFC) nor their directors or employees or advisors/consultants make any representation or warranty, express or implied, or accept any responsibility or liability, whatsoever, in respect of any statements or omission herein, or the accuracy, completeness or reliability of information contained herein, and shall incur no liability under any law, statute, rules or regulations as to the accuracy, reliability or completeness of this RFP, even if any loss or damage is caused to the Bidder by any act or omission on their part." CIVIL APPEAL NO. 11826 OF 2018 etc. Therefore, it is the responsibility of the petitioner to verify the suitability of the location of water intake and ensure reliable water supply for the power plant and workout the relevant approximate cost of water intake system independently and factor in the estimates in the bid so that a realistic cost is reflected in the bid. The petitioner having failed to do so, the increase in cost on account of this head is not admissible." (14) As far as the question relating to imposition of customs duty on mining equipment is concerned, the same is dealt with in paragraphs 40 and 41.

"40. We have considered the submission of the petitioner and respondents. The Notification No.49/2006 provides as under:

Notification No. 49/2006-Customs In exercise of the powers conferred by sub-section (1) of Section 25 of the Customs Act, 1962 (52 of 1962), the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby makes the following further amendments in the notification of the Government of India in the Ministry of Finance (Department of Revenue) No. 21/2002- Customs, dated the 1st March, 2002, which was published in the Gazette of India, Extraordinary vide number G.S.R. 118(E), dated the 1st March, 2002, namely:-

CIVIL APPEAL NO. 11826 OF 2018 etc. In the said notification,-

(I) in the Table, against S.No.400, for the entry in column (3), the following entry shall be substituted, namely:-

"Goods required for setting up of any Mega Power Project, so certified by an officer not below the rank of a Joint Secretary to the Government of India in the Ministry of Power, that is to say-

(a) an inter-state thermal power plant of a capacity of 700MW or more, located in the States of Jammu and Kashmir, Sikkim, Arunachal Pradesh, Assam, Meghalaya, Manipur, Mizoram, Nagaland and Tripura; or

(b) an inter-state thermal power plant of a capacity of 1000MW or more, located in States other than those specified in clause (a) above;

or

(c) an inter-state hydel power plant of a capacity of 350MW or more, located in the States of Jammu and Kashmir, Sikkim, Arunachal Pradesh, Assam, Meghalaya, Manipur, Mizoram, Nagaland and Tripura; or

(d) an inter-state hydel power plant of a capacity of 500MW or more, located in States other than those specified in clause (c) above";

CIVIL APPEAL NO. 11826 OF 2018 etc. (II) in the Annexure, in Condition No. 86, for sub-clauses (ii) and

(iii) of clause (a), the following shall be substituted, namely:-

"(ii) the power purchasing State undertakes, in principle, to privatize distribution in all cities, in that State, each of which has a population of more than one million, within a period to be fixed by the Ministry of Power.".

[F.No.354/104/2003-TRU] It is noticed that the revised policy guidelines issued by Government of India, Ministry of Power vide its letter No. A- 118/2003-IPC dated 2.8.2006 has stated that an inter-State thermal power plant of a capacity of 1000 MW or more is eligible for grant of mega power status. It further states as under:

"Zero Customs Duty: In terms of the notification of the Government of India in the Ministry of Finance (Department of Revenue) No. 21/2002- Customs dated 1.3.2002 read together with No. 49/2006-Customs dated 26.5.2006, the import of capital equipment would be free of customs duty for these projects."

41. It is to be considered whether under the notification as stated above, mining equipments were exempted from customs duty.

General Exemption No.122 under the Customs CIVIL APPEAL NO. 11826 OF 2018 etc. Notification No.21/2002 as amended from time to time contains the list of items which are exempted from customs duty. It is observed that Notification 21 of 2002-Customs clearly demarcates the power projects and mining projects separately. It is seen that at Ser No.399 of the list, coal mining projects are liable to pay customs duty. Ser No. 400 only exempts the mega power project from payment of customs duty and there is no mention that it includes captive power plants. Therefore, it cannot be

said that as on the cut-off date, there was exemption on mining equipment and the petitioner had taken into consideration such exemption while quoting the bids. Nothing has been produced in the petition which could indicate that any such impression was given by the procurers or their representative prior to bidding. In view of the foregoing discussion, the submission of the petitioner that the decision of the Ministry of Power detailed in its office memorandum dated 17.06.2011 and refusal by Energy Department, Government of Madhya Pradesh to provide recommendation letter to import mining equipments for Sasan UMPP under nil custom duty amounts to a "Change in Law" under Article 13.1 of the PPA and the petitioner is entitled to be compensated for the same is not acceptable and hence no compensation would be available in this regard." THE APPEAL BEFORE THE TRIBUNAL (15) This led to the appeal being filed by the first respondent under Section 111 of the Act. It is CIVIL APPEAL NO. 11826 OF 2018 etc. apposite that we set out the exact case which has been set up by the first respondent before the Tribunal.

"9.5 The Report identified the water intake pump house location and pipeline route from the intake pump house to the power plant in its report. This report was made available to all the bidders before bid submission so that the bidders could factor in the cost of water intake system in preparation of their financial bids i.e., the tariff at which power be supplied to the Procurers. The total cost for the construction of water intake system for the location and route of indicated in the report by WAPCOS was estimated to be Rs.92 Crores. The water intake system is an integral part of the Project without with it is not possible to set up and operate the Project. The WAPCOS report along with estimated cost are annexed herewith and marked as Annexure A-14. 9.6 After RPower was declared the successful bidder and the Appellant Company was transferred to RPower, WAPCOS was re-appointed to confirm the technical feasibility as part of the detailed engineering exercise. During this process, it emerged that the water intake location as finalized by WAPCOS vide its earlier report prepared for PFC/ Procurers and made available to all bidders prior to bid submission was not an appropriate location and does not ensure reliable supply of water to the power plant. It also emerged that the water intake at the original location indicated by WAPCOS in the pre-bid report would have resulted in shutdown of the power plant for a considerable period in a year CIVIL APPEAL NO. 11826 OF 2018 etc. during the lean season. Therefore, WAPCOS recommended a new location for water intake, which was 23 km from the power plant as against the 12.5 kms initially indicated at the time of bidding (original location). It was highlighted that the new location would ensure reliable water supply to the power plant. Due to increase in the distance, submergence area along the route and construction time, there has been considerable increase in the cost of water intake system due to change in location as detailed below. The report of WAPCOS recommending the revised location is annexed herewith and marked as Annexure A-15. 9.7 It is submitted that due to the change in location, cost for water intake system has increased on following counts:

(a) While the route length itself increased to 23 kms, the increase in piping length increased from 24 km (2 Pipe Lines each of 12 Kms) to 59.5 km (2 Pipe Lines each of 8 km & 3 Pipes each of 14.5 km)

(b) Increased cost due to deeper Pump House.

(c) Additional dredging for creation of intake channel for the offshore pump house.

(d) Additional cost due to HT transmission line.

There has been considerable increase of approximately Rs.176 Crores in cost of the water intake system, which now is estimated to be approximately Rs.268 Crores. The cost break-up for the new location for the water intake system is annexed herewith and marked as Annexure A-16.

9.8 It is submitted that the increase in cost of the water intake system is on account of the errors in the report provided CIVIL APPEAL NO. 11826 OF 2018 etc. by the Procurers and therefore, the Procurers are required to compensate the Appellant for the difference in cost. 9.9 It is further submitted that since the water pipeline corridor is part of the Land for the Power Station and the water intake pipeline is an integral part of the Power Station, any change in the indicative cost of the water intake system is covered under Change in Law in terms of Article 13 of the PPA since it amounts to change in cost of land of the Project. In fact, the Ld. General Commission has noted in the impugned Order that the estimate for Declared Price of Land for the Power Station includes the Water Intake System. The operative part of the Impugned Order is reproduced below:

> "19. Change in the declared price of land is covered under "Change in Law". The procurers have also agreed that this item of expenditure is admissible under "Change in Law". The declared price of land for the Power Station was stated to be 190.677 crore. This has been verified from the communication dated 23.10.2006 from the representative of the procurers to the bidders. This included the power plant area, the fuel transport system land, the water pipeline corridor and the ash pipeline corridor." 9.11 It is submitted that pre-bid site visit and project reports were prepared and made available by Authorized Representative (Power Finance Corporation) to all bidders.

The disclaimer, if at all applicable, will only apply to such instances where the bidders were able to identify any issues or liability with reasonable diligence. Based on the information and material provided, there was no indication that the water CIVIL APPEAL NO. 11826 OF 2018 etc. intake system proposed in the WAPCOS Report was unfeasible. Therefore, the disclaimer does not absolve the Procurers of their liability to compensate the Appellant for the increase in cost. It is submitted that due to the error in WAPCOS's report, the Appellant is faced with an additional burden of Rs.176 Crore which has adversely impacted the project economics. It is submitted that the disclaimers contained in Para 2.7.2.1 and Para 4 of the RFQ ought not to be considered absolute in nature so as to prevent loading of costs which are incurred by the Appellant as a direct result of omission or error on part of the Procurers in providing information during the pre-bid stage. This approach is counter-intuitive to ensuring that the Appellants Project is able to supply cheap and affordable power to over 42 million consumers in the Procurer States. It is further submitted that the disclaimers cannot act as an absolute bar to the liability of the Procurers. Any duty to independently verify inputs, information factors etc. require only a reasonable duty of care. The grave technical deficiencies and huge differences between actual cost and estimates provided to the bidders defeat the fundamental objective of providing information to the bidders especially when the nature of expense in this case was of buying a report from a Government Company which had carried out a detailed study. The Appellant had no other option but to rely on the information provided by the authorized representative of the Procurers. Therefore, Ld. Commission's reliance on the disclaimers

contained in the bid documents to reject the claim of the Appellant is not sustainable." (16) In regard to the complaint about the notification issued by the Joint Secretary in the CIVIL APPEAL NO. 11826 OF 2018 etc., Ministry of Power having brought about a change in law, we find the following complaint, inter-alia:

> "9.20. It is submitted that as per Notification 21 of 2022- Customs dated 01.03.2002 issued by the Ministry of Finance, Government of India, the customs duty on goods required for setting up mega projects has been prescribed as nil meaning thereby that no customs duty will be levied on goods imported for setting up a mega power project. Notification 21/2022- Customs which provides as under:
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> " S. Chapter or Description of Goods Standard Additional Condition No. Heading or Rate Duty Rate No. sub-heading (1) (2) (3) (4) (5) (6) 98.01 Goods required for setting up any Mega Power Project specified in List 42 if such Mega Power is (a) An inter-

state thermal power plant of 1000 MW or more (b) an inter-state hydel power plant of a capacity of 500 MW or more As certified by an officer not below the rank of joint secretary to the Government of India in the Ministry of Power.

9.22 It is submitted that captive Coal Blocks being an integral part of the Project, the mining equipment would be covered under this provision as well. It is submitted that RFP clearly stated that Procurers through the Appellant (which was a wholly-owned subsidiary of PFC at that time) will procure a certificate from the Ministry of Power that the benefits of the Mega Power Policy would CIVIL APPEAL NO. 11826 OF 2018 etc. be extended to the Project till scheduled Commercial Operations Date of the Power Station. As per definition, Project includes captive mine and hence, it was Procurer's obligation to provide for the exemption to the coal mining equipment.

9.24 It may also noted that:-

Xxx xxx xxx

(b) PPA defines Project as power plant along with captive coal mines.

9.35 It is submitted that the Appellant has set up an ultra-mega power project which comprises of captive coal mines. It is not separately indulging in mining activities. Moreover, the coal from the Project is being used only for the Project. The entire capital cost of the power project includes the cost of the coal mines. This is also evident from Article 13 of the PPA where increase in cost of land and R&R expenditure for the coal mines is included as change in law.

Therefore, the finding that the captive coal mines are a separate activity and will fall under Serial No. 399 is incorrect and ought to be set aside.

FINDINGS OF THE TRIBUNAL (17) As far as the complaint about the increased costs on account of change in water intake system, the following is the finding of the Tribunal.

"12.4 After due consideration of the rival contentions of both the parties, what emerges is that after being declared as the CIVIL APPEAL NO. 11826 OF 2018 etc. successful bidder, the SPL with a view to affirm the technical suitability of the preliminary report of the WAPCOS on Water Intake System, re-engaged the same agency for finalization of the said report. It is not in dispute that the Consultant, WAPCOS reviewed its earlier report and came to a conclusion that the earlier location of Water Intake was not at proper place and would result in non- availability of water for the plant during lean period. It is relevant to note that based on the recommendations of WAPCOS, SPL decided to go ahead for selection of new location as recommended and got carried out the requisite design and engineering of the entire Water Intake System which resulted into longer piping system, increased submergence area along the route, additional construction period etc.. On account of these factors, the cost of Water Intake System went up by over Rs.176 crores. The learned counsel appearing for the Appellant pointed out that the judgment of this Tribunal in Nabha Power case is not applicable to the present case since no cost relating to seismic zone data was provided to Nabha whereas in the instant case, costs were provided to the bidders. The Appellant has further reiterated that para 2.7.2.1 and para 4 of RFP which were relied upon by the Respondent procurers cannot be taken as obsolute in nature so as to absolve procurers of their responsibility for providing grossly incorrect information leading to substantial increase in cost of Water Intake System.

12.5 After thoughtful consideration of the submissions made by the learned counsel for CIVIL APPEAL NO. 11826 OF 2018 etc. the Appellant and the Respondents and the findings of the Central Commission, we find that while the responsibility of carrying out due diligence before bidding and verifying the correctness of information provided in the bid documents rested with the bidders, at the same time, Respondent procurers cannot justify providing grossly erroneous report on Water Intake System taking shelter under the disclaimer in the bid document. As a matter of fact, the water availability for a thermal power station of this magnitude on regular, reliable and uninterrupted basis is essential and is a vital input for successful operation of the plant. It is noticed that the report of WAPCOS supplied to bidders at the time of bidding was deficient in ensuring adequate water supplies throughout the year uninterrupted and if the same would have been taken for construction and implementation, the same could have resulted into huge loss to the Respondent procurers being deprived of power supply for some period of the year due to less/ non-availability of water during the lean period. It is not in dispute that Sasan UMPP is supplying power to the Respondent procurer at one of the most competitive tariff in the country. It is noted from the contentions of the Respondent procurers that such an issue has not been dealt with either in the PPA or in the competitive bidding guidelines issued by Ministry of Power under Section 63 of the Act, however, in view of the criticality of such situation, we opine that the matter needs afresh re-look for suitable redressal. While the Central Commission has correctly concluded that it does not qualify as change in law under CIVIL APPEAL NO. 11826 OF 2018 etc. Articles 13.1.1 of the PPA, it, however, needs to be addressed on the basis of settled principles of law and equity also, in the light of the Hon'ble Supreme Court findings in its judgment at Para 19 in Energy Watchdog vs. CERC dated 11.04.2017. Thus, we are of the considered view that this issue involving substantial additional expenditure basically arising out of erroneous report of the consultants needs to be re-examined afresh by the

Central Commission. Hence, this issue is answered in favour of the Appellant." (18) In regard to the complaint relating to the O.M. dated 17.06.2011 forming change in law, we note the following findings:

> "14.5 We have considered the submissions of the learned counsel for the Appellant and learned counsel for the Respondents along with the consideration of the Central Commission on this issue pertaining to the claims of the Appellant regarding compensation on account of additional payment towards custom duty on mining equipment. After careful consideration and critical evaluation of the same, the key question arises for consideration, whether the equipment required for captive coal mines allocated to UMPP should be considered at par with the equipment required for setting up the power plants as far as exemption from the custom duty is concerned. The contention of the Appellant that the captive coal mines allocated to Sasan UMPP are integral & essential part of the project as a whole and CIVIL APPEAL NO. 11826 OF 2018 etc. as such, the exemption of custom duty was applicable to all equipments being imported for the entire project i.e. captive coal mines as well as power plants. It is not in dispute that the captive coal mines were allotted for UMPP for its exclusive use for power generation and in no way, meant for commercial utilization elsewhere.
>
> 14.6 In this regard, we also take the note of Hon'ble Supreme Court directions in judgment dated 24.08.2014 in Manohar Lal Sharma Vs. Principal Secy., in W.P.(CRL) 120 of 2012 (Para 158) that coal from captive coal mines is to be used for UMPP alone and no diversion of coal for commercial exploitation would be permitted. Keeping these facts in view, we notice the glowing difference between an independent coal mines up for exploitation and selling coal on commercial lines and a captive coal mine set up to meet requirement of UMPP only to generate power for the ultimate benefit of the Respondent procurers and in turn, consumers for obtaining electricity at cheaper rates. The actual positions purported the assumption made by the Appellant that the customs duty exemptions will be available for import of the equipment for the entire project including captive mines and power plants. We find force in the argument of the learned counsel for the Appellant that being the integral and inseparable part of the UMPP, the custom duty rates applicable for stand alone coal mining projects would not be applicable in the present case and the exemption would need to be given effect to.

We, thus opine that the Central Commission CIVIL APPEAL NO. 11826 OF 2018 etc. appears to have been mechanically guided by the mere description of the relevant entry (Sl.No.399 & 400) in the said custom duty notifications and has not appreciated that the captive coal mines being integral part of the UMPP cannot be equated to a stand alone coal mines, having commercial line of utilization. The Appellant was thus right in assuming that Custom Duty exemption will be available for the coal mining equipments. As such, this issue needs to be examined afresh in accordance with law and various provisions of the RFQ/RFP/PPA. Therefore, we answer this issue in favour of the Appellant." (19) On the basis of the aforesaid findings, the Tribunal remanded the matter back to the

Commission. We may also notice the sequel to the impugned judgment. Pursuant to the remand, the Commission reconsidered the matter in regard to the water intake. The Commission ordered payment of sum of Rs.176 crores. As far as the claim for compensation on the basis that the issuance of the office memorandum by the Joint Secretary in the Ministry of Power having brought about a change in law, it was found that the goods in question had been imported not by the first respondent but by its parent company. This, in turn, has triggered two sets of CIVIL APPEAL NO. 11826 OF 2018 etc. appeals again before the Tribunal and they are still pending. Their fate, undoubtedly, will depend upon the decision which we will be rendering in these cases.

(20) We have heard Mr. P. Chidambaram, Mr. Dhruv Mehta; Mr. Rana Mukherjee, Mr. M. G. Ramachandran, Mr. G. Umapathy, learned senior counsel, assisted by Mr. Nikunj Dayal and Ms. Pallavi Sehgal. We have also heard Mr. Shubham Arya, learned counsel appearing on behalf of the appellant in one of the appeals. On the other hand, we also heard Mr. Sajjan Poovayya, learned senior counsel assisted by Mr.Rahul Kinra, learned counsel and Mr. Amit Kapoor, learned counsel.

SUBMISSION OF APPELLANTS (21) Shri P. Chidambaram, learned senior counsel appearing for the appellant, would submit that the Tribunal has clearly acted in error and illegally in passing the impugned order.

(22) He would submit that as far as the finding CIVIL APPEAL NO. 11826 OF 2018 etc. given by the Tribunal in regard to the water intake system being located at a different place, is concerned, the Tribunal agreed with the Commission that there was no change in law. Once, it was found that there was no change in law, there is no power with the Tribunal to do what it did. The PPA signifies an agreement between the parties. The PPA goes into meticulous details. It follows an internationally competitive bidding and the obligations of the parties have been carved out and articulated with great care. Once the party, viz., the first respondent went to the Commission complaining that there is a change in law and it was found that there is no change in law, there ended the jurisdiction of the Tribunal. Instead of terminating the lis, the Tribunal has clearly strayed outside its jurisdiction in granting relief on the basis that report of WAPCOS was grossly erroneous. In this regard, he enlisted in support of his contention, various clauses which unambiguously disclaimed any liability with the procurers on account of any inaccuracies which may CIVIL APPEAL NO. 11826 OF 2018 etc. be reflected in the WAPCOS report. A report submitted by WAPCOS which is a public sector body was only by way of providing information. The bidders were provided with the report well before they decided to put in their bids. Having regard to the various disclaimer clauses, it did not lie in their mouth to thereafter seek to construct a case based on the report being erroneous. In this regard, it is pointed out that the clauses clearly indicate that the bidder was to satisfy itself by conducting a study of the site. Nothing prevented the first respondent from carrying out inspection of the site and verifying for itself the information which was provided through the report of the WAPCOS. (23) Mr. P. Chidambaram, learned senior counsel, further pointed out that a perusal of the second WAPCOS report, which is the sole basis for the huge claim raised by the first respondent, would show that the second report does not, in any manner, rubbish the first report. It is not in dispute, it is pointed out, that the procurers were in no way associated with the carrying out of the second CIVIL APPEAL NO. 11826 OF 2018 etc. WAPCOS report. Unilaterally, the first respondent without any basis gets the second report commissioned and it is on the said basis alone that the claim was made and what is

more, allowed by the Tribunal. This is clearly impermissible. As regards the claim for compensation alleging change in law brought about by the Office Memorandum issued by the Joint Secretary is concerned, in the first place, it is pointed out that the proper thing for the first respondent to do would have been to take up the matter with the Department and claim a refund and he would submit it is strange instead of doing that the burden is sought to be passed on to the procurers and which, in turn, would necessarily be passed on to the ultimate consumers. (24) Further, it is pointed out that the Tribunal has actually proceeded to take into consideration the earlier notifications which prevailed at the time of the cut off date with reference to which alone change in law is projected. Thereafter, it has come to the conclusion that for the goods imported from abroad for the purpose of the captive CIVIL APPEAL NO. 11826 OF 2018 etc. mines, there was an exemption. Such an inquiry itself could not have been done. In other words, it is not a case where the first respondent had indisputable material on hand which established unambiguously that there was a change in law. This is for the reason that there is no material to establish that prior to the cut off date, the goods which are the subject matter of dispute, were exempt under the notification. On the other hand, our attention is drawn to the decision of the Advance ruling authority which has gone into the issue and found that goods in question were not exempt. In fact, it is the contention of the appellants that the office memorandum issued by the Joint Secretary, Ministry of Power, merely follows the advance ruling.

(25) Another argument which is raised in this regard is that the Joint Secretary in the Ministry of Power is not the final Governmental authority within the meaning of clause 13.1.1. What we are concerned with is notification issued under Section 25 of the Customs Act. It is not as if any authority which is CIVIL APPEAL NO. 11826 OF 2018 etc. competent within the meaning of Article 13.1.1 has issued a notification or even an interpretation within the meaning of the said article which has resulted in a change in law within the meaning of Article 13.1.1.

(26) We have also heard Shri Dhruv Mehta, as we have already stated. We have heard the other senior counsel who have essentially adopted the arguments which have been addressed by Mr. P.Chidambaram, learned senior counsel, and they are one in contending that the Tribunal has strayed outside the contours of its jurisdiction and this has resulted in an order which is clearly illegal and erroneous. SUBMISSIONS OF THE FIRST RESPONDENT (27) Per contra, Mr. Sajjan Poovayya, learned senior counsel for the first respondent, took us through the other side of the picture and projected a totally different scenario. He would point out, in the first place, that the Court may not view the PPA in question as an ordinary contract. He pointed out that what is at stake is the interpretation to be CIVIL APPEAL NO. 11826 OF 2018 etc. placed on a long term power procurement contract. It is not as if in such a contract, the matters are fixed with reference to the point of time when the contract is entered into. It is not cast in stone, in other words. It is open to change. More appropriately, it is open to regulation. We are invited to consider that the Act represents a paradigm shift from the previous regime under which the price of power was fixed essentially at the whims and caprice of the State Electricity Boards. There was a stagnation in the production and supply of power. It is realising the need for increasing private participation in the generation of power that the Act was enacted in the year 2003. Being the subject matter of regulations means that tariff was open to be revisited from time to time. It is precisely this regime which is reflected by Section 79 of the Act. It is further pointed out that the complaint of the

appellants regarding the Tribunal in regard to the water intake system despite agreeing with the Commission that there was no change in law rendering the findings it did and CIVIL APPEAL NO. 11826 OF 2018 etc. therefore, being unsustainable, the Court may consider that in fact there was a change in law. This argument is sought to be buttressed with reference to the provisions of clause (iii) of Article 13.1.1. It is contended, in other words, that a perusal of the various clauses of the PPA would show that the procurers (the appellants) were obliged under the contract to provide initial consent. One of the initial consents related to the water linkage for the project. He would submit that in view of the provisions of Schedule II to the PPA the initial consent also consisted of carrying out the task of making available land for the power plant and for the laying of the pipeline. Since as it turned out and as supported by the second report of the WAPCOS, there was clearly insufficient availability of water at the site supported by the first report, the first respondent was compelled to take water from a distant point of the reservoir in question. This led to the colossal increase in the expenditure towards laying of the pipeline inter alia. This constituted, therefore, a change in law. CIVIL APPEAL NO. 11826 OF 2018 etc. (28) As far as the contention based on the disclaimer clauses which are relied upon by the appellant is concerned, it is pointed out that the width of the disclaimer clause could not be stretched to the point that is canvassed by the appellants. We are dealing with a case where a public sector unit viz., WAPCOS has given its report. Not unnaturally, the first respondent relied upon the same. It is factored in its price and once it is found that the report was entirely fallacious, no shelter can be sought by the appellants under the disclaimer clauses. Our attention was drawn to various judgments. They include Energy Watchdog v. Central Electricity Regulatory Commission and Others (2017) 14 SCC 80, Uttar Haryana Bijli Vitran Nigam Ltd. & Anr. v. Adani Power Limited & Ors. (2019) 5 SCC 325, Gujarat Urja Vikas Nigam Ltd. v. Essar Power (2008) 4 SCC 755, Skandia Insurance Co. Ltd. v. Kokilaben Chandravan & Ors. (1987) 2 SCC 654, DLF Universal Limited v. Director, Town and Country Planning Department, Haryana (2010) 14 SCC 1 and Sumitomo CIVIL APPEAL NO. 11826 OF 2018 etc. Heavy Industries v. Oil and Natural Gas Commission of India (2010) 11 SCC 296, Nabha Power Limited v. PSPCL (2018) 11 SCC 508.

(29) The respondents have also relied upon the judgments of this Court which are detailed hereinafter essentially for the proposition that there is power under Order XLI Rule 22 and Rule 33:

> Prahlad & Ors. v. State of Maharashtra & Anr. (2010) 10 SCC 458, State of Punjab & Ors. v. Bakshish Singh (1998) 8 SCC 222, Mahant Dhangir & Anr. v. Madan Mohan & Ors. (1987) (Supp) SCC 528.

(30) It is contended by Mr. Sajjan Povayya, learned senior counsel that there is indeed power, at any rate, under the provisions of Section 79(1)(b) of the Act to revisit the fixation of tariff de hors even the specific relief which is contemplated under the contract. In this regard, emphasis is laid on the fact that clauses 4.7 and 5.1.17 of the guidelines came to be amended and it is the amended guidelines which apply to the facts of the case. That it is the amended guidelines which were applied can be perceived from the fact that the amended CIVIL APPEAL NO. 11826 OF 2018 etc. guidelines are seen reflected in the PPA. The amended provisions are found in 17.3.1 and 13.1.1 (31) Amended Guideline 4.7 is reflected in 13.1.1 whereas amended guideline 5.17 is reflected in Article 17.3.1.

(32) With regard to 17.3.1, it is pointed out that a reading of the same, in particular, the opening limb of the provision would show that there is clearly general power for the purpose of changing determining or increasing the tariff. It is sought to be contrasted with specific instances which would notify the jurisdiction of the Commission which included Article 13.1 which deals with change in law. In other words, the contention is that de hors a change in law, it becomes the duty of the Commission and the Tribunal and of this Court to factor in the need to arm the Tribunal and the Commission with ample power in the interest of justice, to deal with situations which call out for a fair and equitable treatment to be meted out to the private player as well in a long term contract. CIVIL APPEAL NO. 11826 OF 2018 etc. (33) Mr. Amit Kapoor, learned counsel, who supplemented the submissions of Mr.Sajjan Poovayya, learned senior counsel, would draw our attention to Section 61 of the Act. He would submit that Section 61 read with Sections 63 to 79(b) provided a statutory framework which enabled the Commission to devise an equitable tariff even in a PPA governed scenario having regard to the very nature of the services involved and the changed system evolved under the Act.

(34) Mr. Amit Kapoor, learned counsel, laid stress on the principle of contra proferentem. He would point out along with Mr. Sajjan Poovyya, learned senior counsel, that the Court must not be oblivious of the fact that this case represents a case 2 scenario under the RFP. This means that unlike a situation where the contractor is free to choose the site and the other facilities, in a case 2 situation which is the situation prevailing in this case, everything is dictated to by the employer viz., SPV. Expatiating the said point, it is pointed out that the bidders did not have a control over the water CIVIL APPEAL NO. 11826 OF 2018 etc. source from which water had to be taken. In other words, the water could not have been sourced from any other water body. This aspect is relevant for the purpose of considering the free play with the Commission in the matter of fixing tariff based on a situation which was created as are exemplified by two grounds which have been made out and which are the subject matter of the appeals. Another point which is projected is that in regard to geological matters, the bidders were warned that they would have to on their own make an assessment. But such a caveat was not entered with regard to pertinently the hydrological conditions. Since water intake system related to hydrology, it is not open to the appellants to ward off a just fixation of tariff based on the discovery of the fact that the first WAPCOS report was highly flawed. We are reminded that it was of the greatest importance for the first respondent that it ran the power plant on a yearly basis. The second report of the WAPCOS would clearly indicate that if the appellant had to take water in terms of the first WAPCOS report, during CIVIL APPEAL NO. 11826 OF 2018 etc. the lean months, the first respondent would not get sufficient water supply to operate the plant. If such an eventuality had taken place, the result would be that the procurers would end up paying the charges towards capacity charge even though, it would not get power. The appellants would be compelled to buy power from outside and finally the end consumer would have to bear the brunt of the loss. It is to avoid all this that the first respondent has acted in a manner which was not only in tune with its best interest but also ensuring that the procurers and finally the consumers were best protected. It is further pointed out by the learned counsel that the Court must bear in mind that the contract in question permits the passing of the benefit not only to the contractor but also to the employer viz., the appellants. In other words, if it was a case where the first respondent were to be found to be making an unjust enrichment under the regulatory mechanism, the appellants could have moved the Commission for bringing down the rates. Therefore, the regulatory mechanism is meant to work

CIVIL APPEAL NO. 11826 OF 2018 etc. both ways, in both directions and the Court must bear in mind the unique nature of a regulated contract.

(35) Shri Amit Kapoor also referred to the theory of incomplete contracts. This is explained as meaning that being a long term contact, the parties may not expect and factor in all possible developments which may take place. This also necessitates the Commission being endowed with sufficient power to reach the contractor as also the employer a just tariff bearing in mind the regime under Section 61 of the Act.

(36) Upon being queried as to what would be the position at law outside of the PPA and of the jurisdiction of the Commission and if the matter were to be considered with reference to the law of contract, Shri Amit Kapoor drew our attention to Sections 18 and 19 of the Indian Contract Act, 1872. He would point out that even an innocent representation within the meaning of Section 18 can result in the contact becoming voidable under Section 19. Section 19 contemplates that the party CIVIL APPEAL NO. 11826 OF 2018 etc. whose consent is obtained by misrepresentation within the meaning of Section 18 can insist upon the other side to perform the contact. But the wronged party retained the right to insist that it shall be put in the same position it would have occupied if there was no misrepresentation. Therefore, it is pointed out that there is foundation even in the law of contract for contending that the Commission armed with its powers under Section 79(b) could compensate the contractor in the situation we are concerned with.

(37) The judgment of this Court reported in Uttar Pradesh Power Corporation Limited v. National Thermal Power Corporation Limited and Others (2009) 6 SCC 235 rendered by a Bench of three learned judges with Justice S. B. Sinha speaking for the Court had occasion to consider the impact of regulations made purporting to act under the Electricity Regulatory Commission Act, 1998. In the said judgment, it has been inter alia held that there is power under regulation 92, in particular, to revise the tariff (see para 35 read with 38 and CIVIL APPEAL NO. 11826 OF 2018 etc.

40) (38) Noticing this aspect, when we sought assistance from the learned counsel. We heard the following submissions. Mr. M. G. Ramachandran, learned senior counsel, would point out that the observations relating to the power under Section 92 must be understood as confined to the situation obtaining under Section 61 read with Section 62 of the Act. The said power may not be available when the tariff is fixed under Section 63 of the Act. When we queried as to whether the provisions of Section 61 are totally unconnected with Section 63, Mr. M. G. Ramachandran, learned senior counsel, would submit that Section 61 may not be entirely inapplicable. He would submit that particular provisions of Section 61 may, in fact, apply. They include Section 61(b). He would submit that even the guidelines issued under Section 63 have their echo in Section 61 and, therefore, it cannot be said that Section 61 and 63 are strange bedfellows.

(39) He would, however, contend that in no circumstances can the power under regulation 92 of CIVIL APPEAL NO. 11826 OF 2018 etc. 1999 regulations apply when parties have after competitive bidding and approval of the tariff under Section 63 become bound by a long term contract under the PPA. In a case where there is a determination of tariff within the meaning of Section 62, on the other hand, Regulations of 1999 may apply. He would further point out that the power under regulation

92 which provides for reviewing of tariff and which has been understood as power of revision of tariff as a whole must be subject to the rider that the revision of tariff can be done only strictly in accordance with the tariff regulations brought in the year 2001 and as subsequently, amended from time to time. In fact, he would draw our attention to the Regulations of 2014 which expressly excludes tariff determination done under Section 63 of the Act from the ambit of the said regulation. In this regard, Shri Sajjan Povayya, learned senior counsel, on the other hand, drew our attention to the judgment of this Court Gujarat Urja Vikas Nigam Limited v. Tarini Infrastructure Limited and Others (2016) 8 SCC 743 CIVIL APPEAL NO. 11826 OF 2018 etc. 2022 SCC Online SC 1615 2023 SCC Online SC 233. He would on the strength of these judgments point out that there is regulatory power available even in a case covered by Section 63 of the Act. ANALYSIS (40) We, in these cases, are concerned only with two issues. As we have noticed, the first respondent filed a petition before the Commission invoking its power inter alia under Section 79(b). The matter relates expressly to the construction period. It is at this point apposite to notice the relevant provisions under the PPA.

(41) Article 13 deals with change in law. Article 13.1.1. defines what a change in law is. It reads as follows:

"ARTICLE 13: CHANGE IN LAW

13.1 Definitions

In this Article 13, the following terms shall have the following meanings:

13.1.1 "Change in Law" means the occurrence of any of the following events after the date, which is seven(7) days prior to the CIVIL APPEAL NO. 11826 OF 2018 etc. Bid Deadline:

(i) the enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal, of any Law or (ii) a change in the interpretation of any Law by a Competent Court of Law, tribunal or Indian Governmental Instrumentality provided such Court of Law, tribunal or Indian Governmental Instrumentality is final authority under law of such interpretation or (iii) change in any consents, approvals or licenses available or obtained for the Project, otherwise than for default of the Seller, which results in any change in any cost of or revenue from the business of selling electricity by the Seller to the Procurers under the terms of this Agreement, or (iv) any change in the

(a) Declared Price of Land for the Project or (b) the cost of implementation of the resettlement and rehabilitation package of the land for the Project mentioned in RFP or (c) the cost of implementing Environmental Management Plan for the Power Station mentioned in the RFP or (d) the cost of implementing compensatory afforestation for the Coal Mine, indicated under the RFP and the PPA;

but shall not include (i) any change in any withholding tax on income or dividends distributed to the shareholders of the Seller, or (ii) change in respect of UI Charges or frequency intervals by an Appropriate Commission.

Provided that if Government of India does not extend the income tax holiday for power generation projects under Section 80 IA of the Income Tax Act, upto the Scheduled Commercial Operation Date of the Power Station, such non-extension shall be deemed to be a Change in Law." CIVIL APPEAL NO. 11826 OF 2018 etc. (42) Article 13.1.2 declares that the Supreme Court or High Court or a Tribunal or in similar judicial or quasi judicial body in India that has jurisdiction to adjudicate upon issues relating to the project will be treated as competent Court. (43) Article 13.2 provides for the actual application and the principles for computing the impact of change in law. It reads as follows:

> "13.2 Application and Principles for computing impact of Change in Law.
>
> While determining the consequence of Change in Law under this Article 13, the Parties shall have due regard to the principle that the purpose of compensating the Party affected by such Change in Law, is to restore through Monthly Tariff Payments, to the extent contemplated in this Article 13, the affected Party to the same economic position as if such Change in Law has not occurred.
>
> a) Construction Period As a result of any Change in Law, the impact of increase/decrease of Capital Cost of the Project in the Tariff shall be governed by the formula given below:
>
> For every cumulative increase/decrease of each Rupees Fifty crores (Rs.50 crores) in the Capital Cost over the term of this Agreement, the increase/decrease in Non CIVIL APPEAL NO. 11826 OF 2018 etc. Escalable Capacity Charges shall be an amount equal to zero point two six seven (0.267%) of the Non Escalable Capacity Charges.
>
> Provided that the Seller provides to the Procurers documentary proof of such increase/decrease in Capital cost for establishing the impact of such Change in Law. In case of Dispute, Article 17 shall apply.
>
> It is clarified that the above mentioned compensation shall be payable to either Party, only with effect from the date on which the total increase/decrease exceeds amount of Rs. Fifty (50)crores.
>
> b) Operation Period As a result of Change in Law, the compensation for any increase/decrease in revenues or cost to the Seller shall be determined and effect from such date, as decided by the Central Electricity Regulatory Commission whose decision shall be final and binding on both the Parties, subject to rights of appeal provided under applicable Law.

Provided that the above mentioned compensation shall be payable only if and for increase/decrease in revenues or cost to the seller is in excess of an amount equivalent to 1% of Letter of Credit in aggregate for a Contact Year.

(44) Article 13.4.2 provides for the manner in which CIVIL APPEAL NO. 11826 OF 2018 etc. the payment for changes in law is to be effected.

It reads as follows:

"13.4.2 The payment for Changes in Law shall be through Supplementary Bill as mentioned in Article 11.8. However, in case of any change in Tariff by reason of Change in Law, as determined in accordance with this Agreement, the Monthly Invoice to be raised by the Seller after such change in Tariff shall appropriately reflect the changed Tariff." (45) We may notice the other foundational articles relied upon by the first respondent. Article 17 relates to Governing law and Dispute resolution.

Article 17.2.1 reads as follows:

"17.2.1 Either Party is entitled to raise any claim, dispute or difference of whatever nature arising under, out of or in connection with this Agreement including its existence or validity or termination (collectively "Dispute") by giving a written notice to the other Party, which shall contain:

(i) a description of the Dispute;

(ii) the grounds for such Dispute; and

(iii) all written material in support of its claim." (46) The further articles which we need not capture contemplate that the claim may be met even with a counter claim and an attempt should be made to CIVIL APPEAL NO. 11826 OF 2018 etc. settle the dispute amicably (see Article 17.2.3).

Failure to arrive at a settlement opens the doors of Article 17.3. It is justifiable as the caption is 'Dispute Resolution'.

(47) Article 17.3.1 is the crucial article. It reads: -

"Where any Dispute arises from a claim made by any Party for any change in or determination of the Tariff or any matter related to Tariff or claims made by any Party which partly or wholly relate to any change in the Tariff or determination of any of such claims could result in change in the Tariff or (ii) relates to any matter agreed to be referred to the Appropriate Commission under Articles 4.7.1, 13.2, 18.1 or clause 10.1.3 of Schedule l 7 hereof, such Dispute shall be submitted to adjudication by the Appropriate Commission. Appeal against the decisions of the Appropriate

Commission shall be made only as per the provisions of the Electricity Act, 2003, as amended from time to time. The obligations of the Procurers under this Agreement towards the Seller shall not be affected in any manner by reason of inter- se disputes amongst the Procurers." (48) It is thereafter that as we have noticed, Article 17.3.2 appears which we are not setting out, deals with the settlement of disputes which are outside the ambit of Article 17.3.1.

CIVIL APPEAL NO. 11826 OF 2018 etc. (49) We may at the very beginning notice the change that is brought about in the guideline. True it is that as we have noticed that the earlier guidelines which were formulated on 19.01.2005 contemplated a different regime both as regards change in law and also dispute resolution. The question would however be the extent to which the first respondent can derive benefit out of the same. As far as Article 13.1.1 is concerned, clauses 1 and 2 are clearly an inapplicable in regard to the claim based on the change brought about in the water intake system. (50) It is clause (iii) which is referred to and relied upon by Mr. Sajjan Povayya. It reads as follows:

"(iii) change in any consents, approvals or licenses available or obtained for the Project, otherwise than for default of the Seller, which results in any change in any cost of or revenue from the business of selling electricity by the Seller to the Procurers under the terms of this Agreement." (51) It is the case of the first respondent that since in the schedule the initial consent which was, CIVIL APPEAL NO. 11826 OF 2018 etc. in fact, a deemed initial consent consisting of performing of the task of making available land for the power plant and for the pipeline and there is a change in the same in view of what transpired pursuant to the second report of the WAPCOS, the first respondent was entitled to relief. In regard to the said argument, we must notice the following obstacles which are indisputable. We notice that the pleadings which we have set out, position before the Commission and what is more, even before the Tribunal, do not reveal that the first respondent has taken such a stand. No express reference is found to Schedule 2 containing the alleged deemed initial consent being overridden by the subsequent consent as a foundation for the claim based on change in law.

(52) The second obstacle which we must notice is that we are dealing with an appeal under Section 125 which is based on the existence of a substantial question of law. In this regard, indisputably both the Commission and the Tribunal have rendered the concurrent finding that the first respondent has CIVIL APPEAL NO. 11826 OF 2018 etc. failed to establish any change in law. Thus, the first respondent is up against concurrent findings which we cannot lightly disregard.

(53) Thirdly, we may notice that the first respondent has not independently challenged the finding rendered by the Tribunal holding that there is no change in law. We have noticed that the Tribunal has proceeded to premise the grant of relief to the first respondent and remanding the matter on a totally different basis. Here, we may notice no doubt that treating it as a part of the power of appellate Court to correct errors in the findings in the impugned order passed may extend in

appropriate cases by the principle of Order XLI Rule

> 22. However, objection is seen raised by the Appellants to permitting of the principle in Order XLI Rule 22 CPC to govern in the situation such as in an appeal under Section 125 of the Act. We proceed on the basis that there is power to permit the respondent to impugn a finding given by the Tribunal against the respondent even without filing any appeal or cross petition.

CIVIL APPEAL NO. 11826 OF 2018 etc. (54) Examining the claim on merits, we find that the first respondent would fail. It is categorically stated in para 68 of the petition that the increase in the cost is directly attributable to the error in the WAPCOS report provided to the bidders at the pre-bid stage. It is contended that the first respondent is required to be compensated for the same.

(55) In para 108, it is stated that as per the RFP, the procurers had to provide the water intake study report. As per the said report, the cost of water intake system was approximately Rs.92 crores. It is further stated in para 110 that there was considerable increase in the cost of water due to the water intake system. It is stated that it is on account of errors in the report. It is, however, no doubt, in para 111 stated that since water pipeline is part of the power station land and the water intake pipeline is an integral part of the power station, the indicative cost of the water intake system will be covered by change in law. In the appeal also, we have noticed the stand elaborately. CIVIL APPEAL NO. 11826 OF 2018 etc. (56) Initial consent, has been defined in the PPA as meaning the consents listed in Schedule 2. Article 5.5 of the PPA reads as follows:

> "5.5 Consents The Seller shall be responsible for obtaining all Consents (other than those required for the Interconnection and Transmission Facilities and the Initial Consents) required for developing, financing, constructing, operating and maintenance of the Project and maintaining/renewing all such Consents in order to carry out its obligations under this Agreement in general and this Article 5 in particular and shall supply to the Lead Procurer promptly with copies of each application that it submits, and copy/ies of each consent/approval/license which it obtains. For the avoidance of doubt, it is clarified that the Seller shall also be responsible for maintaining/renewing the Initial Consents and for fulfilling all conditions specified therein." (57) It is true that the procurers were to secure certain initial consents whereas the vast majority of the consents were to be procured by the seller.

Whatever was to be procured by the procurers apparently has been described as initial consents. It is also not in dispute that though the word consent is used in Article 13.1.1, the initial consent would also qualify as consent. The CIVIL APPEAL NO. 11826 OF 2018 etc. contention of the appellants is that as far as the initial consent contemplated which was to be performed by the procurers it was to provide the water linkage. The water linkage consisted of making available the source of water which consisted of the Govind Ballabh Pant Sagar(Rihand Reservoir). There has been no change in the said consent. It is not a case of the first respondent, in other words, that the first respondent has been forced to take water from any other water source. In this regard by communication dated

23.10.2006, we find the following:

> "6. Reference Clause: RFP 1.4(v) – regarding tying up water linkage for the Project requirement alongwith approval of Central Water Commissioner
>
> (i) This has already been provided on 12th October, 2006.
>
> (ii) The water intake study report and Project Report including geo-technical study, topographical survey, area drainage study, socio-economic study and EIA rd (rapid), were provided on 3 August, 2006." (58) While on this document, we may also notice the following in regard to the declared price of land contemplated in the RFP under clause 1.4 (ii):
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> CIVIL APPEAL NO. 11826 OF 2018 etc. "2. Reference Clause: RFP 1.4(ii) – regarding Declared Price of Land for Power Station Indicative Declared Price of Land for Power Station is as follows:
>
> (i) Power Plant Area – Rs.110 Crores
> (ii) MGR Land – Rs.88 Crores.
>
> (iii) Water Pipeline Corridor– Rs.0.63 Crores
>
> (iv) Ash Pipeline Corridor – Rs.0.047 Crores" (59) There is no dispute regarding this aspect. In this regard, we notice that under Schedule 1A to the PPA it has been clearly indicated that water source in the project is Govind Ballabh Pant Sagar(Rihand Reservoir).
>
> (60) It is, thereafter, we must notice that under the caption initial consent in Schedule 2, on behalf of the procurers, the SPV was expected to issue the notification under Section 6 of the Land Acquisition Act, obtain necessarily environmental and forest clearance for the power stations, allocate captive coal mines and finally, give the water linkage for the reasonable project requirements. It is this water linkage for the reasonable project requirements which was contemplated to be fulfilled from the water source Govind Ballabh Pant CIVIL APPEAL NO. 11826 OF 2018 etc. Sagar(Rihand Reservoir). The communication dated 23.10.2006 would indicate that the Central Water Commission had given its approval for sourcing the water need from the water body in question. In the said sense, the procurers had fulfilled their obligation as contemplated in RFP.

(61) The RFP which preceded the PPA provided for certain conditions which we have already indicated. Clause 1.4 inter alia contained undertaking for providing the water linkage for the project with the requisite approval of the Central Water Commission at least 30 days prior to Bid deadline. In the PPA, it is indicated that the procurers have completed the initial studies as contained in the project report and obtained initial consent required for the project which are set out in Part I of Schedule 2 and have been made available to the seller on the date of the PPA except two matters: (1)

Forest clearance and the declaration under Section 6 of the Land Acquisition Act. It is in Part I Schedule 2 of the PPA stated that the notification under Section 6 of the Land Acquisition Act was an act to be CIVIL APPEAL NO. 11826 OF 2018 etc. performed by the procurers. It is this act which was not done initially at the stage of the PPA. Also forest clearance is mentioned in the Part I of Schedule 2. Even the said clearance was also apparently not obtained as is indicated at the beginning of the PPA. Thereafter, Part II of Schedule 2 contains the clause which is the fountainhead of the argument based on initial consent.

(62) It contemplated performing of the task mentioned in Article 3.1.2A also shall be part of the initial consent on their completion within the time provided. Article 3.1.2A contemplated performance of the task with which we are concerned viz., making available the land for the power plant and for the water intake pipeline. This task was to be performed within a period of eight months from the date of the letter of intent being issued or six months from the PPA whichever is later. It is true that the task which was to be performed by the procurers in terms of Article 3.1.2A was performed belatedly by the procurers. In other words, the CIVIL APPEAL NO. 11826 OF 2018 etc. time limit was overshot by nearly 18 months. But this delay is not the basis for the claim based on change in law.

(63) The question would then arise as to whether the delay in the performance of the task which has been characterised on its performance within the time as a deemed initial consent would lead to a change in law within the meaning of Article 13.1.1. We find that Article 3.3.3 of the PPA reads as follows:

> "3.3.3 In case of inability of the Seller to fulfil the conditions specified in Article 3.1.2 due to any Force Majeure event, the time period for fulfilment of the Condition Subsequent as mentioned in Article 3.1.2 and Article 3.1.2A, shall be extended for the period of such Force Majeure event, subject to a maximum extension period of ten (10) Months, continuous or non-continuous in aggregate. Thereafter, this Agreement may be terminated by either the Procurers (jointly) or the Seller by giving a notice of at least seven (7) days, in writing to the other Party.

Similarly, in case of inability of the Procurers to fulfil the conditions specified in Article 3.1.2A due to any Force Majeure event, the time period for fulfillment of the Condition subsequent as mentioned in Article 3.1.2 and Article 3.1.2A, shall be extended period of ten (10) Months, continuous or non-continuous in aggregate. Thereafter, this Agreement may be terminated by either the Procurers (jointly) or the CIVIL APPEAL NO. 11826 OF 2018 etc. Seller by giving a notice of at least seven (7) days, in writing to the other Party." (64) We must next notice Article 3.3.3A which follows:

> "3.3.3A In case of inability of the Procurers to perform the activities specified in Article 3.1.2A within the time period specified therein, otherwise than for the reasons directly attributable to the Seller or Force Majeure event, the Condition Subsequent as mentioned in Article 3.1.2 would be extended on a 'day for day' basis, equal to the additional time which may be required by the Procurers to complete the activities

mentioned in Article 3.1.2A, subject to a maximum additional time of six (6) Months. Thereafter, this Agreement may be terminated by the Seller at its option, by giving a notice of at least seven (7) days, in writing to the Procurers. If the Seller elects to terminate this Agreement, the Procurers shall, within a period of thirty days, purchase the entire shareholding in the Seller for the following amount. Provided such purchase of shares shall be undertaken by the Procurers in the ratio of their then existing Allocated Contracted Capacity:

a) total amount of purchase price paid by the Successful Bidder to the shareholders of the Seller acquire the equity shares of the Seller as per the RFP; plus

b) total amount of the Declared Price of Land and Geological Report (GR) to the extent already paid by the Seller after the acquisition of its 100% shareholding by the Selected Bidder; plus

c) an additional sum equal to ten percent (10%) of the sum total of the amounts CIVIL APPEAL NO. 11826 OF 2018 etc. mentioned in sub-clauses (a) and (b).

In addition, the Performance Guarantee of the Seller shall also be released forthwith." (65) A perusal of the aforesaid articles would reveal that the parties have provided for the consequences of failure on the part of the procurers to make available land as contemplated in Article 3.1.2A. The long and short of it is that if a certain timelimit is crossed by the procurers in the performance of its obligations in this regard, the seller (the first respondent) has been given the right to repudiate the contract. What is more, it could insist on the procurers purchasing the entire share capital of the company viz., the first respondent as provided therein. It is not the case of the first respondent that by invoking the aforesaid articles, the first respondent purported to repudiate the contract. On the other hand, it is the common case that the contract continued to be alive and it has survived subject to the claims which have been raised thereunder. This would mean CIVIL APPEAL NO. 11826 OF 2018 etc. that as the consequences of failure to perform the task having been provided in the contract in the manner provided, we should not ordinarily tarry further to ask as to whether this would provide the premise for a change in law as contemplated under Article 13.1.1. We necessarily pose the question still, whether this would be change in law. Not that we are unmindful of the fact that the two bodies have concurrently found that there is no change in law and the attempt is to dislodge such a finding by a side wind in the manner of speaking by an attack lodged by the respondent in the appeal. This is not a case where the first respondent has made use of the land for the purpose of laying the pipeline through the corridor as contemplated and found that drawing water from the water intake system as contemplated would have resulted in water not being available in sufficient quantity through the length of the year. There is no such case. (66) The case of the first respondent, on the other hand, is that the PPA having been signed on 07.08.2007, in the second week of December of the CIVIL APPEAL NO. 11826 OF 2018 etc. very same year-2007, in order to confirm the availability of water through water intake system as contemplated in the first WAPCOS report, the second report was commissioned ironically through the very same consultant. There is no case, whatsoever, that having made attempts to draw water in terms of the first WAPCOS report and having found that such an effort failed, they were compelled to seek recourse to

a second study albeit by the same body. No reasons are forthcoming as to what inspired the first respondent to commission the second study. Secondly, this is not a case where the procurers brought about any change in law in the study on their own or they persuaded or compelled the first respondent to change the corridor for the route for laying of the pipeline. The first respondent did not even involve the procurers in the second study. There is no intimation given that the first respondent was commissioning a new study. There is no basis forthcoming as to what prompted the first respondent to commission a fresh study. What is stated is only that it wished to confirm the CIVIL APPEAL NO. 11826 OF 2018 etc. availability of water in terms of the first water intake study. In other words, we must sum up as follows:

> (67) Even in terms of the case built around Part II of Schedule 2 to the PPA under which the performing of the task mentioned in Article 3.1.2A within the time provided was to be treated as a deemed initial consent, the consequence of failure to do that have been expressly spelt out as we have already noticed.

At best or at worst, it could have empowered the first respondent to rescind the contract. That apart, we are not in a position, for the reasons which we have indicated already, to come to the conclusion that it would amount to change in law. While on change in law, we may notice another aspect of the matter.

(68) Article 13.3.1 reads as follows:

> "13.3.1 If the Seller is affected by a Change in Law in accordance with Article 13.2 and wishes to claim a Change in Law under this Article, it shall give notice to the Procurers of such Change in Law as soon as reasonably practicable after becoming aware of the same or should reasonably have known of the Change in Law." CIVIL APPEAL NO. 11826 OF 2018 etc. (69) Thus, the PPA contemplates that if the seller is affected by change in law and wishes to claim change in law, it has to notify the procurers of the change in law as soon as is reasonably practicable after becoming aware of the same. It may be true that on the basis of the request made by the first respondent apparently based on the second WAPCOS report that the first respondent has taken steps for acquiring the land needed for laying the pipeline.

It may be true that the said pipeline had to cross a greater distance. It is not as if it was on the basis that the procurers rendered themselves liable in law or held themselves liable in law to make good the escalation in cost. There is no such material made available indicating that the procurers have held out that they will be liable. It is not in dispute that the first unit from the power plant was in fact commissioned in August, 2012. In fact, when we asked as to whether a notice was given in terms of Article 13.3.1, Shri Amit Kapur, learned counsel, could not point out to any such notice except the notice which was given on 15.12.2012. In this regard CIVIL APPEAL NO. 11826 OF 2018 etc. also, we may notice the contents of the said notice:

> "5.2 Additional expenditure incurred due to change in Declared Price of Land, cost of implementation of resettlement and rehabilitation package of land, change in

customs duty on mining equipment, water intake system etc.

(a) the actual expenditure incurred by SPL towards land, implementation of resettlement and rehabilitation package of land for the project, water intakes system, customs duty on mining equipment and excise duty on cement and steel." (70) Therein all that is indicated is that for the water intake the original cost was put Rs.92 crores whereas the estimated cost has been Rs.238 crores Contemporaneous with the change in law alleged and in keeping with Article 13.3.1, there is no notice brought to our notice.

(71) No doubt, Shri Amit Kapur, learned counsel for the first respondent, did attempt to draw inspiration from the Minutes of the Meeting which took place on 20.03.2013 as per which the lead procurer appears to have agreed to the change. The case of Mr. Amit Kapur, learned counsel, that the lead procurer can bind the other procurers is CIVIL APPEAL NO. 11826 OF 2018 etc. contested by Shri M. G. Ramachandran, learned senior counsel.

(72) We have noticed that a notice in terms of Article 13.3.1 notifying the change in law as claimed today before the Court was not given at the relevant time.

(73) The argument that the procurers agreed to the acquisition of the land through which the new route had to travel also does not appeal to us as firmly founding the claim of the first respondent in law.

The matter must be viewed from the prism of the specific provisions defining the change in law and the actual change in law which is as we have explained above. In short, being awarded a contract and having entered into the PPA and without any basis as such in facts, the first respondent ventured to commission a new study and acting on the same, a new pipeline corridor came on the scene. Necessarily the cost may go up. But the question we are to decide is as to whether it is change in law and we are of the view that it could not be a change in law as contemplated in the agreement as it is not CIVIL APPEAL NO. 11826 OF 2018 etc. a change in initial consent which is the only case which has been argued in this regard. (74) The argument further is only that the estimated cost was Rs.92 crores and a further sum in excess of the same had to be spent. In this regard, we may notice the following clause in the PPA:

"5.2 The Site The Seller acknowledges that, before entering into this Agreement, it has had sufficient opportunity to investigate the Site and accepts full responsibility for its condition (including but not limited to its geological condition, on the Site, the adequacy of the road and rail links to the Site and the availability of adequate supplies of water) and agrees that it shall not be relieved from any of its obligations under this Agreement or be entitled to any extension of time or financial compensation by reason of the unsuitability of the Site for whatever reason.

> The State Government authorities would be implementing the resettlement and rehabilitation package ("R&R") in respect of the Site for the Project, for which the costs is to be borne by the Seller. The Procurers shall endeavour to ensure that the State Government implements such R&R ensuring that land for different construction activities becomes available in time so as to ensure that the Power Station and each Unit is commissioned in a timely manner. Assistance of the Seller may be sought, which he will provide on best endeavour basis, in execution of those activities of the R&R package and as per estimated costs, if execution of such CIVIL APPEAL NO. 11826 OF 2018 etc. activities is in the interest of expeditious implementation of the package and is beneficial to the Project affected persons." (75) Moving on to the findings actually which have been rendered by the Tribunal, the Tribunal has, in the impugned order, found that the first report of the WAPCOS is grossly erroneous. We are at a loss to understand as to what was the basis for rendering such a finding. Without any material, it is a little inexplicable as to how the Tribunal could have rendered such a finding which has serious consequences as we have noticed. This is after finding undoubtedly that there is no change in law.

Virtually, the Tribunal has brushed aside the disclaimer clauses. Before we go to the disclaimer clauses, we may also indicate that a perusal of the first WAPCOS report indicates that it is a fairly elaborate report. The second WAPCOS report apart from it being prepared without reference to the procurers as we have noticed does not appear to say anything which is critical of the first WAPCOS report. At least, there is, in fact, no express CIVIL APPEAL NO. 11826 OF 2018 etc. whisper about the first report. All that the second WAPCOS report seems to indicate is upon being awarded the work, WAPCOS has gone about preparing another report. At least we are unable to find as to how the Tribunal could on the basis of the second report find that the first WAPCOS report was grossly erroneous. The Tribunal has not undertaken a comparative study of the two reports. There is no discussion whatsoever of the two reports. Nor is there any other material provided to render such a finding. The only area where we find what could perhaps be understood as a reference to the first report is clause 4.2.2. It reads as follows:

> "4.2.2. As intimated by project authority that and acquisition of pipeline corridor on the right side of Vallabhh Pant Sagar is in the final stages and other information gathered during site visit by WAPCOS/CWPRS team by local enquiry survey area 'A' was identified for detailed survey during detailed survey it is found that sufficient depth is not available for intake well as bed level of the reservoir is around 252.5 and this was also in a small patches. So, this area is discarded." (76) It would appear that the word 'project CIVIL APPEAL NO. 11826 OF 2018 etc. authority' according to Shri M.G. Ramachandran is to be understood as the first respondent. All that even clause 4.2.2 indicates is that the first respondent intimated that the acquisition for the pipeline corridor was in its final stages and thereafter it is indicated that during the detailed survey, it was found sufficient depth is not available.
>
> (77) We do not think this can be the basis for acting upon the second report after describing the first report as grossly erroneous.

(78) Now we may consider the disclaimer clauses.

The disclaimers have their genesis in the guidelines. Note 4 of the RFP indicates that the procurers apart from their Directors, employees must not be treated as having made any representation or warranting whatsoever in respect of any statements or omissions or the accuracy, completeness or reliability of information contained therein. They were not to incur any liability under any law inter alia even if any loss or damage is caused to the bidder by any act or omission on their part. Again CIVIL APPEAL NO. 11826 OF 2018 etc. clause 1.4 of the RFP clearly indicated to the bidders that the procurers inter alia do not make any representation or accept any responsibility or liability in respect of any statements or omissions made in the water intake study report and the project report. There is a specific disclaimer also about the accuracy, completeness or reliability of information contained therein. This is even if any loss or damage is caused to the selected bidder by any act or omission on their part. Thus, in respect of the water intake study report, the prospective seller or the bidders were specifically told in no uncertain terms that any statements or omissions in water intake study report would not result in the procurers being visited with liability even if there was loss or damage caused to the selected bidder. This must be borne in mind at this juncture for the following reasons.

(79) The first respondent has a case that water intake system goes to hydrology whereas in relation to geology, the first respondent was duty bound to make its own inquiries. Since the connect between CIVIL APPEAL NO. 11826 OF 2018 etc. hydrology and water intake system is real and since in regard to conditions about hydrology, the first respondent relied on the procurers or the report prepared by a public sector unit, in particular, they should stand relieved of any obligation to conduct any further inquiry on their own, runs the argument.

(80) We are afraid that this argument cannot hold water as the need for making more inquiry in relation to geology cannot relieve the bidder from the operation of other clauses. A just result in the matter of what a contract produces by way of a legal relationship must be viewed holistically on a harmonious survey of all the relevant clauses. In any other approach, the result would have the effect of rendering specific clauses dealing with the topic in question dead letter. In view of clause 1.4 of the RFP, in other words, the bidder was duty bound if it felt advised to check the correctness of the report made by the WAPCOS. It could have undertaken its own study. What it did four months after it was granted the contract and entered into the PPA, it CIVIL APPEAL NO. 11826 OF 2018 etc. could have done before it decided to make the bid and enter into the PPA. At least we are not shown anything which stood in the way of the bidder conducting its own study and being convinced by the correctness of the report. We say this for the reason that what is involved is an international competitive bid. The bidding process is the foundation for the determination of the price in terms of section 63 of the Act. The Commission approves the rates on being convinced that the rates are fair and competitive and arrived at on the basis of a fair bidding process. The provisions of the RFP must, therefore, be viewed from the perspective of it placing on alert the bidders about the imponderables which are inevitably involved in pricing process. This means that having regard to clause 1.4 of the RFP, no bidder could possibly come forward with the claim that the contents of the WAPCOS report must be treated as sacrosanct and infallible and that it should not be taken without a generous pinch of salt as it stands. At least this was the message which is writ

large in the said CIVIL APPEAL NO. 11826 OF 2018 etc. clause. He who acted disregarding the caveat about the report acted at his own peril.

(81) Again, we do notice clause 2.7.2 of the RFP which we have indicated already. It contemplates the duty on the part of the bidder to make independent inquiry and to satisfy itself with regard to the required information, inputs, conditions, circumstances, which may affect the bid. This is apart from the site as referred to in the PPA in clause 5.2 which we have already referred to. (82) With the wealth of disclaimer clauses which we have noticed, we are unable to subscribe to the reasoning adopted by the Tribunal. We are of the view that the Tribunal was wrong in brushing aside the specific and unambiguous disclaimers under which the procurers stood exonerated from liability. (83) One argument which we must notice at this stage is the effect of Article 13.2. We have already adverted to Article 13.2. Article 13.2, no doubt, indicates that while determining the consequence of change in law, the parties shall have due regard to CIVIL APPEAL NO. 11826 OF 2018 etc. the principle that the purpose of compensating the party affected by any change in law is to restore through monthly tariff payments the affected party to the same economic position as if such change has not occurred. We have tested the hypothesis by deliberately omitting a crucial part in Article 13.2 which are the words 'to the extent contemplated in this Article 13'. When we read the words 'to the extent contemplated in this Article 13' as part of the Article 13.2, it necessarily brings in clause

(a) and (b) of Article 13.2. In other words, what the parties have contemplated is that consequence of change in law would result in it being addressed through the mechanism of monthly tariff payments through supplementary bills(see Article 13.4.2). But it is to the extent as contemplated in Article

13. The question would arise as to whether the parties contemplated that it gave authority to the competent body viz., the Commission to discard the formula which is provided in Article 13.2(a) and

(b). We are of the view that what the parties contemplated under Article 13.2 was that change in CIVIL APPEAL NO. 11826 OF 2018 etc. law must be viewed through the specific provisions of clauses (a) and (b). In other words, a change in law may occur during the period of construction. Then it is to be treated as falling under Article 13.2(a). A change in law may occur during the period of its operation. It would then appear to be dealt with under clause (b). If a change in law takes place during the period of construction then its impact is to be measured with reference to the capital cost of the project. The word 'capital cost' understandably has been defined in PPA. A formula has been engrafted. The formula contemplates that for every increase/decrease of each Rs.50 crores in the capital cost as a result of the change in law, the increase/decrease in the non- escalable capacity charges is to be 0.267 per cent of the non-escalable capacity charges. No doubt, this is if the seller provides to the procurers documentary proof of such increase/decrease in establishing the impact of such change. (84) In other words, the effect of change in law during the construction period is captured by CIVIL APPEAL NO. 11826 OF 2018 etc. 13.2(a). We must understand that this is a meticulously thought through contract which emerged after a long rigorous process. Parties were clear about how the change in law had to be compensated and methodology has been set out clearly. Therefore, any appeal made to the general part in Article 13.2 which speaks about the affected party being restored to the same economic condition as if such change in law had not occurred cannot result in departing from the specific formula which has been set in place. This meaning is inevitable

from the words "to the extent contemplated in this Article 13, which precedes the general words. In this regard, we may refer to the judgment of this Court in Uttar Haryana Bijli Vitran Nigam Ltd. & Anr.1. In the said judgment, it has been relied upon understandably by the first respondent also and which also arose under the same clause (Article 13.2), this Court has held inter alia as follows:

> "10. Article 13.2 is an in-built restitutionary principle which compensates 1 Uttar Haryana Bijli Vitran Nigam Ltd. & Anr. v. Adani Power Limited & Ors. (2019) 5 SCC 325 CIVIL APPEAL NO. 11826 OF 2018 etc. the party affected by such change in law and which must restore, through monthly tariff payments, the affected party to the same economic position as if such change in law has not occurred. This would mean that by this clause a fiction is created, and the party has to be put in the same economic position as if such change in law has not occurred i.e. the party must be given the benefit of restitution as understood in civil law. Article 13.2, however, goes on to divide such restitution into two separate periods.

The first period is the "construction period" in which increase/decrease of capital cost of the project in the tariff is to be governed by a certain formula. However, the seller has to provide to the procurer documentary proof of such increase/decrease in capital cost for establishing the impact of such change in law and in the case of dispute as to the same, a dispute resolution mechanism as per Article 17 of the PPA is to be resorted to. It is also made clear that compensation is only payable to either party only with effect from the date on which the total increase/decrease exceeds the amount stated therein.

13. A reading of Article 13 as a whole, therefore, leads to the position that subject to restitutionary principles contained in Article 13.2, the adjustment in monthly tariff payment, in the facts of the present case, has to be from the date of the withdrawal of exemption which was done by administrative orders dated 6-4-2015 and 16- 2-2016. The present case, therefore, falls within Article 13.4.1(i). This being the case, it is clear that the adjustment in monthly tariff payment has to be effected from the date on which the exemptions given were withdrawn. This being the case, monthly invoices to be raised by the seller after such change in tariff are to appropriately CIVIL APPEAL NO. 11826 OF 2018 etc. reflect the changed tariff. On the facts of the present case, it is clear that the respondents were entitled to adjustment in their monthly tariff payment from the date on which the exemption notifications became effective. This being the case, the restitutionary principle contained in Article 13.2 would kick in for the simple reason that it is only after the order dated 4-5-2017 [Adani Power Ltd. v. Uttar Haryana Bijli Vitran Nigam Ltd., 2017 SCC OnLine CERC 66] that CERC held that the respondents were entitled to claim added costs on account of change in law w.e.f. 1-4-2015. This being the case, it would be fallacious to say that the respondents would be claiming this restitutionary amount on some general principle of equity outside the PPA. Since it is clear that this amount of carrying cost is only relatable to Article 13 of the PPA, we find no reason to interfere with the judgment of the Appellate Tribunal.

19. Lastly, the judgment of this Court in Energy Watchdog v. CERC [Energy Watchdog v. CERC, (2017) 14 SCC 80 : (2018) 1 SCC (Civ) 133] was also relied upon. In this judgment, three issues were set out and decided, one of which was concerned with a change in law provision of a PPA. In holding

that change in Indonesian law would not qualify as a change in law under the guidelines read with the PPAs, this Court referred to Clause 13.2 as follows : (SCC p. 131, para 57) "57. ... This being so, it is clear that so far as the procurement of Indian coal is concerned, to the extent that the supply from Coal India and other Indian sources is cut down, the PPA read with these documents provides in Clause 13.2 that while determining the consequences of change in law, parties shall have due regard to the CIVIL APPEAL NO. 11826 OF 2018 etc. principle that the purpose of compensating the party affected by such change in law is to restore, through monthly tariff payments, the affected party to the economic position as if such change in law has not occurred." There can be no doubt from this judgment that the restitutionary principle contained in Clause 13.2 must always be kept in mind even when compensation for increase/decrease in cost is determined by CERC." (Emphasis supplied) (85) We are of the view that the view which we have taken does not in any way conflict with the view which has been laid down by this Court. (86) No doubt, in Energy Watchdog2 again a judgment which is relied upon by both the sides, the Court was dealing with a case under the Act and has expressed the following view:

> "19. The construction of Section 63, when read with the other provisions of this Act, is what comes up for decision in the present appeals. It may be noticed that Section 63 begins with a non obstante clause, but it is a non obstante clause covering only Section
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> 62. Secondly, unlike Section 62 read with Sections 61 and 64, the appropriate Commission does not "determine" tariff but only "adopts" tariff already determined under Section 63. Thirdly, such "adoption" is only 2 Energy Watchdog v. Central Electricity Regulatory Commission and Others (2017) 14 SCC 80 CIVIL APPEAL NO. 11826 OF 2018 etc. if such tariff has been determined through a transparent process of bidding, and, fourthly, this transparent process of bidding must be in accordance with the guidelines issued by the Central Government. What has been argued before us is that Section 63 is a standalone provision and has to be construed on its own terms, and that, therefore, in the case of transparent bidding nothing can be looked at except the bid itself which must accord with guidelines issued by the Central Government. One thing is immediately clear, that the appropriate Commission does not act as a mere post office under Section 63. It must adopt the tariff which has been determined through a transparent process of bidding, but this can only be done in accordance with the guidelines issued by the Central Government. Guidelines have been issued under this section on 19-1-2005, which guidelines have been amended from time to time. Clause 4, in particular, deals with tariff and the appropriate Commission certainly has the jurisdiction to look into whether the tariff determined through the process of bidding accords with Clause 4.

20. It is important to note that the regulatory powers of the Central Commission, so far as tariff is concerned, are specifically mentioned in Section 79(1). This regulatory power is a general one, and it is very difficult to state that when the Commission adopts tariff under Section 63, it functions dehors its general regulatory power under Section 79(1)(b). For one thing, such regulation takes place under the Central Government's guidelines. For another, in a situation where there are no

guidelines or in a situation which is not covered by the guidelines, can it be said that the Commission's power to "regulate" tariff is completely done away with? According to us, this is not a correct way of reading the CIVIL APPEAL NO. 11826 OF 2018 etc. aforesaid statutory provisions. The first rule of statutory interpretation is that the statute must be read as a whole. As a concomitant of that rule, it is also clear that all the discordant notes struck by the various sections must be harmonised. Considering the fact that the non obstante clause advisedly restricts itself to Section 62, we see no good reason to put Section 79 out of the way altogether. The reason why Section 62 alone has been put out of the way is that determination of tariff can take place in one of two ways — either under Section 62, where the Commission itself determines the tariff in accordance with the provisions of the Act (after laying down the terms and conditions for determination of tariff mentioned in Section 61) or under Section 63 where the Commission adopts tariff that is already determined by a transparent process of bidding. In either case, the general regulatory power of the Commission under Section 79(1)(b) is the source of the power to regulate, which includes the power to determine or adopt tariff. In fact, Sections 62 and 63 deal with "determination" of tariff, which is part of "regulating" tariff. Whereas "determining" tariff for inter-State transmission of electricity is dealt with by Section 79(1)(d), Section 79(1)(b) is a wider source of power to "regulate" tariff. It is clear that in a situation where the guidelines issued by the Central Government under Section 63 cover the situation, the Central Commission is bound by those guidelines and must exercise its regulatory functions, albeit under Section 79(1)(b), only in accordance with those guidelines. As has been stated above, it is only in a situation where there are no guidelines framed at all or where the guidelines do not deal with a given situation that the Commission's general regulatory CIVIL APPEAL NO. 11826 OF 2018 etc. powers under Section 79(1)(b) can then be used." (87) It is true that as far as the said case is concerned, the case arose from claims which were made under the PPA on the basis that there were changes in law apart from the argument that a case of Force Majeure was made out. It is not a case which actually on facts involved the Court dealing with a case arising from the fixation of tariff under Section 63. In fact, it arose after a PPA was approved and the rates were fixed already under Section 63. However, if we notice the contents of para 19 and 20, the principle which the first respondent seeks to canvas before us does not appear to emerge. The argument of the first respondent is that even de hors the terms of the contract, there is general regulatory power available under Section 79 of the Act. There is an overarching authority with the Commission exercising power under Section 79 which would enable it and which would empower it to grant compensation even de hors the terms of the contract it is contended. The argument appears to CIVIL APPEAL NO. 11826 OF 2018 etc. be that unlike generality of contracts, a regulated contract which is a long term contract or an incomplete contract generates space for power with the appropriate regulatory body to revisit the rates and thereby vouchsafe a fair deal to both sides, be it a seller or the procurer.

(88) What this Court has laid down in para 19 and 20 in Energy Watchdog3 may be summarized as follows:

> (89) In the case of fixation of tariff under Section 63 of the Act, what is contemplated is to begin with guidelines which have been issued under Section 63.

When the Commission is asked to exercise power under Section 63, it is beholden to the guidelines as it cannot depart from the same. In a area where the guidelines do not occupy the field, undoubtedly, the Commission is clothed with power as a regulatory body to act in the best interest of all sides and to fix the tariff in a manner which is fair in the sense bearing in mind the paramount interest of increased generation of power, the interest of the 3 Energy Watchdog v. Central Electricity Regulatory Commission and Others (2017) 14 SCC 80 CIVIL APPEAL NO. 11826 OF 2018 etc. consumer, as also ensuring of a fair return to the seller. So far so good. When the Commission exercises the power under Section 63, this power is not abridged when there are no guidelines holding the field.

(90) We are not dealing with a case where the exercise of power of the Commission under Section 63 is under review. In a case where, however, the rates are approved under Section 63 and PPA is entered into, the question would undoubtedly arise as to whether there is a power which can be described in a manner of speaking to be plenary power with the Commission under Section 79? Can there be a power which can be christened as omnibus? Can the Tribunal, in other words, disregard the express words of the contract? Can it discover a new change in law which the parties have not contemplated as change in law? In short, can the Tribunal rewrite the contract and create a new bargain?

(91) We are of the view that the Tribunal cannot indeed make a new bargain for the parties. The CIVIL APPEAL NO. 11826 OF 2018 etc. Tribunal cannot rewrite a contract solemnly entered into. It cannot ink a new agreement. Such residuary powers to act which varies the written contract cannot be located in the power to regulate. The power cannot, at any rate, be exercised in the teeth of express provisions of the contract. (92) We notice this for the reason that the first respondent has a case that what is provided in Article 13.2(a) (since we are dealing with the case of alleged change in law during the construction period) does not do justice to the parties or that it is incapable of producing a fair result and therefore, the Tribunal would necessarily be clothed with power bearing in mind its regulatory nature. In a matter where the parties have entered into a contract with express provisions, we are unable to agree with the first respondent that the Tribunal would have power to disregard the express provisions of the contract on the score that as it turns out that with passage of time and even change in circumstances, it is found that the contract cannot be worked except at a loss for the contractor. CIVIL APPEAL NO. 11826 OF 2018 etc. (93) We may, at this juncture, also notice an argument which has been raised by Shri Amit Kapur, learned counsel for the first respondent, when queried as to what would be the position if a claim of the nature were canvassed in a civil suit. The answer came that Section 18 and 19 of the Indian Contract Act, 1872 (hereinafter referred to as 'Contract Act' for brevity), provided the gateway. Section 18 of the Contract Act deals with the effect of representation or rather misrepresentation by a party made to another party to the contract. It, undoubtedly, includes a representation, however, innocent it may be. In other words, an innocent representation made to one party by another party which forms the basis for consent of the person can lead to the contract becoming voidable under Section

19. It is undoubtedly true that Section 19 also contemplates that the wronged party can insist upon the contract being performed and further, however, persevere in requiring that he be placed in the same position if he had not been led astray by the misrepresentation. There may be no dispute about

CIVIL APPEAL NO. 11826 OF 2018 etc. this principle. However, we have noticed the various clauses as contained in the disclaimer clauses. When a party to the contract states that what is contained in the first WAPCOS report and anything else as contemplated in the RFP and the PPA does not amount to a representation, we are unable to agree with the contention that it would still be considered as a representation within the meaning of Section 18 and thereby leading to a claim under Section 19 of the Contract Act. Therefore, we find that the contentions which the first respondent seeks to raise under the provisions of Section 18 and 19 untenable.

(94) Reliance was placed on the judgment of this Court PTC India Limited v. Central Electricity Regulatory Commission (2010) 4 SCC 603. In PTC India Limited4, the actual question which arose was as to whether the appellate Tribunal under the Act has jurisdiction under Section 111 to examine the validity of regulations framed in exercise of power 4 PTC India Limited v. Central Electricity Regulatory Commission (2010) 4 SCC 603 CIVIL APPEAL NO. 11826 OF 2018 etc. under Section 178 of the Act. The further question which arose was whether Parliament has conferred power of judicial review on the Tribunal under Section 121 of the Act. In the course of this judgment, the Court inter alia held as follows:

> "53. Applying the abovementioned tests to the scheme of the 2003 Act, we find that under the Act, the Central Commission is a decision-making as well as regulation-making authority, simultaneously. Section 79 delineates the functions of the Central Commission broadly into two categories — mandatory functions and advisory functions. Tariff regulation, licensing (including inter-State trading licensing), adjudication upon disputes involving generating companies or transmission licensees fall under the head "mandatory functions" whereas advising the Central Government on formulation of National Electricity Policy and tariff policy would fall under the head "advisory functions". In this sense, the Central Commission is the decision-making authority. Such decision- making under Section 79(1) is not dependent upon making of regulations under Section 178 by the Central Commission. Therefore, functions of the Central Commission enumerated in Section 79 are separate and distinct from functions of the Central Commission under Section 178. The former are administrative/adjudicatory functions whereas the latter are legislative.
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> 55. To regulate is an exercise which is different from making of the regulations. However, making of a regulation under Section 178 is not a precondition to the Central Commission taking any steps/measures under Section 79(1). As stated, if there is a CIVIL APPEAL NO. 11826 OF 2018 etc. regulation, then the measure under Section 79(1) has to be in conformity with such regulation under Section 178. This principle flows from various judgments of this Court which we have discussed hereinafter. For example, under Section 79(1)(g) the Central Commission is required to levy fees for the purpose of the 2003 Act. An order imposing regulatory fees could be passed even in the absence of a regulation under Section 178. If the levy is unreasonable, it could be the subject-matter of challenge before the appellate authority under Section 111 as the levy is imposed by an order/decision-making

process. Making of a regulation under Section 178 is not a precondition to passing of an order levying a regulatory fee under Section 79(1)(g). However, if there is a regulation under Section 178 in that regard then the order levying fees under Section 79(1)(g) has to be in consonance with such regulation." (95) We are unable to see how the said judgment can advance the case of the first respondent. The question which fell for consideration and the opinion which has been rendered do not in any way detract from the view which we have taken.

Substantially, it was held that the making of regulation was not a pre condition for levying a regulatory fee under Section 79(1)(g). It is no doubt true that Commission has an adjudicatory function. It is also empowered to give opinions. CIVIL APPEAL NO. 11826 OF 2018 etc. Power to frame regulations indicates that it also has legislative powers. The point is that since in this case we are concerned with the adjudicatory function of the Commission, we are concerned with the trammels to which it is subject in the form of the express terms of the contract. All that we are holding is that in a case where the matter is governed by express terms of the contract, it may not be open to the Commission even donning the garb of a regulatory body to go beyond the express terms of the contract. It is apposite that we notice para 58 reads as follows:

"58. One must understand the reason why a regulation has been made in the matter of capping the trading margin under Section 178 of the Act. Instead of fixing a trading margin (including capping) on a case-to-case basis, the Central Commission thought it fit to make a regulation which has a general application to the entire trading activity which has been recognised, for the first time, under the 2003 Act. Further, it is important to bear in mind that making of a regulation under Section 178 became necessary because a regulation made under Section 178 has the effect of interfering and overriding the existing contractual relationship between the regulated entities. A regulation under Section 178 is in the nature of a subordinate legislation. Such subordinate legislation can even override the existing contracts CIVIL APPEAL NO. 11826 OF 2018 etc. including power purchase agreements which have got to be aligned with the regulations under Section 178 and which could not have been done across the board by an order of the Central Commission under Section 79(1)(j)." (96) While it may be open as indicated therein for a regulation to extricate a party from its contractual obligations, in the course of its adjudicatory power it may not be open to the Commission by using the nomenclature regulation to usurp this power to disregard the terms of the contract.

(97) Another argument which has been raised on behalf of the first respondent is that the guidelines were framed on 19.01.2005. Clauses 4.7 and 5.17 came to be, however, modified before the PPA was entered into and even prior to the RFP and therefore, the PPA and Article 17.3 therein has been cast in the widest terms.

(98) We have already perused Article 17.3.1.

Article 17.3 to begin with, speaks of specific instances which can trigger the dispute resolution mechanism. A case in point and close to facts is a dispute arising from a change in law, after a claim CIVIL APPEAL NO. 11826 OF 2018 etc. is denied and a resolution through settlement not being arrived at. There are other specific clauses which are part of the PPA which are adverted to in the later part of Article 17.3.1. Therefore, the argument is raised on behalf of the first respondent that the opening words of Article 17.3.1 are designedly broad to cater to situations such as are represented by the facts of this case. In other words, even irrespective of a situation being not governed by Article 13.1 in order that the restitutionary principle or the principle of an incomplete contract leading to a lifelong regulation assuring a fair return to the seller is observed, the power of revisiting of the rates is what is contemplated in the amended guideline which finds enshrinement in Article 17.3.1., it is contended. (99) In fact, when we notice the PPA, we find that apart from matters which are expressly referred to in Article 17.3.1, viz., Articles 4.7.1, Article 13.2, Article 18.1 or clause 10.1.3 of Schedule 17, there are other Articles in the PPA with which Article 17.3.1 can bear nexus with. They include CIVIL APPEAL NO. 11826 OF 2018 etc. apparently, Articles 4.5.2, 11.6.6 and 11.6.7. This is besides 12.7(e) which relates to enforcement of claims under Force Majeure. Therefore, it is not as if Article 17.3.1 is not to be understood without reference to the other parts of the contract. No Court should attempt to read a part of the contract in isolation. The draftsman of a contract of the nature we are dealing with would have not left any stone unturned in making the contract one to be construed with a great sense of harmony and care. Therefore, we do not accept the contention of the first respondent that the Commission, Tribunal and this Court must pour in meaning into the opening words of Article 17.3.1 so that in the facts, the first respondent can claim compensation on the basis that it has incurred expenditure acting on the first WAPCOS report.

(100) Here, we must notice finally, that substantially, the claim in regard to the water intake system was founded on the reliance placed on the first WAPCOS report and on the strength of the second WAPCOS report.

CIVIL APPEAL NO. 11826 OF 2018 etc. (101) We also find reinforcement in our view from the following clauses 1.2.12:

> "1.2.12 Different parts of this Agreement are to be taken as mutually explanatory and supplementary to each other and if there is any inconsistency between or among the parts of this Agreement, they shall be interpreted in a harmonious manner so as to give effect to each part." (Emphasis supplied) (102) An argument was raised by Shri Amit Kapur that the contract in the case calls for the application of the principle of contra proferentem rule.
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> (103) We are of the view that the principle of contra proferentem is ordinarily utilised in contracts of insurance and standard form contracts.
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> (104) The principle of contra proferentem apparently in substance is that in case of any doubt in its terms, the doubt should be resolved against the party who drafted the contract. We would not think in the facts of this case that the first respondent has been able to plant any serious doubt in regard to the clauses with which we are

concerned with on a true understanding of the same.

CIVIL APPEAL NO. 11826 OF 2018 etc. (105) The second complaint- The Office Memorandum dated 17.06.2011.

As far as the question relating to the OM dated 17.06.2011 providing the premise for change in law claim is concerned, we are of the view that the claim may not have merit in it. It is true that Article 13.1.1 inter alia provides that a change can be brought about by the issuance of a notification by an Indian Governmental authority. Also a change in interpretation of any law by an Indian Governmental instrumentality inter alia provided that it is final authority under law for such interpretation would constitute a change in law.

Indian Governmental Instrumentality is defined as follow: -

> "Indian Governmental Instrumentality" means the GOI, Government of States where the Procurers and Project are located and any ministry or department of or board, agency or other regulatory or quasi-judicial authority controlled by GOI or Government of States where the Procurers and Project are located and includes the Appropriate CIVIL APPEAL NO. 11826 OF 2018 etc. Commission;" (106) Law as defined in the PPA is as follows:
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> "Law" means, in relation to this Agreement, all laws including Electricity Laws in force in India and any statute, ordinance, regulation, notification or code, rule, or any interpretation of any of them by any Indian Governmental Instrumentality and having force of law and shall further include all applicable rules, regulations, orders, notifications by an Indian Govermental Instrumentatlity pursuant to or under any of them and shall include all rules, regulations, decisions and orders of the Appropriate Commission;
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> (107) While the word 'competent Court' which can also be the source of a change in interpretation of any law is expressly defined in Article 13.1.1., when it comes to the Indian Governmental instrumentality which is the final authority, is concerned, there is no definition in the PPA. The controversy is this.
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> (108) The first respondent allegedly imported goods for the purpose of construction of the captive mining plant. It is its case that the goods so imported were being used for construction of the mining plant which was in turn was utilised for the CIVIL APPEAL NO. 11826 OF 2018 etc. construction and operation of the ultra mega power plant project. Such goods according to the first respondent was expressly exempted from customs duty by virtue of the notification holding the field.

The notifications holding the field it must be understood were the notifications holding the field before the cut off date. The cut off date admittedly is 21.07.2007. In other words, the said date is the date which is seven days before the bid deadline. The OM which is the premise for the argument has

been issued by the Director no doubt with the approval of the Joint Secretary in the Ministry of Power. It reads as follows:

> "No. 12/20/2009-UMPP Government of India Ministry of Power Shram Shakti Bhawan, Rafi marg, New Delhi, the 17th June, 2011 OFFICE MEMORANDUM Sub: 3960 MW Sasan Ultra Mega Power Project, Distt. Singrauli - Exemption from Custom Duty under project Import - reg.
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> The undersigned is directed to refer to Govt. of Madhya Pradesh's letter No. 4468/13/2011/01 dated 24.05.2011 on the subject mentioned above and to say CIVIL APPEAL NO. 11826 OF 2018 etc. that under Mega Power Policy, the Custom/Excise Duty exemption is given in respect of power equipment only.

This issues with the approval of JS (Thermal), Ministry of Power (A.A. Tazir) Director Shri Mohd. Suleman Secretary (Energy) Govt. of Madhya Pradesh, Bhopal" (109) It is the contention of the first respondent that when it imported the goods it had to pay customs duty on the same and it constituted a change in law as the OM issued by the Joint Secretary placing the interpretation constituted a change in interpretation.

(110) In other words, in contrast with the law as it stood before the cut off date, by the issuance of the OM by the Joint Secretary in the Ministry of Power, a change in interpretation of the law is brought about. This sufficed to found a claim of change in law within the meaning of Article 13.1.1 CIVIL APPEAL NO. 11826 OF 2018 etc. (111) The argument of the procurers, on the other hand, is as we have noticed is that the OM cannot be found to be issued by a Governmental instrumentality which can be treated as the final authority under law for such interpretation. It is for the reason that the notification granting exemption has been issued by the authority under the Customs Act and the Joint Secretary in the Ministry of Power is not such an authority. Secondly, it is the contention of the procurers that the matter should have been taken before the appropriate forum by the first respondent on the basis that in law, actually, the import of goods was exempt if it was exempt and it was not open to the first respondent to pass on the burden without taking recourse to law. Thirdly, it is contended that the fact of the matter is that the position even before the cut off date was that goods in question were not exempt.

(112) Since we are dealing with the notifications, we notice that the authority on Advance Ruling has gone into the history of the notifications and dealt with the same though in the context of the right to CIVIL APPEAL NO. 11826 OF 2018 etc. exemption in a mega power plant but not for an ultra mega power project. But we are of the view that as far as the history of the notifications go, it would continue to be relevant:

> "7.1 The Entry corresponding to the present Entry was introduced for the first time in 1999. As pointed out by the learned Sr. counsel for the applicant, the introduction of this Entry in the Customs notification seems to be a follow up to the policy decision taken by the Central Government as set out in the communication dated 10.11.1995 addressed by the Secretary, Ministry of Power, Government of India and the revised

policy/guidelines relating to Mega power projects issued in 1998. The policy formulated in 1995 was in relation to the "setting up of power plants of capacity of 1000 MW or more supplying power to more than one state". In that policy document, it is stated that the "project of capacity of 1000 MW and more and catering power to more than one state should be considered as a mega project. Projects which cater power to a single State, irrespective of size, would not come under this category". In the policy which has been recast in 1998, it was decided that inter-state and inter-regional mega power projects were to be set up both in the public and private sectors. The re-organization of the public sector corporations was also envisaged by the policy. The policy contemplates the beneficiary States constituting Regulatory Commissions with powers to fix tariff. Paragraph 5 of the guidelines is important. It says "the import of capital equipment would be free of custom duty for these projects". In order to ensure that domestic bidders were not adversely affected, certain safeguards were spelt out." CIVIL APPEAL NO. 11826 OF 2018 etc. 7.2 Entry/ Sl.No. 288A of Ch. 98.01 inserted by Notification No. 63/1999 substantially gives effect to the 1995 policy read with revised policy of 1998. The same concept of mega power project is to be found in that Entry. The Entry reads:

SL. Chapter/ Descripti Standa Addition Conditi No. heading/su on of rd al Duty on No. b-head no. goods Rate rate 288 9801 Goods Nil Nil 82 A required for setting up of any Mega Power Project specified in List33, if such Mega Power Project is-

a. an inter-state thermal power plant of a capacity of 1500MW or more; or

b. an inter-State hydel power plant of a capacity of 500MW or more.....

CIVIL APPEAL NO. 11826 OF 2018 etc. Condition No. 82 is as follows: -

82. (a) If an officer not below the rank of a Joint Secretary to the Government of India in the Ministry of Power certifies that-

(i) the power purchasing state undertakes, in principle, to privatize distribution in all cities, in that State, each of which having a population of more than one million within a period to be fixed by the Ministry of Power; and

(ii) In the case of imports by a Central Public Sector Undertaking, the quantity, total value, description and specifications of the imported goods are certified by the Chairman and Managing Director of the said Central Public Sector Undertaking; and

(c) In the case of imports by a Private Sector Project, the quantity, total value, description and specifications of the imported goods are certified by the Chief Executive Officer of such project".

"7.3 List 33 specifies by name the thermal projects and hydel projects in respect of which exemption is made applicable. Then, under Customs Notification No. 100 of 99 dated 28/7/99, the capacity of thermal power project specified in the earlier notification was altered from 1500 to 1000 MW. As a result of this notification, 7 more thermal projects were added to the list." "7.4 Then, the next notifications in succession of 2001 which are substantially the same excepting that the number of thermal and hydel projects specified in List 33 has gone down." "7.5 Then comes the Customs Notification No. 21 of 2002 dated 01.03.2002 which is material for CIVIL APPEAL NO. 11826 OF 2018 etc. our purpose. It reads as follows: -

SL Chapter/ Descripti Standar Addition Conditio . heading/su on of d Rate al Duty n No. No b-head no. goods rate .

40 9801 Goods Nil Nil 86 0 required for setting up of any Mega Power Project specified in List42, if such Mega Power Project is-

a. an inter-state thermal power plant of a capacity of 1000MW or more; or

b. an inter-State hydel power

plant of
a
capacity
of 500MW
or
more.....

as
certified
by an
officer
not below

CIVIL APPEAL NO. 11826 OF 2018 etc. the rank of a Joint Secretary to the Governmen t of India in the Ministry of Power "7.6 Entry 400 was amended by the Notification No. 26/2003. The said amendment was necessitated by reason of the policy decision taken by the Government as reflected in the Union budget speech of 203-04. The following extract from the budged speech is relevant:

"Simultaneous to the emphasis on improvement in power distribution, our attention on capacity addition remains. The Government had earlier, in 1999, notified 18 power projected as mega projects, conferring upon them various duty and licensing benefits. The Government now proposes to liberalise the mega power project policy further by extending all these benefits to any power project that fulfills the conditions already prescribed for mega power projects".

Pursuant to the above policy, Notification No. 26/2003-Cus. Was issued amending the notification no. 21/2002-Cus. Entry 400 as amended reads:

400 9801 Goods required for Nil Nil 86 setting up of any Mega Power Project that is to say -

a. an inter-state thermal power plant of a capacity of 1000MW CIVIL APPEAL NO. 11826 OF 2018 etc. or more; or b. an inter-State hydel power plant of a capacity of 500MW or more..... as certified by an officer not below the rank of a Joint Secretary to the Government of India in the Ministry of Power" "7.7 The amended notification no. 21 of 2002 is almost in the same language as it stands now (vide para 3 supra). Thus, w.e.f. 1/4/2003, the list of specified power projects has been deleted in tune with the liberalized policy of the Government. Further, it is to be mentioned that Entry 400 of notification no.21 of 2002 was further amended keeping in view the revised policy guidelines issued in order to cater to the special requirements of power projects in Jammu and Kashmir and NE States. Entry 399 substantially remained the same from 1999 onwards excepting that there was change in the Sl. No. and the rate." (113) The order of the Advance Ruling Authority is dated 19.12.2008. No doubt, it is after the cut off date. The case of the first respondent is not based

on the order of the Advance Ruling Authority. The case of the first respondent is specifically based only on the OM issued by the Joint Secretary in the Ministry of Power. We may notice that Joint CIVIL APPEAL NO. 11826 OF 2018 etc. Secretary in the Ministry of Power has a role in terms of the notification. The role assigned to him is contained in condition 82 to the notification 63/1999 and this condition has continued thereafter also. The condition as we have noticed is that it is stated that an officer not below the rank of a Joint Secretary is to certify the aspects which are mentioned in condition 82.

(114) It is difficult, in fact, to describe the Joint Secretary in the Ministry of Power as the Governmental authority which is the final authority under the law. The final authority under the law would be the authority under the Customs Act which issues the exemption notification. But we would not wish to rest our findings on the said basis as we feel that the objection of the procurers can rest on surer foundations. The first respondent also relies upon no doubt, the notification dated 26.05.2006 wherein it is indicated as follows:

> "Notification No.49/2006-Customs In exercise of the poowers conferred by sub-section (1) of Section 25 of the Customs Act, CIVIL APPEAL NO. 11826 OF 2018 etc. 1962 (52 of 1962), the Central Government, on being satisfied that it is necessary in the public interest to do so, hereby makes the following further amendments in the notification of the Government of India in the Ministry of finance (Department of Revenue) No.21/2002- Customs, dated the 1st March, 2002, which was published in the Gazette of India, Extraordinary vide number G.S.R. 118(E), dated the 1st March, 2002, namely:-
>
> (I) in the Table, against S.No.400, for the entry in column (3), the following entry shall be substituted,namely:-
>
> "Goods required for setting up of any Mega Power Project, so certified by an officer not below the rank of Joint Secretary to the Government of India in the Ministry of Power, that is to say-
>
> (a) an inter-state thermal power plant of a capacit of 700MW or more, located in the States of Jammu and Kashmir, Sikkim, Arunachal Pradesh, Assam, Meghalaya, Manipur, Mizoram, Nagaland and Tripura,or
>
> (b) an inter-state thermal power plant of a capacity of 1000MW or more, located in States other than those specified in clause(a) above; or
>
> (c) an inter-state hydel power plant of a capacity of 350MW or more, located in the States of Jammu and Kashmir, Sikkim, Arunachal Pradesh, Assam, Meghalaya, Manipur, Mizoram, Nagaland and Tripura,or
>
> (d) an inter-state hydel power plant of a capacity of 500MW or more, located in States other than those specified in Clause(C) above", (II) in the Annexure, in

Condition No.86, for sub-clauses (ii) and (iii) of clause(A), the following shall be substituted, namely:-

"(ii) the power purchasing State CIVIL APPEAL NO. 11826 OF 2018 etc. undertakes, in principle, privatize distribution in all cities, in that State, each of which has a population of more than one million, within a period to be fixed by the Ministry of Power." (115) The Tribunal has, in fact, proceeded on the basis that the goods in question would fall under Entry 400 relating to power projects and therefore, they were exempted. The Tribunal proceeded further on the basis that the notification dated 17.06.2011 issued by the Joint Secretary amounted to an interpretation which constitutes a change in law.

(116) We are of the view that the approach of the Tribunal cannot be upheld. There is no material, whatsoever, apart from the notifications to indicate that the goods in question were being treated as exempt before the cut off date. In other words, it was incumbent upon the first respondent to produce incontestable material establishing that the goods were exempt and were being treated so before the cut off date. The best material would have been examples of similar cases where goods were being treated as exempt. Even though, it is pointed out CIVIL APPEAL NO. 11826 OF 2018 etc. that the first respondent was the only ultra mega power plant, even then power plants including mega power plants were operational. It is difficult to conceive that there would not be a single case where similar inputs by way of examples of other power projects even if it is not ultra mega power projects would not have operated for the first respondent to draw from.

(117) The word law has been defined as we have noticed. While the expression 'Indian Governmental Instrumentality' is used in the definition of the word law in Article 13.1.1, the change in interpretation of any law by an Indian governmental authority must be the final authority under the law for such interpretation. It may be difficult to attribute to the Joint Secretary in the Ministry of Power the position of an Indian Governmental Authority who has the final authority under the law.

But as we have indicated this must not be treated as the basis on which we disagree with the Tribunal. (118) The perusal of the OM does not advance the case of the first respondent for yet another good reason. CIVIL APPEAL NO. 11826 OF 2018 etc. He does not in the OM indicate that the goods in question had been exempted before the cut off date and that the goods becoming exigible to duty on the date after the cut off date. The Authority for Advance Ruling has categorically affirmed that the goods of the type with which we are concerned may not qualify for exemption. The appellants have a case that, in fact, the Joint Secretary was essentially following the Advance Ruling. While it is true that the Advance Ruling may not bind the first respondent as it is not a party, and the respondent could not have sought a ruling under the law, it is undoubtedly an aspect which otherwise adds strength to the case of the appellants. There may be cases where placing the notification holding the field before the cut off date side by side to the subsequent notification or an interpretation issued after the said cut off date, the Commission or a Tribunal could find that there

is change in law, which added to the cost to the seller. On the other hand, when the case of the first respondent involves interpretation of the terms of the CIVIL APPEAL NO. 11826 OF 2018 etc. notification then particularly when two views are fairly competing for acceptance before the body, at best, we would think that the Tribunal has hazarded taking a perilous route in venturing to find that the OM issued by the Joint Secretary constituted the change in law. Though reliance has been placed on the judgment of this Court reported in Manohar Lal Sharma v. Principal Secretary & Ors. (2014) 9 SCC 516 and Manohar Lal Sharma v. Principal Secretary & Ors. (2014) 9 SCC 614 which decisions purported to exempt the mining leases which were captive leases operating for the purpose of the power projects including the power projects specifically in question from the purview of its decision, we do not think that that by itself can determine the question as to whether the goods which were imported for the purpose of the captive mining plant was ever exempt. What was exempt has been goods imported for the purpose of the Power project. In other words, as to whether the goods in question were goods which fell within one entry or the other is in this case a matter which is highly disputed and the premise of CIVIL APPEAL NO. 11826 OF 2018 etc. the first respondent viz., the OM of the Joint Secretary cannot be treated as being a sound foundation for making such a claim. (119) The parties indeed contemplated a project to be constructed and operated. The word 'project' we find has been used in many clauses in the contract. The word 'project' has been defined as follows:

> ""Project" means the Power Station and the Captive Coal Mine(s) undertaken for design, financing, engineering, procurement, construction, operation, maintenance, repair, refurbishment, development and insurance by the Seller in accordance with the terms and conditions of this Agreement;" (120) Since the word 'power station' has been used in word 'project', it is apposite that we advert to the definition of the words 'power station':
>
> "Power Station" means the:
>
> (a) coal fired power generation facility comprising of any or all the Units;
>
> (b) any associated fuel handling, treatment or storage facilities of the power generation facility referred to above;
>
> (c) any water supply, treatment or storage facilities required for the operation of the power generation facility referred to above;
>
> (d) the ash disposal system including ash dyke;

CIVIL APPEAL NO. 11826 OF 2018 etc.

(e) township area for the staff colony; and

(f) bay/s for transmission system in the switchyard of the power station,

(g) all the other assets, buildings/structures, equipments, plant and machinery, facilities and related assets require for the efficient and economic operation of the power generation facility; whether completed or at any stage of development and construction or intended to be developed and constructed as per the provisions of this Agreement." (121) Since the word 'captive coal mine' has also been referred to as part of the definition of the word 'project', it is only right that we advert to the definition:

> "Captive Coal Mine(s) means the captive coal mines as described in Schedule 1A and associated fuel transport system up to the Power Station;" (122) 'Project Documents" again has been defined. We may also notice the definition of the words 'Prudent Utility Practices':
>
> "Project documents Mean
>
> a) Construction Contracts;
>
> b) Fuel mining agreements, including the Fuel Transportation Agreement, if any;
>
> c) O&M contracts;

d) RFP and RFP Project Documents; and

e) any other agreements designated in writing as such, from time to time, jointly by the Procurers and the Seller;

"Prudent Utility Practices means the practices, methods and standards that are generally accepted internationally from time to time by electric utilities or coal mining entities for the purpose of ensuring the safe, efficient and economic design, construction, commissioning, operation and maintenance of coal mines and power generation equipment and mine of the type specified in this Agreement and which practices, methods and standards shall be adjusted as necessary, to take account of:

> a) operation and maintenance guidelines recommended by the manufacturers of the plant and equipment to be incorporated in the Project;
>
> b) the requirements of Indian Law; and
>
> c) the physical conditions at the Site;" (123) We have set out the history of the notifications relating to grant of exemption for power projects. All of it began with the policy issued in the year 1995. The exemptions had their origin with the notification issued in the year 1999. Thereafter there is Notification 21/2002 which was issued on 01.03.2002. Entry 400 in the said notification reads as follows:

	g or Sub-Headin g			Rate	
400	98.01	"Goods required for setting up of any Mega Power Project, so certified by an officer not below the rank of a Joint Secretary to the Government of India in the Ministry of Power, that is to say- a) an inter-state thermal power plant of a capacity of 700 MW or more, located in the States of Jamnu and Kashmir, Sikkim, Arunachal Pradesh, Assam, Meghalaya, Manipur, Mizoram, Nagaland and Tripura; or b an inter-state thermal power plant of a capacity of 1000 MW or more, located	Nil	Nil	86

CIVIL APPEAL NO. 11826 OF 2018 etc. in States other than those specified in clause (a) above; or c an inter-

state hydel power plant of a capacity of 350 MW or more, located in the States of Jammu and Kashmir, Sikkim, Arunachal Pradesh, Assam, Meghalaya, Manipur, Mizoram, Nagaland and Tripura; or d an inter-state hydel power plant of a capacity of 500 MW or more, located in States other than those specified in clause (c) above";

(124) Thereafter another notification namely

Notification No. 26/03 which has given a final shape to it came to be issued which has been noticed also by the Authority of Advance Ruling. It reads as follows:

CIVIL APPEAL NO. 11826 OF 2018 etc. 400 9801 Goods required for Nil Nil 86 setting up of any Mega Power Project that is to say -

a. an inter-state thermal power plant of a capacity of 1000MW or more; or b. an inter-State hydel power plant of a capacity of 500MW or more..... as certified by an officer not below the rank of a Joint Secretary to the Government of India in the Ministry of Power (Emphasis supplied) (125) We may notice that with the issuance of the said notification what stands out is the following:

(126) While in the opening words of the Entry, there is reference to power project, it is conditioned by the words 'that is to say'. We can quite safely proceed on the basis that Entry 400 in the Notification No. 21/2002 which came into effect on 01.03.2002 as amended by Notification No. 46/2008 is the Entry which must be treated as holding the field as on the cut off date. It is thereafter, no doubt, that the first respondent has invoked the change in CIVIL APPEAL NO. 11826 OF 2018 etc. law clause by seeking to draw inspiration from the OM issued on 17.06.2011.

(127) Change in law clause is sought to be invoked apparently contending that there has been a change in interpretation by Indian Governmental Authority which has the final say in terms of the law. The question which looms large before the Court is whether there has been a change in law in terms of 'change in interpretation' placed by the Governmental authority with reference to the position obtaining under the notifications issued under the Customs Act. Even the clauses in the PPA which we have referred to maintain a distinction between a power plant and a captive mine. A power plant cannot be treated as the same as captive mine. In fact, Schedule 1A which defines the site refers to the captive mines in terms of the coal blocks which are allotted. The definition of captive mine also indicates that it is the coal mines as described in Schedule 1A and the associated fuel transport system up to the power station. No doubt, the word 'site' has also been defined as the land CIVIL APPEAL NO. 11826 OF 2018 etc. over which the Project will be developed as provided in Annexure 1A.

(128) Undoubtedly, in view of the very purpose of having a coal mine which is to supply the requisite fuel for the operation of the power plant, there would be a certain measure of geographical contiguity. But the question for the consideration before this Court is whether that would decide the fate of the contents of a notification issued under the Customs Act.

(129) We must notice that it is not as if the first respondent is the only person which had a right to claim the benefit of exemption on the basis that the goods which have been imported for the purpose of their captive mine must be treated as goods used in the power project. As the history of the notifications as captured in order of the Advance Ruling Authority would show over a period of time, there have been a number of power plants which have sprung up. All of them would also be using captive mines for the purpose of generating power. It is not as if there would be a dearth of examples of CIVIL APPEAL NO. 11826 OF 2018 etc. exemption being extended to imports made by them and claiming the benefit of exemption under the notification. Not a single instance of an exemption granted to any other project where goods imported for use in the captive mine has been produced before the Commission, the Tribunal or even this Court. This goes a long way to negate the claim of the first respondent that what was once exempt has ceased to be exempt only by virtue of the issuance of the OM dated 17.06.2011.

(130) There is another very important circumstance which strikes us. The material which appeals to us is to be found undoubtedly in the order of the Advance Ruling Authority relied upon by the appellant. The application, no doubt, is filed in the year 2008. What impresses the Court the most is the stand of the customs authorities before the Advance Ruling Authority. We cannot proceed on the basis that the controversy which led to the seeking of the ruling and far more importantly the

persistent stand of the customs authority before the Advance Ruling Authority would not shed light on how CIVIL APPEAL NO. 11826 OF 2018 etc. the Department viewed the matter. This is important as it is the customs department which has issued the exemption notification. Being the authors of the notification, they would be best placed to understand the width and purport of a notification granting exemption. They have stoutly opposed the application and laid out various grounds which, no doubt, has appealed also to the Advance Ruling Authority. This is an aspect which goes a long way to show that the view of the customs authority which in a manner of speaking can also be viewed as forming contemporanea expositio should not be ignored by this Court.

(131) The first respondent also sought considerable reliance in this regard from the Mega Power Projects: Revised Policy Guidelines. The relevant portions reads as follows:

> "MEGA POWER PROJECTS: REVISED POLICY GUIDELINES The following conditions are required to be fulfilled by the developer for grant of mega project status:-
>
> a) an inter-state thermal power plant of a capacity of 700 MW or more, located in the CIVIL APPEAL NO. 11826 OF 2018 etc. States of Jammu and Kashmir, Sikkim, Arunachal Pradesh, Assam, Meghalaya, Manipur, Mizoram, Nagaland and Tripura; or
>
> b) an inter-state thermal power plant of a capacity of 1000 MW or more, located in States other than those specified in clause (a) above; or
>
> c) an inter-state hydel power plant of a capacity of 350 MW or more. located in the States of Jammu and Kashmir. Sikkim, Arunachal Pradesh, Assam, Meghalaya. Manipur, Mizoram, Nagaland and Tripura: or
>
> d) an inter-state hydel power plant of a capacity of 500 MW or more, located in States other than those specified in clause (c) above' Fiscal concessions/benefits available to the Mega Power Projects Zero Customs Duty: In terms of the notification of the Government of India in the Ministry of Finance(Department of Revenue) No. 21/2002-Customs dated 18 March, 2002 read May, 2006. the import of capital equipment would be free of customs duty for these projects." (132) The understanding of the Authority for Advance Ruling appears to be that as far as the entitlement to exemption under the notification is concerned a mega power project has to be understood as confined to what follows after the words 'that is to say'. In CIVIL APPEAL NO. 11826 OF 2018 etc. other words, though the use of the words power project in entry 400 would appear to suggest that it is capable of embracing within its scope a captive mine from which the fuel is generated to run the power plant, when it came to the actual beneficiary of entry 400, the maker of the notification has confined the exemption to the goods for the purpose of the power plant. In other words, the word power project has been conflated with the power plant.

This appears to be the soul of the reasoning of the Advance Ruling Authority. While we are aware that the first respondent is not bound by the said Ruling as it is not a party, we do not find it erroneous on our part in finding merit in the logic of the same or adopting the same for the purpose of deciding the question which squarely arises before this Court viz., whether there is a change in law. (133) There is also merit in the contention of the appellant that for article 13.1.1 to be successfully invoked by the seller, it must demonstrate that there was an interpretation earlier to or as on the date of the cut off date which was advantageous to CIVIL APPEAL NO. 11826 OF 2018 etc. the seller and there has been a change in the said interpretation after the cut off date. (134) In other words, the OM issued with the approval of the Joint Secretary in the Ministry of Power does not indicate that it is a case of a change in interpretation. He does not say that the position adumbrated in the OM represents a shift or a change from what the position was prior to the cut off date. This is apart from any material being available to show that there was an interpretation in favour of the first respondent prior to the cut off date.

(135) We reiterate that no instance of exemption to goods of similar nature being imported by any person for the captive mine as part of a power project be it mega or ultra mega plant is placed before the Commission. It is one thing to say that in a popular sense and it could be urged and it may be true that the word project has been defined in the PPA as power plant and the captive coal mine, but as we have noticed this is a matter to be determined on what was intended by the author of the notification CIVIL APPEAL NO. 11826 OF 2018 etc. under Section 25 of the Customs Act and the matter is to be further determined with reference to the express terms of the Notification. Even more importantly, the question must fall to be decided with reference to the interpretation available prior to the cut off date and after cut off date. The communication, which is the OM dated 17.06.2011 relied upon by the first respondent appears to have been issued on the basis of the request made by the first respondent to the State of Madhya Pradesh. (136) Shri Amit Kapur, learned counsel on behalf of the first respondent drew our attention to Entry 78 of notification No. 21/02 dated 1.3.2002. Entry 78 reads as follows:

Sr. No.	Chapter or Heading or sub-heading	Description of goods	Standard rate	Additional rate	Condition No.
78.	2714.90	All goods, for the purpose of power generation	- Nil -		

CIVIL APPEAL NO. 11826 OF 2018 etc. (137) Shri Ramchandran, learned senior counsel, would point out that the said Entry relates to inputs for power generation. The case of the first respondent is also that Entry 399 actually specifically deals with the goods required for coal mining project under which the first respondent has been visited with customs duty.

(138) The argument of Shri Amit Kapur is that first of all, Entry 78 if contrasted with Entry 400 would show that all goods needed for a power project understood in a larger sense as including a captive coal mine would also come within four walls of Entry

400. (139) Shri Amit Kapur, learned counsel, would point out that captive coal mine envisaged as such is one where the entire production of coal is to be utilised for the power plant in question which also would indicate that it is part of the power project. It is not in dispute that whatever may be the distinction which may exist between a mega power project, an ultra mega power project (we are concerned with latter), there is no separate CIVIL APPEAL NO. 11826 OF 2018 etc. notification under the Customs Act which deals with ultra mega power project.

(140) The upshot of the above discussion is that we are of the view that the first respondent has not been able to demonstrate that there was a change in law as contemplated in Article 13.1.1 by issuance of the OM dated 17.06.2011.

RELIEF (141) The three procurers who were respondents before the Tribunal have not chosen to file appearance before this Court. The lead procurer has filed an appeal before this Court. Further, there is only one PPA. Ironically, decisions relating to Order XLI Rule 21 and Rule 33 have been placed before this Court by the first respondent reminding this Court of the power available to it. No doubt, they placed this position in an attempt at salvaging the situation arising from no appeal have been filed by it challenging the finding relating to there being no change in law in regard to the water intake system.

CIVIL APPEAL NO. 11826 OF 2018 etc. (142) In the facts of this case, we also notice that the three non-filing parties are respondents in the appeals filed by the appellants. We also cannot be unmindful of the argument of Shri P. Chidambaram and others that if the first respondent had a case that they were entitled to an exemption under the situation extant prior to the cut off date then proper remedy would be to seek refund on the basis that they have been illegally visited with customs duty.

(143) In the facts of this case, we feel that the interest of justice do require that the impugned order be set aside not only as against the appellants but also as against the three non- appellants. In the nature of the litigation, we would think that the benefit of this order should be vouchsafed to the three respondents also, viz., (1) respondent No. 12(BSES Rajdhani Power Limited); (2) respondent No. 13 (BSES Yamuna Power Limited); and (3) respondent No. 15(Uttarakhand Power Corporation Limited). Apparently, these respondents have not contested the appeals.

149.

CIVIL APPEAL NO. 11826 OF 2018 etc. (144) As we have noticed in the beginning as a sequel to the impugned order, the Commission has passed orders allowing the claim relating to the water intake system whereas it has rejected the prayer relating to change in law flowing from OM dated 17.06.2011. The affected parties have carried the matter to the Tribunal in appeals. It is brought to our notice that this Court passed an order of stay dated 25.11.2019. Since the appellants have challenged the order of the Tribunal, the subsequent order by the Commission can only be treated as a consequential order and therefore, it may not have any independent legs to stand on. The appellants must be given the fruits of the decision which ultimately is rendered in their favour, as we are rendering this judgment.

(145) Accordingly, the appeals are allowed. The impugned order is set aside. The order will enure to the benefit also of the three respondents also, viz., (1) respondent No. 12(BSES Rajdhani Power Limited); (2) respondent No. 13 (BSES Yamuna Power Limited); and (3) respondent No. 15(Uttrakhand Power CIVIL APPEAL NO. 11826 OF 2018 etc. Corporation Limited). Equally, the order passed by the Commission consequent upon the remand under the impugned order cannot survive. The appeals filed will also lose their force and it is for the appellants to do the needful to bring it to an end in the light of this judgment.

The parties will suffer their own costs.

....., J.

[K.M. JOSEPH] ....., J.

[B.V. NAGARATHNA] New Delhi;

April 06, 2023.

15a

BERORE THE NATIONAL GREEN TRIBUNAL,

PRINCIPAL BENCH, NEW DELHI

EXECUTION APPLICATION NO. 50 OF 2023 IN OA No.60 of 2014

IN THE MATTER OF:

SPCHETNA ... Applicant

VERSUS

UOI & Ors. ... RESPONDENTS

KNOW ALL to whom these present shall come that I/We, Mahesh Kapoor, partner M/s Jhankar Banquets, competent to sign affidavit and file reply, do hereby appoint Vivin Kumar Ahuja (D 2216/2022) & Associates Advocates & Consultants (Mr Kamal Joshi D881/2022), Tel 9871235758 (hereinafter called the advocate/s) to be my/our Advocates in the above noted case authorize them:-

To act, appear and plead in the above noted case before this Tribunal/Court/Authority or in any other court/tribunal in which the same may be tried or heard and also in the appellate court including High court subject to payment of fees separately for each court by me/us.

To sign, file, verify and present pleadings, appeals, cross-objections or petitions for Executions, Review, Revision, withdrawal, compromise or others petitions or Affidavits or others Documents as may be deemed necessary or proper for the prosecution of the said case in its all stages subject to payment of fees for each stages.

To File and take back Documents to admit and/of Deny the Documents of the opposite party. To withdraw or Compromise the said case or submit to arbitration any differences or disputes that may arises touching or in any manner relating to the said case.

To take execution proceeding. To deposit, draw and receive monthly cheques, cash and grant receipts thereof and to do all other acts and things which may be necessary to be done for the progress and in the course of the prosecution of the said case.

To appoint and instruct any other Legal Practitioner authorizing him to exercise the power and authority hereby conferred upon the Advocate whenever he my thinks fits to do so and to sign the power of attorney on our behalf.

And I/we undertake that I/we or my/our duly authorized agent would appear in Court on all hearing and will inform the Advocate for appearance when the case is called.

And I/we the undersigned do hereby agree not to hold the Advocate or his substitute responsible for the result of the said case. The Adjournment costs whenever ordered by the court shall be of the Advocate which he shall received and retain for himself.

That in case, the costs is imposed on me/us by court shall be paid by us/me too. And I/ we the undersigned do hereby agree that in the event of the whole or part of the fee agreed by me/us to be paid to the Advocate remaining unpaid he shall be entitled to withdraw from the prosecution of the said case until the same is paid up.

The fee settled is only for the above case and above court. I / we hereby agree that once fee is paid, I /we will not entitled for the refund of the same in any case whatsoever and if the case prolongs for more than three (3) years the original fee shall be paid again by me/us.

IN WITNESS WHEREOF we do hereunto set my/our hand to these presents the content of which have been read over & explained to me in vernacular and the same are understood by me/us on this ..... Day of ....., 2024 Accepted subject to the terms and payment of the fees.

Advocates

Client (s)

VIVIN KUMAR AHUJA
Advocate
Enrolment No.D/2216/2022
1949, Sector-4, Gurugram-122041 (Hr)

Gmail **Vivin Ahuja <vivinahuja@gmail.com>**

(no subject)

Vivin Ahuja <vivinahuja@gmail.com> Sat, 27 Apr at 1:12 PM
To: madhumita@casassociates.in <madhumita@casassociates.in>,
sameer@casassociates.in <sameer@casassociates.in>

Dear Sir/ Madam

Please find herewith enclosed as attachment a copy of reply on behalf of Respondent No. 3 to the Execution Application No 50/2023 in the matter of Society (for SPCHENA) Vs UoI and Ors

Please acknowledge receipt of the same

Warm Regards

Vivin Ahuja
Advocate for R 3
vivinahuja@gmail.com
9871235758
---------- Forwarded message ---------
From: **Vivin Ahuja** <vivinahuja@gmail.com>
Date: Sat, 27 Apr 2024 at 1:04 PM
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Protection of Culture.pdf