RE: SPECIAL REFERENCE NO.1 OF 2012
[Under Article 143(1) of the Constitution of India]

SEPTEMBER 27, 2012

[S.H. KAPADIA, CJI, D.K. JAIN, JAGDISH SINGH KHEHAR, DIPAK MISRA AND RANJAN GOGOI, JJ.]

CONSTITUTION OF INDIA, 1950:

Art 143(1) - Power of President to consult Supreme Court - Scope of - It is not necessary that the question on which the opinion of Supreme Court is sought must have actually arisen - The President can make a reference even at an anterior stage, namely, at the stage when the President is satisfied that the question is likely to arise - The satisfaction whether the question meets pre-requisites of Art. 143(1) is essentially a matter for the President to decide - Upon receipt of a reference under Art. 143(1), the only discretion Supreme Court has is either to answer the reference or respectfully decline to send a report to the President - In the instant Reference, Question no. 1 involves interpretation of a constitutional principle inherent under Art. 14 of the Constitution and it is of great public importance as it deals with allocation/alienation/ disposal/ distribution of natural resources.

Art. 137 and 143(1) - Review and Reference - Difference between - Explained - Held: Merely because a review of the judgment of Supreme Court in a case had been filed and withdrawn and in the recital of Reference, the narration pertains to the said case, the same would not be an embargo or impediment for exercise of discretion to answer the Reference.

Art.143 (1) - Presidential Reference - Notice - Practice and procedure.

Art. 143(1) - Presidential Reference subsequent to decision of Supreme Court in "2G Case" - Maintainability of

- Held: The Reference is maintainable, notwithstanding its effect on the ratio of 2G Case, as long as the decision in that case qua lis inter partes is left unaffected - By the Reference, Court's opinion is sought on the limited point of permissibility of methods other than auction for alienation of natural resources, other than spectrum - It has been stated on behalf of Government of India that it is not questioning the correctness of directions in 2G Case, in so far as allocation of spectrum is concerned and, in fact, Government is in the process of implementing the same, in letter and spirit - As long as the decision with respect to allocation of spectrum licenses is untouched, the Court is within its jurisdiction to evaluate and clarify ratio of the judgment in 2G Case.

Art. 141 - Law declared by Supreme Court - Held: The 'law declared' in a judgment, which is binding upon courts, is the ratio decidendi of the judgment - It is the principle culled out on the reading of a judgment as a whole in the light of the questions raised upon which the case is decided - In"2G case" the Court was not considering the case of auction in general, but was specifically evaluating the validity of the methods adopted in the distribution of spectrum during the relevant period - The recommendation of auction for alienation of natural resources was never intended to be taken as an absolute or blanket statement applicable across all natural resources - The choice of the word 'perhaps' suggests that the Court considered situations requiring a method other than auction as conceivable and desirable - Observations in 2G Case could not apply beyond the specific case of spectrum, which according to the law declared in 2G Case, is to be alienated only by auction and no other method - Precedents.

Art. 14 - Disposal of natural resources by State - Auctions - Held: Auctions are not the only permissible method for disposal of all natural resources across all sectors and in all circumstances - Auction, as a method of disposal of natural resources cannot be declared a constitutional mandate under

Art.14 - Auction despite being a more preferable method of alienation/allotment of natural resources, cannot be held to be a constitutional requirement or limitation for alienation of all natural resources and, therefore, every method other than auction cannot be struck down as ultra-vires the Constitution - Market price, in economics, is an index of the value that a market prescribes to a good - However, this valuation is a function of several dynamic variables; it is a science and not a law - Auction is just one of the several price discovery mechanisms - Since multiple variables are involved in such valuations, auction or any other form of competitive bidding, cannot constitute even an economic mandate, much less a constitutional mandate - Therefore, auction, as an economic choice of disposal of natural resources, is not a constitutional mandate - Alienation of natural resources is a policy decision, and the means adopted for the same are thus, executive prerogatives - However, when such a policy decision is not backed by a social or welfare purpose, and precious and scarce natural resources are alienated to private entrepreneurs for commercial pursuits of profit maximizing, adoption of means other than those that are competitive and maximize revenue may be arbitrary and face the wrath of Art. 14 of the Constitution.

Art. 14 read with Art.299 - Government contracts - Held: A State action has to be tested on the touchstone of Art.14 - The action has to be fair, reasonable, non-discriminatory, transparent, non-capricious, unbiased, without favouritism or nepotism, in pursuit of promotion of healthy competition and equitable treatment - It should conform to the norms which are rational, informed with reasons and guided by public interest, etc. - All these principles are inherent in the fundamental conception of Art.14 - This is the mandate of Art.14.

Arts. 14 and. 39(b) - Equality in allocation of natural resources and "common good" factor - Held: Auctions may be the best way of maximizing revenue but revenue

maximization may not always be the best way to subserve public good - "Common good" is the sole guiding factor and a norm under Art. 39(b) for distribution of natural resources - Where revenue maximization is the object of a policy, being considered qua that resource at that point of time to be the best way to subserve the common good, auction would be one of the preferable methods, though not the only method - Where revenue maximization is not the object of a policy of distribution, the question of auction would not arise - Revenue considerations may give way to developmental considerations - Public interest litigation - Judicial notice.

Arts. 298 and 299 read with Art.14 - Power of State to trade and execute contracts - Discussed.

ADMINISTRATIVE LAW:

State Policy - Judicial review of - Held: Court cannot conduct a comparative study of various methods of distribution of natural resources and suggest the most efficacious mode - The methodology pertaining to disposal of natural resources is clearly an economic policy - It cannot, and shall not, be the endeavour of the Court to evaluate the efficacy of auction vis-à-vis other methods of disposal of natural resources - When questioned, courts are entitled to analyse legal validity of different means of distribution and give a constitutional answer as to which methods are ultra vires and intra vires the provisions of the Constitution - If a policy or law is patently unfair to the extent that it falls foul of the fairness requirement of Art. 14, Court would not hesitate in striking it down - Legality and constitutionality of State Policy and implementation thereof - Discussed - Constitution of India, 1950 - Art.14.

After the decision of the Supreme Court in the case of Centre for Public Interest Litigation & Ors.[1],**(2G Case) the instant Reference was made by the President of India, in exercise of powers under Clause (1) of Art. 143 of the**

Constitution of India, for consideration and report of the Supreme Court on the following questions:

Q.1 "Whether the only permissible method for disposal of all natural resources across all sectors and in all circumstances is by the conduct of auctions?

Q.2 Whether a broad proposition of law that only the route of auctions can be resorted to for disposal of natural resources does not run contrary to several judgments of the Supreme Court including those of Larger Benches?

Q.3 Whether the enunciation of a broad principle, even though expressed as a matter of constitutional law, does not really amount to formulation of a policy and has the effect of unsettling policy decisions formulated and approaches taken by various successive governments over the years for valid considerations, including lack of public resources and the need to resort to innovative and different approaches for the development of various sectors of the economy?

Q.4 What is the permissible scope for interference by courts with policy making by the Government including methods for disposal of natural resources?

Q.5 Whether, if the court holds, within the permissible scope of judicial review, that a policy is flawed, is the court not obliged to take into account investments made under the said policy including investments made by foreign investors under multilateral/bilateral agreements?

Q.6 If the answers to the aforesaid questions lead to an affirmation of the judgment dated 02.02.2012 then the following questions may arise, viz.

(i) whether the judgment is required to be given retrospective effect so as to unsettle all licences issued and 2G spectrum (800, 900, and 1800 MHz bands) allocated in and after 1994 and prior to 10.01.2008?

(ii) whether the allocation of 2G spectrum in all circumstances and in all specific cases for different policy considerations would nevertheless have to be undone?

And specifically

(iii) Whether the telecom licences granted in 1994 would be affected?

(iv) Whether the Telecom licences granted by way of basic licences in 2001 and licences granted between the period 2003-2007 would be affected?

(v) Whether it is open to the Government of India to take any action to alter the terms of any licence to ensure a level playing field among all existing licensees?

(vi) Whether dual technology licences granted in 2007 and 2008 would be affected?

(vii) Whether it is necessary or obligatory for the Government of India to withdraw the

Spectrum allocated to all existing licensees or to charge for the same with retrospective effect and if so on what basis and from what date?

Q.7 Whether, while taking action for conduct of auction in accordance with the orders of the Supreme Court, it would remain permissible for the Government to:

(i) Make provision for allotment of Spectrum from time to time at the auction discovered price and in accordance with laid down criteria during the period of validity of the auction determined price?

(ii) Impose a ceiling on the acquisition of Spectrum with the aim of avoiding the emergence of dominance in the market by any licensee/applicant duly taking into consideration TRAI recommendations in this regard?

(iii) Make provision for allocation of Spectrum at auction related prices in accordance with laid down criteria in bands where there may be inadequate or no competition (for e.g. there is expected to be a low level of competition for CDMA in 800 MHz band and TRAI has recommended an equivalence ratio of 1.5 or 1.3X1.5 for 800 MHz and 900 MHz bands depending upon the quantum of spectrum held by the licensee that can be applied to auction price in 1800 MHz band in the absence of a specific price for these bands)?

Q.8 What is the effect of the judgment on 3G Spectrum acquired by entities by auction whose licences have been quashed by the said judgment?"

Notice was issued to the Attorney General for India, and after hearing him, it was directed that notice be issued to all the States through their Standing Counsel, the petitioners in 2G Case, the Federation of Indian Chamber of Commerce and Industry, and the Confederation of Indian Industry.

Answering the reference in part, the Court

HELD: Per D.K. Jain, J. (For CJI, himself, Dipak Misra and Ranjan Gogoi, JJ.)

MAINTAINABILITY OF THE REFERENCE:

1.1 Art. 143 of the Constitution of India is couched in broad terms; and from its language, it is plain that it is not necessary that the question on which the opinion of the Supreme Court is sought must have actually arisen. The President can make a reference under the said Article even at an anterior stage, namely, at the stage when the President is satisfied that the question is likely to arise. The satisfaction whether the question meets the pre-requisites of Art. 143(1) is essentially a matter for the President to decide. Upon receipt of a reference under Art. 143(1), the function of this Court is to consider the reference, the question(s) on which the President has made the reference, on the facts as stated in the reference and report to the President its opinion thereon. Nevertheless, the usage of the word "may" in the latter part of Art. 143(1) implies that this Court is not bound to render advisory opinion in every reference and may refuse to express its opinion for strong, compelling and good reasons. [Para 23-24] [373-E-F, G-H; 374-B-C]

Special Reference No.1 of 1964("Keshav Singh") **[1965] 1 S.C.R. 413; and** *Re: The Kerala Education Bill, 1957 In Reference under Article 143(1) Of the Constitution of India* **[1959] S.C.R. 995 - relied on.**

In re: Allocation of Lands and Buildings Situate in a Chief Commissioner's Province and in the matter of Reference by the Governor-General under S. 213; Government of India Act, **1935 A.I.R. (30) 1943 FC 13; and** *Dr. M. Ismail Faruqui & Ors. vs. Union of India & Ors.* **1994 (5) Suppl. SCR 1 = (1994) 6 SCC 360 - referred to.**

1.3 As far as the allegation of mala fide is concerned, it is trite that this Court is neither required to go into the truth or otherwise of the facts of the recitals nor can it go into the question of bona fides or otherwise of the authority making a reference. The constitutional power to seek opinion of this Court rests with the President. The only discretion this Court has is either to answer the reference or respectfully decline to send a report to the President. Therefore, the challenge on the ground of mala fide, as raised, is unsustainable. [Para 34] [379-A-C]

Re: Presidential Poll **1975 (1) SCR 504 = (1974) 2 SCC 33 - referred to.**

1.4 From the judgment in The Special Courts Bill, 1978, three broad principles emerge: (i) a reference should not be vague, general and undefined, (ii) this Court can go through the written briefs and arguments to narrow down the legal controversies, and (iii) when the question becomes unspecific and incomprehensible, the risk of returning the reference unanswered arises. [para 30] [377-D-E]

Re: The Special Courts Bill, **1978 1979 (2) SCR 476 = (1979) 1 SCC 380;** *Special Reference No.1 of 1964 ("Keshav Singh"),* **[1965] 1 S.C.R. 413 - referred to**

1.5 There is no denying the fact that in the entire Reference the word 'doubt' has not been used. Nor does Art. 143(1) use the term 'doubt'. No specific format has been provided in any of the Schedules of the Constitution as to how a reference is to be drawn. The use of the word 'doubt' in a reference is also not a constitutional command or mandate. Thus, it cannot be said that use of the word 'doubt' is a necessary condition for a reference to be maintainable under Art. 143(1). That apart, Question No.1 of the instant Reference is neither vague nor general nor unspecific, but is in the realm of comprehension which is relatable to a question of law. It expresses a 'doubt' and seeks the opinion of the Court on that question, besides others. [Para 27 and 32] [374-G-H; 375-A; 378-B]

P. Ramanatha Aiyar's, The Major Law Lexicon, **4th Edn.;** *Concise Oxford Dictionary (Tenth Edn.);* **and Black's Law Dictionary-referred to.**

1.6 In so far as the impact of filing and withdrawal of the review application by the Union of India, against the decision in the 2G Case* on the maintainability of the instant Reference is concerned, there is a difference between the jurisdiction exercised by this Court in a review and the discretion exercised in answering a reference under Art. 143(1) of the Constitution. A review is basically guided by the well-settled principles for review of a judgment and a decree or order passed inter se parties. But, when an opinion of this Court is sought by the Executive taking recourse to a constitutional power, the same stands on a different footing altogether. A review is lis specific and the rights of the parties to the controversy are dealt with therein; whereas a reference is answered keeping in view the terms of the reference and scrutinising whether the same satisfies the requirements inherent in the language employed under Art. 143(1) of the Constitution. Therefore, merely because

a review had been filed and withdrawn and in the recital the narration pertains to the said case, the same would not be an embargo or impediment for exercise of discretion to answer the Reference. [Para 33] [378-C-H]

Centre for Public Interest Litigation & Ors. vs. Union of India & Ors.* **(2012) 3 SCR 147=(2012) 3 SCC 1 - referred to.

1.7 As regards the objection to the maintainability of the Reference that it is an indirect endeavour to unsettle and overturn the verdict in the 2G Case, at the outset it may be noted that it has been stated on behalf of the Government of India that it is not questioning the correctness of the directions in the 2G Case, in so far as the allocation of spectrum is concerned and, in fact, the Government is in the process of implementing the same, in letter and spirit. [Para 35- 36] [379-C-D; E-F]

1.8 As regards reconsideration of a decision, there are two limitations - one jurisdictional and the other self-imposed. The first limitation is that a decision of this Court can be reviewed only under Art. 137 or a Curative Petition and in no other way. Once a lis between parties is decided, the operative decree can only be opened in review. Overruling the judgment - as a precedent - does not reopen the decree. The second limitation, a self-imposed rule of judicial discipline, was that overruling the opinion of the Court on a legal issue does not constitute sitting in appeal, but is done only in exceptional circumstances, such as when the earlier decision is per incuriam or is delivered in the absence of relevant or material facts or if it is manifestly wrong and capable of causing public mischief. In fact, the overruling of a principle of law is not an outcome of appellate jurisdiction but a consequence of its inherent power. This inherent power can be exercised as long as a previous decree vis-à-vis lis inter partes is not affected. [Para 45-47] [386-D-

H; 387-A-C]

Bengal Immunity Company Ltd. v. State of Bihar **(1955) 2 SCR 603;** *In the matter of: Cauvery Water Disputes Tribunal* **1991 (2) Suppl. SCR 497 = 1993 Supp (1) SCC 96 (II) ("Cauvery-II");** *State of Tamil Nadu vs. State of Karnataka & Ors.* **1991 (2) SCR 501 = 1991 Suppl (1) SCC 240** *("Cauvery I") & Rupa Ashok Hurra vs. Ashok Hurra & Anr.* **2002 (2) SCR 1006 = (2002) 4 SCC 388 - referred to**

1.9 From the decisions of this Court, it is demonstrable that while entertaining the reference under Art. 143(1), this Court can look into an earlier decision. For the purpose of validity of a reference, suffice it to say, dwelling upon an earlier judgment is permissible. That apart, one cannot be oblivious of the fact that the scope of limited judicial review, in the Second Judges Case, which otherwise is quite restricted, was slightly expanded in the Court's opinion to the Presidential reference. [Para 58] [395-D-E]

In re: The Special Courts Bill, **1978 1979 (2) SCR 476 = (1979) 1 SCC 380,** *In Re: The Delhi Laws Act, 1912, the Ajmer-Merwara (Extension of Laws) Act, 1947 And The Part C States (Laws) Act, 1950* **[1951] S.C.R. 747,** *Jatindra Nath Gupta vs. The Province of Bihar & Ors.* **[1949-50] F.C.R. 595,** *Special Reference No.1 of 1964* **[1965] 1 S.C.R. 41("Keshav Singh"),** *Gunupati Keshavram Reddy vs. Nafisul Hasan & the State of U.P.* **AIR 1954 SC 636,** *Pandit M.S.M. Sharma vs. Shri Sri Krishna Sinha & Ors.* **[1959] Supp. 1 S.C.R. 806 ("Sharma"),** *Supreme Court Advocates-on-Record Association and Ors. vs. Union of India* **(1993) 4 SCC 441,** *Special Reference No. 1 of 1998 Re.* **1998 (2) Suppl. SCR 400 = (1998) 7 SCC 739** *("Second Judges Case"), & Dr. M. Ismail Faruqui & Ors. vs. Union of India & Ors.* **(1994) 6 SCC 360 - referred to.**

1.10 From the analysis of the decisions of this Court,

it is quite vivid that this Court would respectfully decline to answer a reference if it is improper, inadvisable and undesirable; or the questions formulated have purely socio-economic or political reasons, which have no relation whatsoever with any of the provisions of the Constitution or otherwise are of no constitutional significance; or are incapable of being answered; or would not subserve any purpose; or there is authoritative pronouncement of this Court which has already decided the question referred. [Para 60] [395-H; 396-A-B]

1.11 In the case at hand, the Reference states that in the current circumstances, certain questions of law with far reaching national and international implications have arisen, including in relation to conduct of the auction and the regulation of the telecommunications industry in accordance with the judgment (2G Case) that may affect the flow of FDI in the telecom industry and otherwise in other sectors into this country. The Reference also states that the questions of law that have arisen are of great public importance and are of far reaching consequences for the development of the country and, therefore, it is thought expedient to obtain the opinion of this Court. Question No. 1 of the Reference involves interpretation of a constitutional principle inherent under Art. 14 of the Constitution and it is of great public importance as it deals with allocation/alienation/disposal/ distribution of natural resources. [Para 28 and 61] [375-H; 376-A-C]

1.12 This Court is, therefore, of the view that as long as the decision with respect to the allocation of spectrum licenses is untouched, this Court is within its jurisdiction to evaluate and clarify the ratio of the judgment in the 2G Case. Therefore, the fact that the Reference may require the Court to say something different to what has been enunciated in the 2G Case as a proposition of law, cannot strike at the root of the maintainability of the Reference. Consequently, this Court holds that the Reference is

maintainable, notwithstanding its effect on the ratio of the 2G Case, as long as the decision in that case qua lis inter partes is left unaffected. [Para 62] [396-E-G]

ON MERITS

2.1 Art. 141 of the Constitution lays down that the 'law declared' by the Supreme Court is binding upon all the courts within the territory of India. The 'law declared' has to be construed as a principle of law that emanates from a judgment, or an interpretation of a law or judgment by the Supreme Court, upon which, the case is decided. Therefore, the 'law declared' is the principle culled out on the reading of a judgment as a whole in the light of the questions raised upon which the case is decided. Thus, the 'law declared' in a judgment, which is binding upon courts, is the ratio decidendi of the judgment. It is the essence of a decision and the principle upon which, the case is decided, which has to be ascertained in relation to the subject-matter of the decision. [Para 66] [397-E-H; 398-A]

Fida Hussain & Ors. Vs. Moradabad Development Authority & Anr. **2011 (9) SCR 290 = (2011) 12 SCC 615;** *Ambica Quarry Works Vs. State of Gujarat & Ors.* **1987 (1) SCR 562 = (1987) 1 SCC 213 and** *Commissioner of Income Tax Vs. Sun Engineering Works (P) Ltd.* **1992 (1) Suppl. SCR 732 = 1992 (4) SCC 363;** *Islamic Academy of Education & Anr. Vs. State of Karnataka & Ors.* **(2003) 6 SCC 697 - relied on**

Union of India Vs. Amrit Lal Manchanda & Anr. **(2004) 3 SCC 75;** *State of Orissa & Ors. Vs. Md. Illiyas* **2005 (5) Suppl. SCR 395 = 2006 (1) SCC 275 - referred to.**

"The Nature of Judicial Process" **by Justice Benjamin Cardozo - referred to.**

2.2 On a reading paragraphs 85 and 89 of the

judgment in 2G Case, it can be noticed that while referring to the concept of 'public trust doctrine', emphasis was laid on the doctrine of equality, larger public good, adoption of a transparent and fair method, opportunity of competition; and avoidance of any occasion to scuttle the claim of similarly situated applicants. While dealing with alienation of natural resources like spectrum, it was stated that it is the duty of the State to ensure that a non-discriminatory method is adopted for distribution and alienation which would necessarily result in the protection of national/public interest. Paragraphs 94 and 95 suggest that the Court was not considering the case of auction in general, but specifically evaluating the validity of those methods adopted in the distribution of spectrum from September 2007 to March 2008. It is also pertinent to note that reference to auction is made in the subsequent paragraph (96) with the rider 'perhaps'. It has been observed that "a duly publicized auction conducted fairly and impartially is perhaps the best method for discharging this burden." It is true that a judgment is not to be read as a statute, but at the same time, when it is argued with vehemence that the judgment lays down auction as a constitutional principle, the word "perhaps" gains significance. This suggests that the recommendation of auction for alienation of natural resources was never intended to be taken as an absolute or blanket statement applicable across all natural resources, but simply a conclusion made at first blush over the attractiveness of a method like auction in disposal of natural resources. The choice of the word 'perhaps' suggests that the Court considered situations requiring a method other than auction as conceivable and desirable. Further, the final conclusions summarized in paragraph 102 of the judgment (SCC) make no mention about auction being the only permissible and intra vires method for disposal of natural resources; the findings are limited to the case of spectrum. In case the Court had

actually enunciated, as a proposition of law, that auction is the only permissible method or mode for alienation/ allotment of natural resources, the same would have found a mention in the summary at the end of the judgment. [Para 75,76,78 and 79] [402-G; 403-A-B; 404-G-H; 405-A-E]

M.C. Mehta Vs. Kamal Nath & Ors. **1996 (10) Suppl. SCR 12 =1997 (1) SCC 388;** *Jamshed Hormusji Wadia Vs. Board of Trustees, Port of Mumbai & Anr.* **2004 (1) SCR 483 = 2004 (3) SCC 214;** *Intellectuals Forum, Tirupathi Vs. State of A.P. & Ors.* **2006 (2) SCR 419 = 2006 (3) SCC 549;** *Fomento Resorts And Hotels Limited & Anr. Vs. Minguel Martins & Ors.* **2009 (3) SCR 1 = (2009) 3 SCC 571 and** *Reliance Natural Resources Limited Vs. Reliance Industries Limited* **2010 (5) SCR 704 = 2010 (7) SCC 1;** *Akhil Bhartiya Upbhokta Congress vs. State of Madhya Pradesh & Ors.* **2011 (5) SCR 77 = (2011) 5 SCC 29,** *Sachidanand Pandey & Anr. vs. State of West Bengal & Ors.* **1987 (2) SCR 223 = (1987) 2 SCC 295 - referred to.**

The Illinois Central Railroad Co. Vs. The People of the State of Illinois **36 L ED 1018 : 146 U.S. 387 (1892) - referred to**

2.3 The 2G Case does not even consider other laws and judgments that prescribe methods, other than auction, for dispensation of natural resources; something that it would have done, in case, it intended to make an assertion as wide as applying auction to all natural resources. Therefore, the observations in Paras 94 to 96 could not apply beyond the specific case of spectrum, which according to the law declared in the 2G Case, is to be alienated only by auction and no other method. Thus, 2 G case does not deal with modes of allocation for natural resources, other than spectrum. [Para 80-81] [405-H; 406-A-C]

3.1 By the Reference this Court's opinion is sought on the limited point of permissibility of methods other than auction for alienation of natural resources, other than spectrum. [Para 82] [406-D-E]

3.2 As regards the objection pertaining to the classification of resources made in the 2G Case, suffice it to say that the judgment itself does not carve out any special case for scarce natural resources only meant for commercial exploitation. However, this Court has the jurisdiction to classify the subject matter of a reference, if a genuine case for it exists. [Para 83] [406-G-H; 407-A-B-D]

3.3 In the 2G Case, two concepts namely, "public trust doctrine" and "trusteeship" have been adverted to. This Court in M.C. Mehta vs Kamal Nath, as explained in Intellectuals Forum, has held that when the affirmative duties are set out from a nugatory angle, the doctrine does not exactly prohibit the alienation of property held as a public trust, but mandates a high degree of judicial scrutiny. [Para 85 and 87] [407-G-H; 409-E; 410-B]

M.C. Mehta vs. Kamal Nath & Ors. **1996 (10) Suppl. SCR 12 = (1997) 1 SCC 388,** *Intellectuals Forum, Tirupathi vs. State of A.P. & Ors.* **(2006) 3 SCC 549-referred to**

The Illinois Central Railroad Co. Vs. The People of the State of Illinois **36 L ED 1018 : 146 U.S. 387 (1892) - referred to**

3.4 The public trust doctrine is a specific doctrine with a particular domain and has to be applied carefully. [Para 90] [411-C]

"The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention" by Joseph. L. Sax; and Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the

Public Trust Doctrine" by Richargd J. Lazarus, - referred to

3.5 The legislature and the Executive are answerable to the Constitution and it is there where the judiciary, the guardian of the Constitution, must find the contours to the powers of disposal of natural resources, especially Art. 14 and Art. 39(b). [Para 92] [413-A-B]

Municipal Corporation of Delhi Vs. Birla Cotton, Spinning and Weaving Mills, Delhi & Anr. **[1968] 3 SCR 251 - relied on.**

Raja Ram Pal Vs. Hon'ble Speaker, Lok Sabha & Ors. **(2007) 3 SCC 184- referred to.**

In Re: Delhi Laws Act, 1912- referred to

MANDATE OF Art. 14:

4.1 The underlying object of Art. 14 of the Constitution of India is to secure to all persons, citizens or non-citizens, the equality of status and opportunity referred to in the preamble to Constitution. The right to equality before law is secured from all legislative and executive tyranny by way of discrimination since the language of Art.14 uses the word "State" which as per Art.12, includes the executive organ. Besides, Art.14 is expressed in absolute terms and its effect is not curtailed by restrictions like those imposed on Art.19(1) by Arts.19(2)-(6). However, notwithstanding the absence of such restrictions, certain tests, e.g. classification test, 'arbitrariness' doctrine have been devised through judicial decisions to test if Art.14 has been violated or not. The expressions 'arbitrariness' and 'unreasonableness' have been used interchangeably and in fact, one has been defined in terms of the other. [Para 94 and 101] [413-D-F; 414-A; 418-B-C]

Basheshar Nath Vs. The Commissioner of Income Tax, Delhi & Rajasthan & Anr. **1959 Supp (1) SCR 528;** *Budhan Choudhry & Ors. Vs. State of Bihar* **AIR 1955 SC 191;** *Shri Ram Krishna Dalmiya Vs. Shri Justice S.R. Tendolkar and Ors.* **[1959] 1 SCR 279;** *E.P. Royappa Vs. State of Tamil Nadu & Anr.* **1974 (2) SCR 348 = (1974) 4 SCC 3;** *Maneka Gandhi vs. Union of India & Anr.* **1978 (2) SCR 621 = (1978) 1 SCC 248** *Sharma Transport Vs. Government of A.P. & Ors.* **2001 (5) Suppl. SCR 390 = (2002) 2 SCC 188;** *Om Kumar & Ors. Vs. Union of India* **2000 (4) Suppl. SCR 693 = (2001) 2 SCC 386;** *Air India Vs. Nergesh Meerza* **1982 (1) SCR 438 = (1981) 4 SCC 335;** *Ajay Hasia & Ors. Vs. Khalid Mujib Sehravardi & Ors.* **1981 (2) SCR 79 = (1981) 1 SCC 722; and** *Ramana Dayaram Shetty Vs. International Airport Authority of India & Ors.* **1979 (3) SCR 1014 = (1979) 3 SCC 489 : AIR 1979 SC 1628 - referred to.**

4.2 From a scrutiny of the trend of decisions it is clearly perceivable that the action of the State, whether it relates to distribution of largesse, grant of contracts or allotment of land, is to be tested on the touchstone of Art.14. A law may not be struck down for being arbitrary without pointing out a constitutional infirmity. Therefore, a State action has to be tested for constitutional infirmities qua Art.14. The action has to be fair, reasonable, non-discriminatory, transparent, non-capricious, unbiased, without favouritism or nepotism, in pursuit of promotion of healthy competition and equitable treatment. It should conform to the norms which are rational, informed with reasons and guided by public interest, etc. All these principles are inherent in the fundamental conception of Art.14. This is the mandate of Art.14. [Para 105] [421-B-E]

State of A.P. & Ors. vs. McDowell & Co. & Ors. **1996 (3) SCR 721 = (1996) 3 SCC 709 - referred to.**

WHETHER 'AUCTION' A CONSTITUTIONAL MANDATE:

4.3 Auction as a method of disposal of natural

resources cannot be declared a constitutional mandate under Art.14 of the Constitution of India. Firstly, Art.14 may imply positive and negative rights for an individual, but with respect to the State, it is only couched in negative terms; like an admonition against the State which prohibits the State from taking up actions that may be arbitrary, unreasonable, capricious or discriminatory. Art. 14, therefore, is an injunction to the State against taking certain type of actions rather than commanding it to take particular steps. Reading the mandate of auction into its scheme would thus, be completely contrary to the intent of the Article apparent from its plain language. Secondly, a constitutional mandate is an absolute principle that has to be applied in all situations; it cannot be applied in some and not tested in others. The absolute principle is then applied on a case by case basis to see which actions fulfill the requirements of the constitutional principle and which do not. [Para 106-107] [421-F-H; 422-A-C]

"Some Constitutional Problems" **by Justice K. Subba Rao;** *"Democracy, Equality and Freedom"* **by Justice K. K. Mathew - referred to**

4.4 Equality cannot be limited to mean only auction, without testing it in every scenario. One cannot test the validity of a law with reference to the essential elements of ideal democracy, actually incorporated in the Constitution. [Para 110] [423-D-E]

His Holiness Kesavananda Bharti Sripadagalvaru Vs. State of Kerala & Anr. **1973 Suppl. SCR 1 = (1973) 4 SCC 225;** *The State of West Bengal Vs. Anwar Ali Sarkar* **1952 SCR 284;** *Indira Nehru Gandhi Vs. Raj Narain* **1976 SCR 347 = 1975 (Supp) SCC 1 - referred to**

Kotch Vs. Pilot Comm'rs **330 U.S. 552 - referred to.**

4.5 Courts are not at liberty to declare a statute void, because in their opinion it is opposed to the spirit of the Constitution. Courts cannot declare a limitation or constitutional requirement under the notion of having discovered some ideal norm. Further, a constitutional principle must not be limited to a precise formula but ought to be an abstract principle applied to precise situations. [Para 110] [423-F]

4.6 The repercussion of holding auction as a constitutional mandate would be the voiding of every action that deviates from it, including social endeavours, welfare schemes and promotional policies. It would be odd to derive auction as a constitutional principle only for a limited set of situations from the wide and generic declaration of Art.14. The strength of constitutional adjudication lies in case to case adjudication and, therefore, auction cannot be elevated to a constitutional mandate. [Para 110] [423-F-G; 424-A-B]

4.7 Finally, reading auction as a constitutional mandate would be impermissible because such an approach may distort another constitutional principle embodied in Art.39(b), which mandates that the ownership and control of natural resources should be so distributed as to best subserve the common good. Art.37 provides that the provisions of Part IV shall not be enforceable by any court, but the principles laid down therein are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws. [Para 111] [424-C-G]

4.8 Therefore, Art.39(b) in a sense, is a restriction on 'distribution' built into the Constitution. But the restriction is imposed on the object and not the means. The overarching and underlying principle governing 'distribution' is furtherance of common good. But for the

achievement of that objective, the Constitution uses the generic word 'distribution'. Distribution has broad contours and cannot be limited to meaning only one method i.e. auction. It envisages all such methods available for distribution/allocation of natural resources which ultimately subserve the "common good". [Para 112] [424-H; 425-A-B]

4.9 The term "distribute" undoubtedly, has wide amplitude and encompasses all manners and methods of distribution, which would include classes, industries, regions, private and public sections, etc. Having regard to the basic nature of Art.39(b), a narrower concept of equality under Art.14 may frustrate the broader concept of distribution, as conceived in Art. 39(b). There cannot, therefore, be a cavil that "common good' and "larger public interests" have to be regarded as constitutional reality deserving actualization. [Para 115] [425-H; 426-A-C]

State of Tamil Nadu & Ors. Vs. L. Abu Kavur Bai & Ors. **1984 (1) SCR 725 = (1984) 1 SCC 515 - referred to**

4.10 Auctions may be the best way of maximizing revenue but revenue maximization may not always be the best way to subserve public good. "Common good" is the sole guiding factor and a norm under Art. 39(b) for distribution of natural resources. It is the touchstone of testing whether any policy subserves the "common good" and if it does, irrespective of the means adopted, it is clearly in accordance with the principle enshrined in Art. 39(b). The norm of "common good" has to be understood and appreciated in a holistic manner. It is obvious that the manner in which the common good is best subserved is not a matter that can be measured by any constitutional yardstick - it would depend on the economic and political philosophy of the government. Revenue maximization is not the only way in which the

common good can be subserved. Where revenue maximization is the object of a policy, being considered qua that resource at that point of time to be the best way to subserve the common good, auction would be one of the preferable methods, though not the only method. Where revenue maximization is not the object of a policy of distribution, the question of auction would not arise. Revenue considerations may assume secondary position to developmental considerations. [Para 116 and 119] [426-D-F; 427-F-H; 428-A]

The State of Karnataka and Anr. Vs. Shri Ranganatha Reddy and Anr. **1978 (1) SCR 641 = (1977) 4 SCC 471;** *Bennett Coleman & Co. and Ors. Vs. Union of India and Ors.* **1973 (2) SCR 757 = (1972) 2 SCC 788 - referred to.**

4.11 There is no constitutional imperative in the matter of economic policies. Art. 14 does not pre-define any economic policy as a constitutional mandate. Even the mandate of 39(b) imposes no restrictions on the means adopted to subserve the public good and uses the broad term 'distribution', suggesting that the methodology of distribution is not fixed. Economic logic establishes that alienation/allocation of natural resources to the highest bidder may not necessarily be the only way to subserve the common good, and at times, may run counter to public good. Therefore, it needs little emphasis that disposal of all natural resources through auctions is clearly not a constitutional mandate. [Para 120] [430-B-D]

4.12 Finally, market price, in economics, is an index of the value that a market prescribes to a good. However, this valuation is a function of several dynamic variables; it is a science and not a law. Auction is just one of the several price discovery mechanisms. Since multiple variables are involved in such valuations, auction or any other form of competitive bidding, cannot constitute even an economic mandate, much less a constitutional

mandate. [Para 147] [444-G-H]

4.13 Auction despite being a more preferable method of alienation/allotment of natural resources, cannot be held to be a constitutional requirement or limitation for alienation of all natural resources and, therefore, every method other than auction cannot be struck down as ultra-vires the constitutional mandate. [Para 148] [445-A-B]

LEGITIMATE DEVIATIONS FROM AUCTION:

5.1 The Government has repeatedly deviated from the course of auction and this Court has repeatedly upheld such actions. The judiciary tests such deviations on the limited scope of arbitrariness and fairness under Art.14 and its role is limited to that extent. Essentially whenever the object of policy is anything but revenue maximization, the Executive is seen to adopt methods other than auction. [129] [434-E-F]

Sachidanand Pandey & Anr. Vs. State of West Bengal & Ors. **(1987) 2 SCC 295;** *M.P. Oil Extraction and Anr. Vs. State of M.P. & Ors.* **(1997) 7 SCC 592;** *Netai Bag & Ors. Vs. State of W.B. & Ors.* **(2000) 8 SCC 262;** *M & T Consultants, Secunderabad Vs. S.Y. Nawab* **(2003) 8 SCC 100;** *Haji T.M. Hassan Rawther Vs. Kerala Financial Corpn.* **1988 (1) SCR 1079 = (1988) 1 SCC 166;** *Villianur Iyarkkai Padukappu Maiyam Vs. Union of India & Ors.* **1997 (1) Suppl. SCR 671 = (2009) 7 SCC 561 - referred to para 128.**

5.2 A fortiori, besides legal logic, mandatory auction may be contrary to economic logic as well. Different resources may require different treatment. Very often, exploration and exploitation contracts are bundled together due to the requirement of heavy capital in the discovery of natural resources. A concern would risk undertaking such exploration and incur heavy costs only

if it was assured utilization of the resource discovered; a prudent business venture, would not like to incur the high costs involved in exploration activities and then compete for that resource in an open auction. The logic is similar to that applied in patents. Firms are given incentives to invest in research and development with the promise of exclusive access to the market for the sale of that invention. Such an approach is economically and legally sound and sometimes necessary to spur research and development. Similarly, bundling exploration and exploitation contracts may be necessary to spur growth in a specific industry. Similar deviation from auction cannot be ruled out when the object of a State policy is to promote domestic development of an industry. Thus, auction cannot be the sole criteria for alienation of all natural resources. [Para 130-131] [434-G-H; 435-A-D]

M/s Kasturi Lal Lakshmi Reddy Vs. State of Jammu & Kashmir & Anr. **1980 (3) SCR 1338 = (1980) 4 SCC 1 - referred to**

PLEA OF POTENTIAL ABUSE:

5.3 A potential for abuse cannot be the basis for striking down a method as ultra vires the Constitution. It is the actual abuse itself that must be brought before the Court for being tested on the anvil of constitutional provisions. In fact, it may be said that even auction has a potential of abuse, like any other method of allocation, but that cannot be the basis of declaring it as an unconstitutional methodology either. [Para 135] [437-D-E]

R.K. Garg Vs. Union of India & Ors. **1982 (1) SCR 947 = (1981) 4 SCC 675;** *D. K. Trivedi & Sons & Ors. Vs. State of Gujarat & Ors.* **1986 SCR 479 = (1986) Supp SCC 20 - referred to.**

JUDICIAL REVIEW OF POLICY DECISIONS:

6.1 The wisdom and advisability of the policies are ordinarily not amenable to judicial review unless the policies are contrary to statutory or constitutional provisions or arbitrary or irrational or an abuse of power. Court cannot strike down a policy decision taken by the Government merely because it feels that another decision would have been fairer, or more scientific or logical, or wiser. Further, it is validity of a law and not its efficacy that can be challenged. In the context of the instant Reference, it needs to be emphasized that this Court cannot conduct a comparative study of the various methods of distribution of natural resources and suggest the most efficacious mode, if there is one universal efficacious method in the first place. It respects the mandate and wisdom of the executive for such matters. The methodology pertaining to disposal of natural resources is clearly an economic policy. It entails intricate economic choices and the court lacks the necessary expertise to make them. As has been repeatedly said, it cannot, and shall not, be the endeavour of this Court to evaluate the efficacy of auction vis-à-vis other methods of disposal of natural resources. Court cannot mandate one method to be followed in all facts and circumstances. Therefore, auction, an economic choice of disposal of natural resources, is not a constitutional mandate. [para 139, 144 and 146] [440-F; 443-D; 444-B-D]

Rustom Cavasjee Cooper Vs. Union of India **1970 (3) SCR 530 = (1970) 1 SCC 248;** *R.K. Garg Vs. Union of India & Ors.* **1982 (1) SCR 947 = (1981) 4 SCC 675;** *Delhi Science Forum & Ors. Vs. Union of India & Anr.* **1996 (2) SCR 767 = (1996) 2 SCC 405;** *Peerless General Finance and Investment Co. Ltd. & Anr. Vs. Reserve Bank of India* **1992 (1) SCR 406 = (1992) 2 SCC 343;** *Premium Granites & Anr. Vs. State of T.N. & Ors.* **1994 (1) SCR 579 = (1994) 2 SCC 691** *Delhi Science Forum & Ors. Vs. Union of India & Anr.* **1996 (2) SCR**

767 = (1996) 2 SCC 405; *BALCO Employees' Union (Regd.) Vs. Union of India & Ors.* **2001 (5) Suppl. SCR 511 = (2002) 2 SCC 333;** *M/s Prag Ice & Oil Mills & Anr. Vs. Union of India* **[1978] 3 SCC 459; and** *State of Madhya Pradesh Vs. Narmada Bachao Andolan & Anr.* **2011 (6) SCR 443 = (2011) 7 SCC 639 - referred to**

6.2 However, courts can test the legality and constitutionality of these methods. When questioned, courts are entitled to analyse the legal validity of different means of distribution and give a constitutional answer as to which methods are ultra vires and intra vires the provisions of the Constitution. Nevertheless, it cannot and will not compare which policy is fairer than the other, but, if a policy or law is patently unfair to the extent that it falls foul of the fairness requirement of Art.14 of the Constitution, court would not hesitate in striking it down. [Para 146] [444-D-F]

6.3 Alienation of natural resources is a policy decision, and the means adopted for the same are thus, executive prerogatives. However, when such a policy decision is not backed by a social or welfare purpose, and precious and scarce natural resources are alienated for commercial pursuits of profit maximizing private entrepreneurs, adoption of means other than those that are competitive and maximize revenue may be arbitrary and face the wrath of Art. 14 of the Constitution. Therefore, rather than prescribing or proscribing a method, a judicial scrutiny of methods of disposal of natural resources should depend on the facts and circumstances of each case, in consonance with the principles culled out in the instant opinion. Failing which, the Court, in exercise of power of judicial review, shall term the executive action as arbitrary, unfair, unreasonable and capricious due to its antimony with Art. 14 of the Constitution. [Para 149] [445-C-E]

7.1 In conclusion, answer of this Court to the first set of five questions is that auctions are not the only permissible method for disposal of all natural resources across all sectors and in all circumstances. [Para 150] [445-F]

7.2 As regards the remaining questions, the answer to the same would have a direct bearing on the mode of alienation of Spectrum and, therefore, in light of the statement made on behalf of the Government that it is not questioning the correctness of judgment in the 2G Case, this Court respectfully declines to answer the said questions. [Para 151] [445-G-H]

PER JAGDISH SINGH KHEHAR, J(Concurring):

1.1 It is obvious, that the Government is alive to the fact that disposal of some natural resources have to be made only by auction. Therefore, the first question in the Presidential Reference must be understood to seek this Court's opinion on whether there are circumstances in which natural resources ought to be disposed of only by auction. [Para 2] [447-C-D]

1.2 The term "auction" expressed in the instant opinion may be read as a means to "maximize revenue returns", irrespective of whether the means adopted should technically and correctly be described as tender, tender-cum-auction, or auction. [Para 3] [448-A-B]

1.3 The concept of equality before the law and the equal protection of the laws, emerges from the fundamental right expressed in Art.14 of the Constitution of India. The true effect of Art.14 is to provide equality before the law and the equal protection of the laws not only with reference to individual rights, but also by ensuring that its citizens on the other side of the balance are likewise not deprived of their right to the equality before the law, and their right to equal protection of the

laws. An individual citizen cannot be a beneficiary, at the cost of the country i.e., the plurality. Enriching one at the cost of all others would amount to deprivation to the plurality i.e., the nation itself. The gist of the first question in the Presidential Reference, raises the issue whether ownership rights over the nation's natural resources, vest in the citizens of the country. [Para 4] [448-B-C-G-H; 449-A-B]

1.4 Natural resources are the nation's collective wealth. Public interest litigation as a jurisprudential concept brings into focus the rights of the plurality (as against individual's right) specially when the plurality is, for one or the other reason, not in a position to seek redressal of its grievances. [Para 5] [449-E-F; 449-D]

2.1 An analysis of the decisions of this Court would lead to the inference that the State has the right to trade. Government must act as a prudent businessman and the profit earned should be for public benefit and not for private gains. In executing public contracts in its trading activity, State must be guided by relevant principles, and not by extraneous or irrelevant consideration. The same should be based on reasonableness and rationality as well as non-arbitrariness. The State while entering into a contractual relationship is bound to maintain the standard or principle which meets the test of reasonableness and non-discrimination. And any departure from the said standards would be invalid unless the same is supported by good reasons. [Para 6(b) and (c)] [456-E-F; 459-A-C]

Ramana Dayaram Shetty Vs. International Airport Authority of India & Ors., **1979 (3) SCR 1014 = (1979) 3 SCC 489;** *Rashbihari Panda etc. Vs. State of Orissa* **1969 (3) SCR 374 = (1969) 1 SCC 414;** *S.G. Jaisinghani Vs. Union of India & Ors.,* **1967 SCR 703 =AIR 1967 SC 1427;** *Kasturi Lal Lakshmi Reddy Vs. State of Jammu & Kashmir & Anr.* **1980**

(3) SCR 1338 = (1980) 4 SCC 1; *Dwarkadas Marfatia and Sons Vs. Board of Trustees of the Port of Bombay,* **1989 (2) SCR 751 = (1989) 3 SCC 293;** *Mahabir Aauto Stores & Ors. vs. Indian Oil Corporation & Ors.* **(1990) 3 SCC 752;** *Kumari Shrilekha Vidyarthi & Ors. Vs. State of U.P. & Ors.* **1990 (1) Suppl. SCR 625 = (1991) 1 SCC 212;** *Lucknow Development Authority Vs. M.K. Gupta,* **1993 (3) Suppl. SCR 615 = (1994) 1 SCC 243;** *Common Cause, A Registered Society Vs. Union of India & Ors.,* **1996 (6) Suppl. SCR 719 = (1996) 6 SCC 530;** *Meerut Development Authority vs. Association of Management Studies & Anr. etc.* **2009 (6) SCR 663 = (2009) 6 SCC 171,** *Reliance Natural Resources Ltd. Vs. Reliance Industries Ltd. etc.* **2010 (5) SCR 704 = (2010) 7 SCC 1;** *Akhil Bhartiya Upbhokta Congress Vs. State of Madhya Pradesh & Ors.,* **2011 (5) SCR 77 = (2011) 5 SCC 29- referred to**

Council of Civil Service Unions vs. Minister for the Civil Service, **(1984) 3 All ER 935, 950 - referred to**

Wade: Administrative Law **(6th edn.) - referred to**

2.2 All powers vested in a public office, even in the field of contract, are meant to be exercised for public good and for promoting public interest; and Art. 14 of the Constitution applies also to matters of governmental policy even in contractual matters, and if the policy or any action of the government fails to satisfy the test of reasonableness, the same would be unconstitutional. [para 6(g)] [476-C-D]

Kumari Shrilekha Vidyarthi & Ors. Vs. State of U.P. & Ors. **1990 (1) Suppl. SCR 625 = (1991) 1 SCC 212 - referred to.**

2.3 In Centre for Public Interest Litigation, it was affirmed, that the State was duty bound to adopt the method of auction by giving wide publication while alienating natural resources, so as to ensure that all eligible persons can participate in the process. [para 6] [501-G]

Centre for Public Interest Litigation & Ors. vs. Union of India & Ors. **(2012) 3 SCC 1 - referred to.**

2.4 This Court in its judgments has laid down the parameters as regards the scope of applicability of Art.14 of the Constitution, in matters where the State, its instrumentalities, and their functionaries, are engaged in contractual obligations. For an action to be able to withstand the test of Art.14, it has already been expressed in the "main opinion" that it has to be fair, reasonable, non-discriminatory, transparent, non-capricious, unbiased, without favouritism or nepotism, in pursuit of promotion of healthy competition and equitable treatment. The judgments of this Court endorse all those requirements where the State, its instrumentalities, and their functionaries, are engaged in contractual transactions. Therefore, all "governmental policy" drawn with reference to contractual matters, it has been held, must conform to the said parameters. While Art.14 permits a reasonable classification having a rational nexus to the object sought to be achieved, it does not permit the power of pick and choose arbitrarily out of several persons falling in the same category. Therefore, a criteria or procedure has to be adopted so that the choice among those falling in the same category is based on reason, fair play and non-arbitrariness. Even if there are only two contenders falling in the zone of consideration, there should be a clear, transparent and objective criteria or procedure to indicate which out of the two is to be preferred. It is this, which would ensure transparency. [Para 7] [501-H; 502-A-E]

2.5 Another aspect which emerges from the judgments of this Court is that, the State, its instrumentalities and their functionaries, while exercising their executive power in matters of trade or business etc. including making of contracts, should be mindful of public interest, public purpose and public good. This is

so, because every holder of public office by virtue of which he acts on behalf of the State, or its instrumentalities, is ultimately accountable to the people in whom sovereignty vests. As such, all powers vested in the State are meant to be exercised for public good and in public interest. Therefore, the question of unfettered discretion in an executive authority, just does not arise. The fetters on discretion are - a clear, transparent and objective criteria or procedure which promotes public interest, public purpose and public good. A public authority is ordained, therefore, to act reasonably and in good faith and upon lawful and relevant grounds of public interest. [Para 8] [502-F-H; 503-A-B]

2.6 Observations recorded by this Court on the subject of revenue returns, during the course of the State's engagements in commercial ventures are being summarized: It has been held, where the State is simply selling a product, there can be no doubt that the State must endeavour to obtain the highest price, subject of course to any other overriding public consideration. The validity of a trading agreement executed by the Government has to be judged by the test, that the entire benefit arising therefrom enures to the State, and is not used as a cloak for conferring private benefits on a limited class of persons. In Reliance Natural Resources Ltd.'s case, the Union of India has adopted the position, that natural resources are vested in the State as a matter of trust, for and on behalf of the citizens of the country and is the solemn duty of the State, to protect those natural resources. More importantly, it was accepted, that natural resources must always be used in the common interest of the citizens of the country, and not for private interest. [Para 9] [503-C-H; 504-A]

3.1 When natural resources are made available by the State to private persons for commercial exploitation

exclusively for their individual gains, the State's endeavour must be towards maximization of revenue returns. This alone would ensure, that the fundamental right enshrined in Art.14 (assuring equality before the law and the equal protection of the laws), and the directive principle contained in Art.39(b) (that material resources of the community are so distributed as best to subserve the common good), have been extended to the citizens of the country. Article 14 does not permit the State to pick and choose arbitrarily out of several persons falling in the same category. A transparent and objective criteria/ procedure has to be evolved so that the choice amongst those belonging to the same class or category is based on reason, fair play, and non-arbitrariness. If the participation of private persons is for commercial exploitation exclusively for their individual gains, then the State's endeavour to maximize revenue alone, would satisfy the constitutional mandate contained in Arts. 14 and 39(b) of the Constitution. [para 10-12] [504-E-G; 505-B-D]

Common Cause, A Registered Society Vs. Union of India & Ors. **1996 (6) Suppl. SCR 719 = (1996) 6 SCC 530 - referred to.**

3.2 Auction is certainly not a constitutional mandate in the manner expressed, in the "main opinion", but it can surely be applied in some situations to maximize revenue returns, to satisfy legal and constitutional requirements. It is, therefore, that in the instant opinion it has been chosen to express the manner of disposal of natural resources by using the words "maximization of revenue" in place of the term "auction". Further, auction by way of competitive bidding is certainly an indisputable means, by which maximization of revenue returns is assured. It is reiterated that disposal of assets by process of tender, tender-cum-auction and auction could assure maximization of revenue returns. Thus, if the State arrives

at the conclusion, in a given situation, that maximum revenue would be earned by auction of the natural resource in question, then that alone would be the process which it would have to adopt. [Para 3 and 12] [447-G-H; 505-F-H; 506-A-B]

3.3 One is compelled to take judicial notice of the fact, that allotment of natural resources is an issue of extensive debate in the country. In Centre for Public Interest Litigation, extensive revenue loss, in the course of allocation of the 2G spectrum was duly noticed. On each occasion when the issue of allocation of natural resources results in an alleged loss of revenue, it is portrayed as a loss to the nation. The Presidential Reference is aimed at invoking this Court's advisory jurisdiction to iron out the creases, so that legal and constitutional parameters are correctly understood. This would avoid such controversies in future. Therefore, an opinion is also being rendered, on the fourth question. The mandate contained in the Art.39(b) envisages that all material resources ought to be distributed in a manner which would "best sub-serve the common good". It is, therefore, apparent that governmental policy for distribution of such resources should be devised by keeping in mind the "common good" of the community i.e., the citizens of this country. It has been expressed in the "main opinion" that matters of policy fall within the realm of the legislature or the executive, and cannot be interfered with, unless the policy is in violation of statutory law, or is ultra vires the provision(s) of the Constitution. It is not within the scope of judicial review for a court to suggest an alternative policy, which in the wisdom of the court could be better suited in the circumstances of a case. Thus far, the position is clearly unambiguous. [Para 13] [506-C-D; 507-A-B-H; 508-A-C]

3.4 The legality and constitutionality of policy is one matter, and the manner of its implementation quite

another. Even at the implementation stage a forthright and legitimate policy, may take the shape of an illegitimate stratagem. The policy of allocation of natural resources for public good can be defined by the legislature. Likewise, policy for allocation of natural resources may also be determined by the executive. The parameters for determining the legality and constitutionality of the two are exactly the same. Thus, there can be no doubt about the conclusion recorded in the "main opinion" that auction which is just one of the several price recovery mechanisms, cannot be held to be the only constitutionally recognized method for alienation of natural resources. That should not be understood to mean, that it can never be a valid method for disposal of natural resources. [para 13] [514-C-E; 508-D]

3.5 Therefore, no part of the natural resource can be dissipated as a matter of largess, charity, donation or endowment, for private exploitation. Each bit of natural resource expended must bring back a reciprocal consideration. The consideration may be in the nature of earning revenue or may be to "best sub-serve the common good". It may well be the amalgam of the two. There cannot be a dissipation of material resources free of cost or at a consideration lower than their actual worth. One set of citizens cannot prosper at the cost of another set of citizens, for that would not be fair or reasonable. [para 13] [514-E-G]

Case Law Reference:

As per D.K. Jain, J.

(2012) 3 SCC 1	**referred to**	**para 2**
[1951] S.C.R. 747	**referred to**	**Para 5**
[1960] 3 S.C.R. 250	**referred to**	**para 5**
[1959] S.C.R. 995	**referred to**	**para 5**

[1965] 1 S.C.R. 413	**referred to**	**para 5**
1975 (1) SCR 504	**referred to**	**para 5**
1979 (2) SCR 476	**referred to**	**para 5**
1991 (2) Suppl. SCR 497	**referred to**	**para 5**
1998 (2) Suppl. SCR 400	**referred to**	**para 5**
1994 (5) Suppl. SCR 1	**referred to**	**Para 9**
[1934] A.C. 586	**referred to**	**Para 12**
[1959] Supp. 1 S.C.R. 806	**referred to**	**para 17**
A.I.R. (30) 1943 FC 13	**referred to**	**Para 25**
1991 (2) SCR 501	**referred to**	**Para 37**
2002 (2) SCR 1006	**referred to**	**Para 45**
(1955) 2 SCR 603	**referred to**	**Para 47**
[1949-50] F.C.R. 595	**referred to**	**Para 50**
AIR 1954 SC 636	**referred to**	**Para 51**
(1993) 4 SCC 441	**referred to**	**Para 56**
2011 (9) SCR 290	**relied on**	**para 66**
1987 (1) SCR 562	**relied on**	**para 66**
1992 (1) Suppl. SCR 732	**relied on**	**para 66**
2005 (5) Suppl. SCR 395	**referred to**	**para 68**
(2004) 3 SCC 75	**referred to**	**para 69**
(2003) 6 SCC 697	**relied on**	**para 70**
36 L ED 1018 : 146 U.S. 387 (1892)	**referred to**	**para 74**
1996 (10) Suppl. SCR 12	**referred to**	**para 74**

2004 (1) SCR 483	**referred to**	**para 74**
2006 (2) SCR 419	**referred to**	**para 74**
2009 (3) SCR 1	**referred to**	**para 74**
2010 (5) SCR 704	**referred to**	**para 74**
2011 (5) SCR 77	**referred to**	**para 74**
1987 (2) SCR 223	**referred to**	**para 74**
(2007) 3 SCC 184	**referred to**	**para 91**
[1968] 3 SCR 251	**relied on**	**Para 92**
1959 Supp (1) SCR 528	**referred to**	**para 94**
AIR 1955 SC 191	**referred to**	**para 95**
[1959] 1 SCR 279	**referred to**	**para 95**
1974 (2) SCR 348	**referred to**	**para 96**
1978 (2) SCR 621	**referred to**	**Para 97**
1981 (2) SCR 79	**referred to**	**Para 98**
1979 (3) SCR 1014	**referred to**	**Para 99**
2001 (5) Suppl. SCR 390	**referred to**	**Para101**
2000 (4) Suppl. SCR 693	**referred to**	**Para 102**
1996 (3) SCR 721	**referred to**	**Para 103**
1982 (1) SCR 438	**referred to**	**Para 104**
1973 (0) Suppl. SCR 1	**referred to**	**para 109**
1952 SCR 284	**referred to**	**para 110**
330 U.S. 552	**referred to**	**para 110**
1976 SCR 347	**referred to**	**para 11**

1984 (1) SCR 725	**referred to**	**para 113**
1978 (1) SCR 641	**referred to**	**para 117**
1973 (2) SCR 757	**referred to**	**para 118**
1980 (3) SCR 1338	**referred to**	**para 118**
1988 (1) SCR 1079	**referred to**	**para 122**
1988 (1) SCR 1079	**referred to**	**para 124**
1997 (1) Suppl. SCR 671	**referred to**	**para 125**
(2000) 8 SCC 262	**referred to**	**para 126**
(2003) 8 SCC 100	**referred to**	**para 127**
1997 (1) Suppl. SCR 671	**referred to**	**para 128**
1982 (1) SCR 947	**referred to**	**Para 133**
1986 SCR 479	**referred to**	**para 134**
1970 (3) SCR 530	**referred to**	**para 137**
1994 (1) SCR 579	**referred to**	**para 139**
1996 (2) SCR 767	**referred to**	**para 140**
2001 (5) Suppl. SCR 511	**referred to**	**para 141**
1992 (1) SCR 406	**referred to**	**para 142**
1978] 3 SCC 459	**referred to**	**para 143**
2011 (6) SCR 443	**referred to**	**para 144**
As Per Khehar, J.		
1967 SCR 703	**referred to**	**para 6(a)**
1969 (3) SCR 374	**referred to**	**para 6(b)**
1979 (3) SCR 1014	**referred to**	**para 6(c)**
1980 (3) SCR 1338	**referred to**	**para 6(d)**

1989 (2) SCR 751	**referred to**	**para 6(e)**
(1984) 3 All ER 935, 950	**referred to**	**para 6(e)**
(1990) 3 SCC 752	**referred to**	**para 6(f)**
1990 (1) Suppl. SCR 625	**referred to**	**para 6(g)**
1993 (3) Suppl. SCR 615	**referred to**	**para 6(h)**
1996 (6) Suppl. SCR 719	**referred to**	**para 6(i)**
2009 (6) SCR 663	**referred to**	**para 6(j)**
2010 (5) SCR 704	**referred to**	**para 6(k)**
(2012) 3 SCC 1	**referred to**	**para 6(l)**
(2012) 3 SCC 1	**referred to**	**para 13**

ADVISORY JURISDICTION : Special Reference No. 1 of 2012.

[Under Article 143(1) of the Constitution of India]

[Regarding 2G Spectrum]

Goolam E. Vahanvati, D.J. Khambata, A. Mariarputham, AGs, Indira Jaising, ASG, Shanti Bhushan, Soli J. Sorabjee, Biswajit Deb, Vivek K. Tankha, Ravindra Shrivastava, C.A. Sundaram, Harish N. Salve, T.R. Andhyarujina, Shyam Divan, M.N. Krishnamani, Vikas Singh, Dr. Manish Singhvi, Manjit Singh, Guru Krishna Kumar, AAGs., Devadatt Kamat, Anoopam N. Prasad, Rohit Sharma, Nishanth Patil, Anandh Kannan, T.A. Khan, D.S. Mahra, Supriya Jain, Sonam Anand, Jhuma Sen, Nizam Pasha, Prashant Bhushan, Pranav Sachdeva, Shakil Ahmed, Gaurav Dhingra, A. Subhashini, G.N. Reddy, M. Rambabu, S. Nagarajan, Ashoka Thakur, Anil K. Chopra, Khwairakpam Nobin Singh, Sapam Biswajit Meitei, Navnit Kumar, Deepika Ghatowar (For Corporate Law Group), Pragyan Sharma, Rupesh Gupta, Mandakini Sharma, Gautam Dhamija, Heshu Kayina, B.S. Banthia, Vikas Upadhyay,

Sameer Sodhi, Avijit Singh, Rachana Srivastava, Utkarsh Sharma, Gopal Singh, Manish Kumar, Chandan Kumar, Radha Shyam Jena, Irshad Ahmad, Milind Kumar, Ramesh Babu M.R., Sushrut Jindal, Madhavi Divan, Sanjay Kharde, Asha G. Nair, Sunil Fernandes, Vernika Tomar, V.N. Raghupathy, P.V. Yogeswaran, C.D. Singh, Dr. Indra Pratap Singh, Sunny Choudhary, Himinder Lal, Anil Shrivastav, Rituraj Biswas, Edward Belho, K. Enatoli Sema, Nimshim Vashum, Jagjit Singh Chhabra, Aruna Mathur, Yusuf Khan, Kamal Mohan Gupta, B. Balaji, A. Prasanna Venkat, Hemantika Wahi, Jayesh Gaurav, S. Chandra Shekhar, Pallavi S. Shroff, Manu Nair, Kirat Singh Nagra, Rohini Musa, Saanjh N. Purohit, Monika Singhal, Mohit Auluck, A.P. Medh (For Suresh A. Shroff & Co.), Rohit Kumar Singh, Anupam Bharti, Ruchi A. Mahajan, Binsy Susan, Anannya Ghosh, Samarika Singh (For Suresh A. Shroff & Co.), Sunil Dogra, Kiran Suri, S.J. Amith, Jayna Kothari, Shruthi Ramakrishna, Vasuman Khandelwal, Mohit Kumar Shah, Dr. Subramanian Swamy (In-Peson), Dipak Kumar Jena, Minakshi Ghosh Jena, Rajesh Singh, Gautam Narayan, T.G.N. Nair for the Appearing Parties.

The opinions of the Court were delivered by

D.K. JAIN, J. [FOR S.H. KAPADIA, CJ, HIMSELF, DIPAK MISRA & RANJAN GOGOI, JJ.]

In exercise of powers conferred under Article 143(1) of the Constitution of India, the President of India has on 12th April, 2012, made the present Reference. The full text of the Reference (sans the annexures) is as follows:

> "WHEREAS in 1994, the Department of Telecommunication, Government of India ("GOI"), issued 8 Cellular Mobile Telephone Services Licenses ("CMTS Licenses"), 2 in each of the four Metro cities of Delhi, Mumbai, Kolkata and Chennai for a period of 10 years (the "1994 Licenses"). The 1994 licensees were selected based on rankings achieved by them on the technical and

financial evaluation based on parameters set out by the GoI in the tender and were required to pay a fixed licence fee for initial three years and subsequently based on number of subscribers subject to minimum commitment mentioned in the tender document and licence agreement. The 1994 Licenses issued by GoI mentioned that a cumulative maximum of upto 4.5 MHz in the 900 MHz bands would be permitted based on appropriate justification. There was no separate upfront charge for the allocation of Spectrum to the licensees, who only paid annual Spectrum usage charges, which will be subject to revision from time to time and which under the terms of the license bore the nomenclature "licence fee and royalty". A copy of the 1994 Licenses, along with a table setting out the pre-determined Licence Fee as prescribed by DoT in the Tender, is annexed hereto as Annexure I (Colly).

WHEREAS in December 1995, 34 CMTS Licenses were granted based on auction for 18 telecommunication circles for a period of 10 years (the "1995 Licenses"). The 1995 Licenses mentioned that a cumulative maximum of up to 4.4 MHz in the 900 MHz bands shall be permitted to the licensees, based on appropriate justification. There was no separate upfront charge for allocation of spectrum to the licensees who were also required to pay annual spectrum usage charges, which under the terms of the license bore the nomenclature "licence fee and royalty" which will be subject to revision from time to time. A copy of the 1995 Licenses, along with a table setting out the fees payable by the highest bidder, is annexed hereto as Annexure II (Colly).

WHEREAS in 1995, bids were also invited for basic telephone service licenses ("BTS Licenses") with the license fee payable for a 15 year period. Under the terms of the BTS Licenses, a licensee could provide fixed line basic telephone services as well as wireless basic

telephone services. Six licenses were granted in the year 1997-98 by way of auction through tender for providing basic telecom services (the "1997 BTS Licenses"). The license terms, inter-alia, provided that based on the availability of the equipment for Wireless in Local Loop (WLL), in the world market, the spectrum in bands specified therein would be considered for allocation subject to the conditions mentioned therein. There was no separate upfront charge for allocation of spectrum and the licensees offering the basic wireless telephone service were required to pay annual Spectrum usage charges, which under the terms of the license bore the nomenclature "licence fee and royalty". A sample copy of the 1997 BTS Licenses containing the table setting out the license fees paid by the highest bidder is annexed hereto as Annexure III (Colly).

WHEREAS in 1997, the Telecom Regulatory Authority of India Act, 1997 was enacted and the Telecom Regulatory Authority of India (the "TRAI") was established.

WHEREAS on 1st April, 1999, the New Telecom Policy 1999 ("NTP 1999") was brought into effect on the recommendation of a Group on Telecom ("GoT") which had been constituted by GoI. A copy of NTP 1999 is annexed hereto as Annexure IV. NTP 1999 provided that Cellular Mobile Service Providers ("CMSP") would be granted a license for a period of 20 years on the payment of a one-time entry fee and licence fee in the form of revenue share. NTP 1999 also provided that BTS (Fixed Service Provider or FSP) Licenses for providing both fixed and wireless (WLL) services would also be issued for a period of 20 years on payment of a one-time entry fee and licence fee in the form of revenue share and prescribed charges for spectrum usage, appropriate level of which was to be recommended by TRAI. The licensees both cellular and basic were also required to pay annual Spectrum usage charges.

WHEREAS based on NTP 1999, a migration package for migration from fixed license fee to one time entry fee and licence fee based on revenue share regime was offered to all the existing licenses on 22nd July, 1999. This came into effect on 1st August 1999. Under the migration package, the licence period for all the CMTS and FSP licensees was extended to 20 years from the date of issuance of the Licenses.

WHEREAS in 1997 and 2000, CMTS Licenses were also granted in 2 and 21 Circles to Mahanagar Telephone Nigam Limited ("MTNL") and Bharat Sanchar Nigam Limited ("BSNL") respectively (the "PSU Licenses"). However, no entry fee was charged for the PSU Licenses. The CMTS Licenses issued to BSNL and MTNL mentioned that they would be granted GSM Spectrum of 4.4 + 4.4 MHz in the 900 MHz band. The PSU Licensees were also required to pay annual spectrum usage charges. A copy of the PSU Licenses is annexed hereto as Annexure V (Colly).

WHEREAS in January 2001, based on TRAI's recommendation, DoT issued guidelines for issuing CMTS Licenses for the 4th Cellular Operator based on tendering process structured as "Multistage Informed Ascending Bidding Process". Based on a tender, 17 new CMTS Licenses were issued for a period of 20 years in the 4 Metro cities and 13 Telecom Circles (the "2001 Cellular Licenses"). The 2001 Licenses required that the licensees pay a one-time non refundable entry fee as determined through auction as above and also annual license fee and annual spectrum usage charges and there was no separate upfront charge for allocation of spectrum. In accordance with the terms of tender document, the license terms, inter-alia, provided that a cumulative maximum of upto 4.4 MHz + 4.4 MHz will be permitted and further based on usage, justification and availability, additional

spectrum upto 1.8 MHz + 1.8 MHz making a total of 6.2 MHz + 6.2 MHz, may be considered for assignment, on case by case basis, on payment of additional Licence fee. The bandwidth upto maximum as indicated i.e. 4.4 MHz & 6.2 MHz as the case may be, will be allocated based on the Technology requirements (e.g. CDMA @ 1.25 MHz, GSM @ 200 KHz etc.). The frequencies assigned may not be contiguous and may not be same in all cases, while efforts would be made to make available larger chunks to the extent feasible. A copy of the 2001 Cellular Licenses, along with a table setting out the fees payable by the highest bidder, is annexed hereto as Annexure VI.

WHEREAS in 2001, BTS Licenses were also issued for providing both fixed line and wireless basic telephone services on a continual basis (2001 Basic Telephone Licenses). Service area wise one time Entry Fee and annual license fee as a percentage of Adjusted Gross Revenue (AGR) was prescribed for grant of BTS Licenses. The licence terms, inter-alia, provided that for Wireless Access System in local area, not more than 5 + 5 MHz in 824-844 MHz paired with 869-889 MHz band shall be allocated to any basic service operator including existing ones on FCFS basis. A detailed procedure for allocation of spectrum on FCFS basis was given in Annexure-IX of the 2001 BTS license. There was no separate upfront charge for allocation of spectrum and the Licensees were required to pay revenue share of 2% of the AGR earned from wireless in local loop subscribers as spectrum charges in addition to the one time entry fee and annual license fee. A sample copy of the 2001 Basic Telephone License along with a table setting out the entry fees is annexed hereto as Annexure VII.

WHEREAS on 27th October, 2003, TRAI recommended a Unified Access Services Licence ("UASL") Regime. A copy of TRAI's recommendation is annexed hereto as Annexure VIII.

WHEREAS on 11.11.2003, Guidelines were issued, specifying procedure for migration of existing operators to the new UASL regime. As per the Guidelines, all applications for new Access Services License shall be in the category of Unified Access Services Licence. Later, based on TRAI clarification dated 14.11.2003, the entry fee for new Unified Licensee was fixed same as the entry fee of the 4th cellular operator. Based on further recommendations of TRAI dated 19.11.2003, spectrum to the new licensees was to be given as per the existing terms and conditions relating to spectrum in the respective license agreements. A copy of the Guidelines dated 11.11.2003 is annexed hereto as Annexure IX.

WHEREAS consequent to enhancement of FDI limit in telecom sector from 49% to 74%, revised Guidelines for grant of UAS Licenses were issued on 14.12.2005. These Guidelines, inter-alia stipulate that Licenses shall be issued without any restriction on the number of entrants for provision of Unified Access Services in a Service Area and the applicant will be required to pay one time non-refundable Entry, annual License fee as a percentage of Adjusted Gross Revenue (AGR) and spectrum charges on revenue share basis. No separate upfront charge for allocation of spectrum was prescribed. Initial Spectrum was allotted as per UAS License conditions to the service providers in different frequency bands, subject to availability. Initially allocation of a cumulative maximum up to 4.4 MHz + 4.4 MHz for TDMA based systems or 2.5 MHz + 2.5 MHz for CDMA based systems subject to availability was to be made. Spectrum not more than 5 MHz + 5 MHz in respect of CDMA system or 6.2 MHz + 6.2 MHz in respect of TDMA based system was to be allocated to any new UAS licensee. A copy of the UASL Guidelines dated 14.12.2005 is annexed hereto as Annexure X.

WHEREAS after the introduction of the UASL in 2003 and until March 2007, 51 new UASL Licenses were issued based on policy of First Come-First Served, on payment of the same entry fee as was paid for the 2001 Cellular Licenses (the "2003-2007 Licenses") and the spectrum was also allocated based on FCFS under a separate wireless operating license on case by case basis and subject to availability. Licensees had to pay annual spectrum usage charges as a percentage of AGR, there being a no upfront charge for allocation of spectrum. A copy of the 2003-2007 License, along with a table setting out the fees payable, is annexed hereto as Annexure XI (Colly).

WHEREAS on 28th August 2007, TRAI revisited the issue of new licenses, allocation of Spectrum, Spectrum charges, entry fees and issued its recommendations, a copy of which is annexed hereto as Annexure XII. TRAI made further recommendations dated 16.07.2008 which is annexed hereto as Annexure XIII.

WHEREAS in 2007 and 2008, GoI issued Dual Technology Licences, where under the terms of the existing licenses were amended to allow licensees to hold a license as well as Spectrum for providing services through both GSM and CDMA network. First amendment was issued in December, 2007. All licensees who opted for Dual Technology Licences paid the same entry fee, which was an amount equal to the amount prescribed as entry fee for getting a new UAS licence in the same service area. The amendment to the license inter-alia mentioned that initially a cumulative maximum of upto 4.4 MHz + 4.4 MHz was to be allocated in the case of TDMA based systems (@ 200 KHz per carrier or 30 KHz per carrier) and a maximum of 2.5 MHz + 2.5 MHz was to be allocated in the case of CDMA based systems (@ 1.25 MHz per carrier), on case by case basis subject to availability. It was also, inter-alia,

mentioned that additional spectrum beyond the above stipulation may also be considered for allocation after ensuring optimal and efficient utilization of the already allocated spectrum taking into account all types of traffic and guidelines/criteria prescribed from time to time. However, spectrum not more than 5 + 5 MHz in respect of CDMS system and 6.2 + 6.2 MHz in respect of TDMA based system was to be allocated to the licensee. There was no separate upfront charge for allocation of Spectrum. However, Dual Technology licensees were required to pay Spectrum usage charges in addition to the license fee on revenue share basis as a percentage of AGR. Spectrum to these licensees was allocated 10.01.2008 onwards.

WHEREAS Subscriber based criteria for CMTS was prescribed in the year 2002 for allocation of additional spectrum of 1.8 + 1.8 MHz beyond 6.2 + 6.2 MHz with a levy of additional spectrum usage charge of 1% of AGR. The allocation criteria was revised from time to time. A copy of the DoT letter dated 01.02.2002 in this regard is annexed hereto as Annexure XIV.

WHEREAS for the spectrum allotted beyond 6.2 MHz, in the frequency allocation letters issued by DoT May 2008 onwards, it was mentioned inter-alia that allotment of spectrum is subject to pricing as determined in future by the GoI for spectrum beyond 6.2 MHz + 6.2 MHz and the outcome of Court orders. However, annual spectrum usage charges were levied on the basis of AGR, as per the quantum of spectrum assigned. A sample copy of the frequency allocation letter is annexed hereto as Annexure XV.

WHEREAS Spectrum for the 3G Band (i.e. 2100 MHz band) was auctioned in 2010. The terms of the auction stipulated that, for successful new entrants, a fresh license agreement would be entered into and for existing licensees who were successful in the auction, the license

agreement would be amended for use of Spectrum in the 3G band. A copy of the Notice inviting Applications and Clarifications thereto are annexed hereto and marked as Annexure XVI (Colly). The terms of the amendment letter provided, inter alia, that the 3G spectrum would stand withdrawn if the license stood terminated for any reason. A copy of the standard form of the amendment letter is annexed hereto and marked as Annexure XVII.

WHEREAS letters of intent were issued for 122 Licenses for providing 2G services on or after 10 January 2008, against which licenses (the "2008 Licenses") were subsequently issued. However, pursuant to the judgment of this Hon'ble Court dated 2nd February, 2012 in Writ Petition (Civil) No.423 of 2010 (the "Judgment"), the 2008 Licenses have been quashed. A copy of the judgment is annexed hereto and marked Annexure XVIII.

WHEREAS the GoI has also filed an Interlocutory Application for clarification of the Judgment, wherein the GoI has placed on record the manner in which the auction is proposed to be held pursuant to the Judgment and sought appropriate clarificatory orders/directions from the Hon'ble Court. A copy of the Interlocutory Application is annexed hereto and marked as Annexure XIX.

WHEREAS while the GoI is implementing the directions set out in the Judgment at paragraph 81 and proceeding with a fresh grant of licences and allocation of spectrum by auction, the GoI is seeking a limited review of the Judgment to the extent it impacts generally the method for allocation of national resources by the State. A copy of the Review Petition is annexed hereto and marked as Annexure XX.

WHEREAS by the Judgment, this Hon'ble Court directed TRAI to make fresh recommendations for grant of licenses and allocation of Spectrum in the 2G band by

holding an auction, as was done for the allocation of Spectrum for the 3G licenses.

WHEREAS, in terms of the directions of this Hon'ble Court, GoI would now be allocating Spectrum in the relevant 2G bands at prices discovered through auction.

WHEREAS based on the recommendations of TRAI dated 11.05.2010 followed by further clarifications and recommendations, the GoI has prescribed in February 2012, the limit for spectrum assignment in the Metro Service Areas as 2x10MHz/2x6.25 MHz and in rest of the Service Areas as 2x8MHz/2x5 MHz for GSM (900 MHz, 1800 MHz band)/CDMA(800 MHZ band), respectively subject to the condition that the Licensee can acquire additional spectrum beyond prescribed limit in the open market should there be an auction of spectrum subject to the further condition that total spectrum held by it does not exceed the limits prescribed for merger of licenses i.e. 25% of the total spectrum assigned in that Service Area by way of auction or otherwise. This limit for CDMS spectrum is 10 MHz.

WHEREAS, in view of the fact that Spectrum may need to be allocated to individual entities from time to time in accordance with criteria laid down by the GoI, such as subscriber base, availability of Spectrum in a particular circle, inter-se priority depending on whether the Spectrum comprises the initial allocation or additional allocation, etc., it may not always be possible to conduct an auction for the allocation of Spectrum.

AND WHEREAS in view of the aforesaid, the auctioning of Spectrum in the 2G bands may result in a situation where none of the Licensees, using the 2G bands of 800 MHz., 900 MHz and 1800 MHz would have paid any separate upfront fee for the allocation of Spectrum.

AND WHEREAS the Government of India has received various notices from companies based in other countries, invoking bilateral investment agreements and seeking damages against the Union of India by reason of the cancellation/threat of cancellation of the licenses.

AND WHEREAS in the circumstance certain questions of law of far reaching national and international implications have arisen, including in relation to the conduct of the auction and the regulation of the telecommunications industry in accordance with the Judgment and FDI into this country in the telecom industry and otherwise in other sectors.

Given that the issues which have arisen are of great public importance, and that questions of law have arisen of public importance and with such far reaching consequences for the development of the country that it is expedient to obtain the opinion of the Hon'ble Supreme Court of India thereon.

NOW THEREFORE, in exercise of powers conferred upon me by clause (1) of Article 143 of the Constitution of India, I, Pratibha Devisingh Patil, President of India, hereby refer the following questions to the Supreme Court of India for consideration and report thereon, namely:

Q.1 Whether the only permissible method for disposal of all natural resources across all sectors and in all circumstances is by the conduct of auctions?

Q.2 Whether a broad proposition of law that only the route of auctions can be resorted to for disposal of natural resources does not run contrary to several judgments of the Supreme Court including those of Larger Benches?

Q.3 Whether the enunciation of a broad principle, even though expressed as a matter of constitutional law, does not really amount to formulation of a policy and has the effect of unsettling policy decisions formulated and approaches taken by various successive governments over the years for valid considerations, including lack of public resources and the need to resort to innovative and different approaches for the development of various sectors of the economy?

Q.4 What is the permissible scope for interference by courts with policy making by the Government including methods for disposal of natural resources?

Q.5 Whether, if the court holds, within the permissible scope of judicial review, that a policy is flawed, is the court not obliged to take into account investments made under the said policy including investments made by foreign investors under multilateral/ bilateral agreements?

Q.6 If the answers to the aforesaid questions lead to an affirmation of the judgment dated 02.02.2012 then the following questions may arise, viz.

(i) whether the judgment is required to be given retrospective effect so as to unsettle all licences issued and 2G spectrum (800, 900, and 1800 MHz bands) allocated in and after 1994 and prior to 10.01.2008?

(ii) whether the allocation of 2G spectrum in all

circumstances and in all specific cases for different policy considerations would nevertheless have to be undone?

And specifically

(iii) Whether the telecom licences granted in 1994 would be affected?

(iv) Whether the Telecom licences granted by way of basic licences in 2001 and licences granted between the period 2003-2007 would be affected?

(v) Whether it is open to the Government of India to take any action to alter the terms of any licence to ensure a level playing field among all existing licensees?

(vi) Whether dual technology licences granted in 2007 and 2008 would be affected?

(vii) Whether it is necessary or obligatory for the Government of India to withdraw the Spectrum allocated to all existing licensees or to charge for the same with retrospective effect and if so on what basis and from what date?

Q.7 Whether, while taking action for conduct of auction in accordance with the orders of the Supreme Court, it would remain permissible for the Government to:

(i) Make provision for allotment of Spectrum from time to time at the auction discovered price and in accordance with laid down criteria during the period of validity of the auction determined price?

(ii) Impose a ceiling on the acquisition of Spectrum with the aim of avoiding the emergence of dominance in the market by any licensee/applicant duly taking into consideration TRAI recommendations in this regard?

(iii) Make provision for allocation of Spectrum at auction related prices in accordance with laid down criteria in bands where there may be inadequate or no competition (for e.g. there is expected to be a low level of competition for CDMA in 800 MHz band and TRAI has recommended an equivalence ratio of 1.5 or 1.3X1.5 for 800 MHz and 900 MHz bands depending upon the quantum of spectrum held by the licensee that can be applied to auction price in 1800 MHz band in the absence of a specific price for these bands)?

Q.8 What is the effect of the judgment on 3G Spectrum acquired by entities by auction whose licences have been quashed by the said judgment?

NEW DELHI;
DATED: 12 April 2012 PRESIDENT OF INDIA"

2. A bare reading of the Reference shows that it is occasioned by the decision of this Court, rendered by a bench of two learned Judges on 2nd February, 2012 in *Centre for Public Interest Litigation & Ors. Vs. Union of India & Ors.*[1] (for brevity "2G Case").

3. On receipt of the Reference, vide order dated 9th May, 2012, notice was issued to the Attorney General for India. Upon hearing the learned Attorney General, it was directed vide order

1. (2012) 3 SCC 1.

dated 11th May, 2012, that notice of the Reference shall be issued to all the States through their Standing Counsel; on Centre for Public Interest Litigation (CPIL) and Dr. Subramanian Swamy (petitioners in the 2G Case); as also on the Federation of Indian Chambers of Commerce and Industry (FICCI) and Confederation of Indian Industry (CII), as representatives of the Indian industry. On the suggestion of the learned Attorney General, it was also directed (though not recorded in the order), that the reference shall be dealt with in two parts viz. in the first instance, only questions No. 1 to 5 would be taken up for consideration and the remaining questions shall be taken up later in the light of our answers to the first five questions.

4. At the commencement of the hearing of the Reference on 10th July, 2012, a strong objection to the maintainability of the Reference was raised by the writ petitioners in the 2G Case. Accordingly, it was decided to first hear the learned counsel on the question of validity of the Reference.

SUBMISSIONS ON MAINTAINABILITY:

5. Mr. Soli Sorabjee, learned senior counsel, appearing for CPIL, strenuously urged that in effect and substance, the Reference seeks to question the correctness of the judgment in the 2G Case, which is not permissible once this Court has pronounced its authoritative opinion on the question of law now sought to be raised. The learned counsel argued that reference under Article 143(1) of the Constitution does not entail appellate or review jurisdiction, especially in respect of a judgment which has attained finality. According to the learned counsel, it is evident from the format of the Reference that it does not express or suggest any 'doubt' as regards the question of fact or law relating to allocation of all natural resources, a sine-qua-non for a valid reference. In support of the proposition, learned counsel placed reliance on observations in earlier references - *In Re: The Delhi Laws Act, 1912, the Ajmer-Merwara (Extension of Laws) Act, 1947 And The Part C States (Laws)*

Act, 1950[2]*, In Re: The Berubari Union and Exchange of Enclaves Reference Under Article 143(1) of the Constitution of India*[3]*, In Re: The Kerala Education Bill, 195,7 In Reference Under Article 143(1) Of The Constitution of India*[4]*, Special Reference No.1 of 1964*[5] (commonly referred to as "Keshav Singh"), *In Re: Presidential Poll*[6], In *Re: The Special Courts Bill, 1978*[7]*, In the Matter of : Cauvery Water Disputes Tribunal*[8] (hereinafter referred to as "Cauvery-II") and *Special Reference No.1 of 1998 Re.*[9]

6. Next, it was contended by the learned senior counsel that if for any reason, the Executive feels that the 2G Case does not lay down a correct proposition of law, it is open to it to persuade another bench, before which the said judgment is relied upon, to refer the issue to a larger bench for reconsideration. In short, the submission was that an authoritative pronouncement, like the one in the 2G Case, cannot be short circuited by recourse to Article 143(1).

7. Learned counsel also contended that the Reference as framed is of an omnibus nature, seeking answers on hypothetical and vague questions, and therefore, must not be answered. Commending us to *In Re: The Special Courts Bill, 1978* (supra) and several other decisions, learned counsel urged that a reference under Article 143(1) of the Constitution for opinion has to be on a specific question or questions. It was asserted that by reason of the construction of the terms of Reference, the manner in which the questions have been

2. [1951] S.C.R. 747.
3. [1960] 3 S.C.R. 250.
4. [1959] S.C.R. 995.
5. [1965] 1 S.C.R. 413.
6. (1974) 2 SCC 33.
7. (1979) 1 SCC 380.
8. 1993 Supp (1) SCC 96 (II).
9. (1998) 7 SCC 739.

framed and the nature of the answers proposed, this Court would be entitled to return the Reference unanswered by pointing out the aforesaid impediments in answering it. Lastly, it was fervently pleaded that if the present Reference is entertained, it would pave the way for the Executive to circumvent or negate the effect of inconvenient judgments, like the decision in the 2G Case, which would not only set a dangerous and unhealthy precedent, but would also be clearly contrary to the ratio of the decision in Cauvery II.

8. Mr. Prashant Bhushan, learned senior counsel, while adopting the arguments advanced by Mr. Soli Sorabjee, reiterated that from the format of questions No.1 to 5, as well as from the review petition filed by the Government in the 2G Case, it is clear that the present Reference seeks to overrule the decision in the 2G Case by reading down the direction that allowed only 'auction' as the permissible means for allocation of all natural resource, in paragraphs 94 to 96 of the 2G Case, to the specific case of spectrum. It was argued by the learned counsel that it is apparent from the grounds urged in the review petition filed by the Government that it understood the ratio of the 2G Case, binding them to the form of procedure to be followed while alienating precious natural resources belonging to the people, and yet it is seeking to use the advisory jurisdiction of this Court as an appeal over its earlier decision. It was contended that even if it be assumed that a doubt relating to the disposal of all natural resources has arisen on account of conflict of decisions on the point, such a conflict cannot be resolved by way of a Presidential reference; that would amount to holding that one or the other judgments is incorrectly decided, which, according to the learned counsel, is beyond the scope of Article 143(1). Learned counsel alleged that the language in which the Reference is couched, exhibits mala fides on the part of the Executive. He thus, urged that we should refrain from giving an opinion.

9. Dr. Subramanian Swamy, again vehemently objecting

to the maintainability of the Reference, on similar grounds, added that the present Reference is against the very spirit of Article 143(1), which, according to the constituent assembly debates, was meant to be invoked sparingly, unlike the case here. It was pleaded that the Reference is yet another attempt to delay the implementation of the directions in the 2G Case. Relying on the decision of this Court in *Dr. M. Ismail Faruqui & Ors. Vs. Union of India & Ors.*[10], Dr. Swamy submitted that we will be well advised to return the Reference unanswered.

10. Mr. G.E. Vahanvati, the learned Attorney General for India, defending the Reference, submitted that the plea regarding non-maintainability of the Reference on the ground that it does not spell out a 'doubt', is fallacious on a plain reading of the questions framed therein. According to him, Article 143(1) uses the word 'question' which arises only when there is a 'doubt' and the very fact that the President has sought the opinion of this Court on the questions posed, shows that there is a doubt in the mind of the Executive on those issues. It was stressed that merely because the Reference does not use the word 'doubt' in the recitals, as in other cited cases, does not imply that in substance no doubt is entertained in relation to the mode of alienation of all natural resources, other than spectrum, more so when the questions posed for opinion have far reaching national and international implications. It was urged that the content of the Reference is to be appreciated in proper perspective, keeping in view the context and not the form.

11. It was urged that maintainability and the discretion to decline to answer a reference are two entirely different things. The question of maintainability arises when ex-facie, the Presidential reference does not meet the basic requirements of Article 143(1), contrastive to the question of discretion, which is the power of the Court to decline to answer a reference, for good reasons, once the reference is maintainable. In support

10. (1994) 6 SCC 360.

of the proposition, reliance was placed on In *Re: The Kerala Education Bill, 1957* (supra), *Keshav Singh* and *In Re: The Special Courts Bill, 1978* (supra). According to the learned counsel, the question as to whether the reference is to be answered or not, is not an aspect of maintainability, and is to be decided only after hearing the reference on merits.

12. Learned Attorney General, while contesting the plea that in a reference under Article 143(1), correctness or otherwise of earlier decisions can never be gone into, submitted that in a Presidential reference, there is no constitutional embargo against reference to earlier decisions in order to clarify, restate or even to form a fresh opinion on a principle of law, as long as an inter partes decision is left unaffected. In support of the contention that in the past, references have been made on questions in relation to the correctness of judgments, learned counsel placed reliance on the decisions of this Court In *Re: The Delhi Laws Act, 1912* (supra), *Special Reference No.1 of 1998* (supra), *Keshav Singh* (supra) and of the Privy Council *In re Piracy Jure Gentium*[11]. It was asserted that it has been repeatedly clarified on behalf of the Executive that the decision in the *2G Case* has been accepted and is not being challenged. The Reference was necessitated by certain observations made as a statement of law in the said judgment which require to be explicated. Referring to certain observations *in Re: The Berubari Union and Exchange of Enclaves* (supra), learned counsel submitted that this Court had accepted that a reference could be answered to avoid protracted litigation.

13. Learned Attorney General also contended that withdrawal of the review petition by the Government is of no consequence ; its withdrawal does not imply that the question about the permissible manner of disposal of other natural resources, and the issues regarding the environment for investment in the country, stood settled. Stoutly refuting the allegation that the reference is mala fide, learned counsel

11. [1934] A.C. 586.

submitted that in *In Re Presidential Poll* (supra), it is clearly laid down that the Court cannot question the bona fides of the President making the reference.

14. Mr. T.R. Andhyarujina, learned senior counsel, voiced concerns arising out of an apparent conflict between provisions of the statutes and the judgment delivered in the 2G Case; specifically with reference to Sections 10 and 11 of the Mines and Minerals (Regulation and Development) Act, 1957 (for short, "MMRD Act"), which prescribe a policy of preferential treatment and first come first served, unlike the 2G Case, which according to the learned counsel only mandates auction for all natural resources. He thus, urged this Court to dispel all uncertainties regarding the true position of law after the judgment in the 2G Case, by holding it as per incuriam in light of the provisions of the MMRD Act and other statutes.

15. Mr. Harish Salve, learned senior counsel, appearing on behalf of CII, while supporting the Reference, fervently urged that the contention that the Reference deserves to be returned unanswered due to the absence of the use of the word 'doubt' in the recitals of the Reference, is untenable. According to the learned counsel, under Article 143(1), the President can seek an opinion on any question of law or fact that has arisen, or is likely to arise, which is of such a nature and such public importance that it is expedient to seek the opinion of this Court. There is no additional condition that there should be any 'doubt' in the mind of the President. It was submitted by the learned counsel that the need for a Presidential reference may also arise to impart certainty to certain questions of law or fact which are of such a nature and of such moment as to warrant seeking opinion of this Court. It was urged that a pedantic interpretation, by which a Presidential reference would be declined on semantic considerations, such as the failure to use the word 'doubt' in the reference, should be eschewed.

16. Learned counsel contended that at the stage of making a reference, it is the satisfaction of the President in relation to

the nature of the question and its importance that is relevant. As a matter of comity of institutions, this Court has always declined to go behind the reasons that prevailed upon the President to make a reference and its bona fides. Nevertheless, this Court always has the discretion not to answer any such reference or the questions raised therein for good reasons. It was stressed that since this Court does not sit in review over the satisfaction of the President, the question of jurisdiction and of maintainability does not arise.

17. Learned counsel also argued that the premise that earlier judgments of this Court are binding in reference jurisdiction, and thus any reference, which impinges upon an earlier judgment should be returned unanswered, is equally fallacious. It was argued that the principle of stare decisis and the doctrine of precedent are generally accepted and followed as rules of judicial discipline and not jurisdictional fetters and, therefore, this Court is not prevented from re-examining the correctness of an earlier decision. On the contrary, the precedents support the proposition that this Court can, when exercising its jurisdiction under Article 143(1), examine the correctness of past precedents. According to the learned counsel, in *Keshav Singh,* this Court did examine the correctness of the judgment in *Pandit M.S.M. Sharma Vs. Shri Sri Krishna Sinha & Ors.*[12] (hereinafter referred to as "Sharma"). Explaining the ratio of the decision in Cauvery-II, learned counsel submitted that it is clear beyond any pale of doubt that the said pronouncement does not lay down, as an abstract proposition of law, that under Article 143(1), this Court cannot consider the correctness of any precedent. What it lays down is that once a lis between the parties is decided, the operative decree can only be opened by way of a review. According to the learned counsel, overruling a judgment - as a precedent - does not tantamount to reopening the decree.

18. Arguing on similar lines, Mr. C.A. Sundaram, learned

12. [1959] Supp. 1 S.C.R. 806.

senior counsel appearing on behalf of FICCI, contended that if the observations in the 2G Case are read as applying to all natural resources and not limited to spectrum, it would tantamount to de facto policy formulation by the Court, which is beyond the scope of judicial review. He also took a nuanced stance on this Court's power of reconsideration over its precedents. It was submitted that a precedent can be sliced into two parts viz. the decision or operative part of an order or decree pertaining to the inter partes dispute and the ratio with respect to the position of law; the former being beyond this Court's powers of review once an earlier bench of this Court has pronounced an authoritative opinion on it, but not the latter. He thus, urged that this Court does have the power to reconsider the principles of law laid down in its previous pronouncements even under Article 141.

19. Mr. Darius Khambata, learned Advocate General of Maharashtra, submitted that observations in the 2G Case were made only with regard to spectrum thus, leaving it open to this Court to examine the issue with regard to alienation of other natural resources. It was urged that even if broader observations were made with respect to all natural resources, it would still be open to this Court under Article 143(1) to say otherwise. He also pointed to certain State legislations that prescribe methods other than auction and thus, urged this Court to answer the first question in the negative lest all those legislations be deemed unconstitutional.

20. Mr. Sunil Gupta, learned senior counsel, appearing on behalf of the State of U.P., added that when Article 143(1) of the Constitution unfolds a high prerogative of a constitutional authority, namely, the President, to consult this Court on question of law or fact, it contains a no less high prerogative of this Court to report to the President its opinion on the question referred, either by making or declining to give an answer to the question. In other words, according to the learned counsel, the issue of a reference being maintainable at the instance of the President is an issue different from the judicial power of this Court to

answer or not to answer the question posed in the reference.

21. Mr. Ravindra Shrivastava, learned senior counsel appearing on behalf of the State of Chhattisgarh, contended that neither history supports nor reality warrants auction to be a rule of disposal of all natural resources in all situations. He referred to decisions of this Court that unambiguously strike a just balance between considerations of power of the State and duty towards public good, by leaving the choice of method of allocation of natural resources to the State, as long as it conforms to the requirements of Article 14. It was pleaded that the State be allowed the choice of methodology of allocation, especially in cases where it intends to incentivize investments and job creation in backward regions that would otherwise have been left untouched by private players if resources were given at market prices.

22. To sum up, the objections relating to the maintainability of the Reference converge mainly on the following points: (i) the foundational requirement for reference under Article 143(1) viz. a genuine 'doubt' about questions of fact or law that the executive labours under, is absent; (ii) the filing and withdrawal of a review petition whose recitals pertain to the 2G Case would be an impediment in the exercise of discretion under Article 143(1); (iii) the language in which the Reference is couched exhibits mala fides on the part of the Executive; (iv) in light of enunciation of law on the point in Cauvery II, entertaining a Presidential reference on a subject matter, which has been decided upon directly and with finality, is barred; (v) the present Reference is an attempt to overturn the judgment of this Court in the 2G Case, which is against the spirit of Article 143(1) of the Constitution and (vi) the Executive is adopting the route of this Reference to wriggle out of the directions in the 2G Case as the same are inconvenient for them to follow.

DISCUSSION:

23. Before we evaluate the rival stands on the

maintainability of the Reference, it would be necessary to examine the scope and breadth of Article 143 of the Constitution, which reads thus:

> **"143. Power of President to consult Supreme Court.-** (1) If at any time it appears to the President that a question of law or fact has arisen, or is likely to arise, which is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it, he may refer the question to that Court for consideration and the Court may, after such hearing as it thinks fit, report to the President its opinion thereon.
>
> (2) The President may, notwithstanding anything in the proviso to article 131, refer a dispute of the kind mentioned in the said proviso to the Supreme Court for opinion and the Supreme Court shall, after such hearing as it thinks fit, report to the President its opinion thereon."

A bare reading at the Article would show that it is couched in broad terms. It is plain from the language of Article 143(1) that it is not necessary that the question on which the opinion of the Supreme Court is sought must have actually arisen. The President can make a reference under the said Article even at an anterior stage, namely, at the stage when the President is satisfied that the question is likely to arise. The satisfaction whether the question meets the pre-requisites of Article 143(1) is essentially a matter for the President to decide. Upon receipt of a reference under Article 143(1), the function of this Court is to consider the reference; the question(s) on which the President has made the reference, on the facts as stated in the reference and report to the President its opinion thereon.

24. Nevertheless, the usage of the word "may" in the latter part of Article 143(1) implies that this Court is not bound to render advisory opinion in every reference and may refuse to express its opinion for strong, compelling and good reasons. In *Keshav Singh*, highlighting the difference in the phraseology

used in clauses (1) and (2) of Article 143, P.B. Gajendragadkar, C.J., speaking for the majority, held as follows:

> "…whereas in the case of reference made under Article 143 (2) it is the constitutional obligation of this Court to make a report on that reference embodying its advisory opinion, in a reference made under Article 143 (1) there is no such obligation. In dealing with this latter class of reference, it is open to this Court to consider whether it should make a report to the President giving its advisory opinion on the questions under reference."

25. Further, even in an earlier judgment in *In re: Allocation of Lands and Buildings Situate in a Chief Commissioner's Province and in the matter of Reference by the Governor-General under S. 213, Government of India Act, 1935*[13], the Federal Court had said that even though the Court is within its authority to refuse to answer a question on a reference, it must be unwilling to exercise its power of refusal "except for good reasons." A similar phrase was used in *In Re: The Kerala Education Bill, 1957* (supra) when this Court observed that opinion on a reference under Article 143(1), may be declined in a "proper case" and "for good reasons". In *Dr. M. Ismail Faruqui & Ors.* (supra), it was added that a reference may not be answered when the Court is not competent to decide the question which is based on expert evidence or is a political one.

26. Having noted the relevant contours of Article 143(1) of the Constitution, we may now deal with the objections to the maintainability of the Reference.

27. There is no denying the fact that in the entire Reference the word 'doubt' has not been used. It is also true that in all previous references, noted in para 5 (supra), it had been specifically mentioned that doubts had arisen about various issues. Nonetheless, the fact remains that Article 143(1) does

13. A.I.R. (30) 1943 FC 13.

not use the term 'doubt'. No specific format has been provided in any of the Schedules of the Constitution as to how a reference is to be drawn. The use of the word 'doubt' in a reference is also not a constitutional command or mandate. Needless to emphasise that the expression, 'doubt', which refers to a state of uncertainty, may be with regard to a fact or a principle. In P. Ramanatha Aiyar's, The Major Law Lexicon, 4th Edition, the words 'doubt' and 'question' have been dealt with in the following manner:-

> "Doubt, Question. These terms express the act of the mind in staying its decision. Doubt lies altogether in the mind; it is a less active feeling than question; by the former we merely suspend decision; by the latter we actually demand proofs in order to assist us in deciding. We may doubt in silence. We cannot question without expressing it directly or indirectly. He who suggests doubts does it with caution: he who makes a question throws in difficulties with a degree of confidence. We doubt the truth of a position; we question the veracity of an author. (Crabb.)"

As per the Concise Oxford Dictionary (Tenth Edition), 'question' means : "a doubt; the raising of a doubt or objection; a problem requiring solution".

In Black's Law Dictionary 'doubt', as a verb, has been defined as follows:

> "To question or hold questionable."

The word 'doubt', as a noun, has been described as under:-

> "Uncertainty of mind; the absence of a settled opinion or conviction; the attitude of mind towards the acceptance of or belief in a proposition, theory, or statement, in which the judgment is not at rest but inclines alternately to either side."

28. The afore-extracted recitals of the instant Reference state that in the current circumstances, certain questions of law

with far reaching national and international implications have arisen, including in relation to conduct of the auction and the regulation of the telecommunications industry in accordance with the judgment (2G Case) that may affect the flow of FDI in the telecom industry and otherwise in other sectors into this country. Thereafter, it is also stated that questions of law that have arisen are of great public importance and are of far reaching consequences for the development of the country and hence, it is thought expedient to obtain the opinion of this Court. Question No.1 of the reference reads as follows:-

> "Whether the only permissible method for disposal of all natural resources across all sectors and in all circumstances is by the conduct of auctions?"

29. At this juncture, reference may profitably be made to the decision in *In Re: The Special Courts Bill, 1978* (supra), an opinion by a Bench of seven learned Judges, wherein it was observed as follows:

> "27. We were, at one stage of the arguments, so much exercised over the undefined breadth of the reference that we were considering seriously whether in the circumstances it was not advisable to return the reference unanswered. But the written briefs filed by the parties and the oral arguments advanced before us have, by their fullness and ability, helped to narrow down the legal controversies surrounding the Bill and to crystallize the issues which arise for our consideration. We propose to limit our opinion to the points specifically raised before us. It will be convenient to indicate at this stage what those points are."

While expressing the hope that, in future, specific questions would be framed for the opinion of this Court, Y.V. Chandrachud (as his Lordship then was), speaking for the majority, said:

> "30. We hope that in future, whenever a reference is made to this Court under Article 143 of the Constitution, care will

be taken to frame specific questions for the opinion of the Court. Fortunately, it has been possible in the instant reference to consider specific questions as being comprehended within the terms of the reference but the risk that a vague and general reference may be returned unanswered is real and ought to engage the attention of those whose duty it is to frame the reference. Were the Bill not as short as it is, it would have been difficult to infuse into the reference the comprehension of the two points mentioned by us above and which we propose to decide. A long Bill would have presented to us a rambling task in the absence of reference on specific points, rendering it impossible to formulate succinctly the nature of constitutional challenge to the provisions of the Bill."

30. From the afore-extracted paragraphs, three broad principles emerge: (i) a reference should not be vague, general and undefined, (ii) this Court can go through the written briefs and arguments to narrow down the legal controversies, and (iii) when the question becomes unspecific and incomprehensible, the risk of returning the reference unanswered arises. In Keshav Singh, this Court while dealing with the validity of the reference, referred to earlier decisions and opined as follows:

"…It would thus be seen that the questions so far referred by the President for the Advisory opinion of this Court under Article 143(1) do not disclose a uniform pattern and that is quite clearly consistent with the broad and wide words used in Article 143(1)."

31. An analysis of the afore-noted cases, indicates that neither has a particular format been prescribed nor any specific pattern been followed in framing references. The first principle relates to the 'form' and the second pertains to the 'pattern of content'. Holistically understood, on the ground of form or pattern alone, a reference is not to be returned unanswered. It requires appropriate analysis, understanding and appreciation of the content or the issue on which doubt is expressed,

keeping in view the concept of constitutional responsibility, juridical propriety and judicial discretion.

32. Thus, we find it difficult to accept the stand that use of the word 'doubt' is a necessary condition for a reference to be maintainable under Article 143(1). That apart, in our view, question No.1, quoted above, is neither vague nor general or unspecific, but is in the realm of comprehension which is relatable to a question of law. It expresses a 'doubt' and seeks the opinion of the Court on that question, besides others.

33. In so far as the impact of filing and withdrawal of the review application by the Union of India, against the decision in the 2G Case on the maintainability of the instant Reference is concerned, it is a matter of record that in the review petition, certain aspects of the grounds for review which have been stated in the recitals of the Reference as well as in some questions, were highlighted. However, there is a gulf of difference between the jurisdiction exercised by this Court in a review and the discretion exercised in answering a reference under Article 143(1) of the Constitution. A review is basically guided by the well-settled principles for review of a judgment and a decree or order passed inter se parties. The Court in exercise of power of review may entertain the review under the acceptable and settled parameters. But, when an opinion of this Court is sought by the Executive taking recourse to a constitutional power, needless to say, the same stands on a different footing altogether. A review is lis specific and the rights of the parties to the controversy are dealt with therein, whereas a reference is answered keeping in view the terms of the reference and scrutinising whether the same satisfies the requirements inherent in the language employed under Article 143(1) of the Constitution. In our view, therefore, merely because a review had been filed and withdrawn and in the recital the narration pertains to the said case, the same would not be an embargo or impediment for exercise of discretion to answer the Reference.

34. As far as the allegation of mala fide is concerned, it is trite that this Court is neither required to go into the truth or otherwise of the facts of the recitals nor can it go into the question of bona fides or otherwise of the authority making a reference. [See: *In Re: Presidential Poll* (supra)]. To put it differently, the constitutional power to seek opinion of this Court rests with the President. The only discretion this Court has is either to answer the reference or respectfully decline to send a report to the President. Therefore, the challenge on the ground of mala fide, as raised, is unsustainable.

35. The principal objection to the maintainability of the Reference is that it is an indirect endeavour to unsettle and overturn the verdict in the 2G Case, which is absolutely impermissible. The stand of the objectors is that the 2G Case is an authoritative precedent in respect of the principle or proposition of law that all natural resources are to be disposed of by way of public auction and, therefore, the Reference should be held as not maintainable. Emphasis in this behalf was on paragraphs 85 and 94 to 96 of the said judgment. In support of the proposition, heavy reliance was placed on *Cauvery II*.

36. At the outset, we may note that the learned Attorney General has more than once stated that the Government of India is not questioning the correctness of the directions in the 2G Case, in so far as the allocation of spectrum is concerned, and in fact the Government is in the process of implementing the same, in letter and spirit. Therefore, in the light of the said statement, we feel that it would be unnecessary to comment on the submission that the Reference is an attempt to get an opinion to unsettle the decision and directions of this Court in the 2G Case. Nevertheless, since in support of the aforesaid submission, the opinion of this Court in Cauvery II has been referred to and relied upon in extenso, it would be appropriate to decipher the true ratio of Cauvery II, the lynchpin of the opposition to maintainability of the present Reference.

37. Cauvery II was preceded by *State of Tamil Nadu Vs.*

State of Karnataka & Ors.[14] (hereinafter referred to as "Cauvery I"), which dwelled on the issue whether the Cauvery Water Disputes Tribunal (for short "the Tribunal") had the power to grant interim relief. In that case, applications filed by the State of Tamil Nadu for urgent interim reliefs were rejected by the Tribunal on the ground that they were not maintainable. This order was challenged, resulting in the judgment dated 26th April, 1991 by this Court, where it was held as follows:

> "15. Thus, we hold that this Court is the ultimate interpreter of the provisions of the Interstate Water Disputes Act, 1956 and has an authority to decide the limits, powers and the jurisdiction of the Tribunal constituted under the Act. This Court has not only the power but obligation to decide as to whether the Tribunal has any jurisdiction or not under the Act, to entertain any interim application till it finally decides the dispute referred to it…"

38. The Tribunal had ruled that since it was not like other courts with inherent powers to grant interim relief, only in case the Central Government referred a case for interim relief to it, would it have the jurisdiction to grant the same. Inter-alia, the Court observed that the Tribunal was wrong in holding that the Central Government had not made any reference for granting any interim relief, and concluded that the interim reliefs prayed for clearly fell within the purview of the dispute referred by the Central Government. Accordingly, the appeals preferred by the State of Tamil Nadu were allowed and the Tribunal was directed to decide the applications for interim relief. However, the Court did not decide the larger question of whether a Tribunal, constituted under the Interstate Water Disputes Act, 1956 had the power to grant an interim relief, though the answer to the same may be deduced from the final direction.

39. In pursuance of these directions, the Tribunal decided the application and vide its order dated 25th June, 1991,

14. 1991 Supp (1) SCC 240.

proceeded to issue certain directions to the State of Karnataka. Thereafter, on 25th July 1991, the Governor of Karnataka issued an Ordinance named "The Karnataka Cauvery Basin Irrigation Protection Ordinance, 1991". Hot on the heels of the Ordinance, the State of Karnataka also instituted a suit under Article 131 of the Constitution against the State of Tamil Nadu for a declaration that the Tribunal's order granting interim relief was without jurisdiction and, therefore, null and void, etc. The Ordinance was replaced by Act 27 of 1991. In the context of these developments, the President made a reference to this Court under Article 143(1) of the Constitution, posing three questions for opinion. The third question of the reference, relevant for the present Reference, was :-

> "3. Whether a Water Disputes Tribunal constituted under the Act is competent to grant any interim relief to the parties to the dispute."

However, while dealing with the reference in Cauvery II, the Court split the question, viz., whether a Water Disputes Tribunal constituted under the Act is competent to grant any interim relief into two parts: (i) when a reference for grant of interim relief is made to the Tribunal, and (ii) when no such reference is made to it. It was contended by the States of Karnataka and Kerala that if the Tribunal did not have power to grant interim relief, the Central Government would be incompetent to make a reference for the purpose in the first place and the Tribunal in turn would have no jurisdiction to entertain such reference, if made. Dealing with the said submission, after making a reference to the earlier order, this Court observed that once the Central Government had made a reference to the Tribunal for consideration of the claim for interim relief, prayed for by the State of Tamil Nadu, the Tribunal had jurisdiction to consider the said request being a part of the reference itself. Implicit in the said decision was the finding that the subject of interim relief was a matter connected with or relevant to the water dispute within the meaning of Section 5(1) of the said Act. It was held

that the Central Government could refer the matter for granting interim relief to the Tribunal for adjudication.

40. The consequence of the Court in coming to the conclusion, while replying to the third question was that the Tribunal did not have the jurisdiction to make an interim award or grant interim relief, would have not only resulted in the Court overruling its earlier decision between the two contending parties i.e. the two States, but it would have also then required the Court to declare the order of the Tribunal as being without jurisdiction. The Court therefore, said :

> "83…Although this Court by the said decision has kept open the question, viz., whether the Tribunal has incidental, ancillary, inherent or implied power to grant the interim relief when no reference for grant of such relief is made to it, it has in terms concluded the second part of the question. We cannot, therefore, countenance a situation whereby question 3 and for that matter questions 1 and 2 may be so construed as to invite our opinion on the said decision of this Court. That would obviously be tantamount to our sitting in appeal on the said decision which it is impermissible for us to do even in adjudicatory jurisdiction. Nor is it competent for the President to invest us with an appellate jurisdiction over the said decision through a Reference under Article 143 of the Constitution."

These observations would suggest that the Court declined to construe Article 143 as a power any different from its adjudicative powers and for that reason, said that what could not be done in the adjudicatory process would equally not be achieved through the process of a reference.

41. The expression, "sitting in appeal" was accurately used. An appellate court vacates the decree (or writ, order or direction) of the lower court when it allows an appeal - which is what this Court was invited to do in Cauvery I. This Court, in that appeal decided earlier, held that the Tribunal had the

jurisdiction to pass the interim order sought by the State of Tamil Nadu. To nullify the interim order passed by the Tribunal, pursuant to a direction of the Supreme Court, on the ground that it was without jurisdiction, would necessarily require vacating the direction of the Supreme Court to the Tribunal to exercise its jurisdiction and decide the interim matter. Para 85 of that decision puts the matter beyond any pale of doubt:

> "85... In the first instance, the language of clause (1) of Article 143 far from supporting Shri Nariman's contention is opposed to it. The said clause empowers the President to refer for this Court's opinion a question of law or fact which has arisen or is likely to arise. When this Court in its adjudicatory jurisdiction pronounces its authoritative opinion on a question of law, it cannot be said that there is any doubt about the question of law or the same is res integra so as to require the President to know what the true position of law on the question is. The decision of this Court on a question of law is binding on all courts and authorities. Hence under the said clause the President can refer a question of law only when this Court has not decided it. Secondly, a decision given by this Court can be reviewed only under Article 137 read with Rule 1 of Order 40 of the Supreme Court Rules, 1966 and on the conditions mentioned therein. When, further, this Court overrules the view of law expressed by it in an earlier case, it does not do so sitting in appeal and exercising an appellate jurisdiction over the earlier decision. It does so in exercise of its inherent power and only in exceptional circumstances such as when the earlier decision is per incuriam or is delivered in the absence of relevant or material facts or if it is manifestly wrong and productive of public mischief. [See: *Bengal Immunity Company Ltd. v. State of Bihar* (1955) 2 SCR 603]. Under the Constitution such appellate jurisdiction does not vest in this Court, nor can it be vested in it by the President under Article 143. To accept Shri

> Nariman's contention would mean that the advisory jurisdiction under Article 143 is also an appellate jurisdiction of this Court over its own decision between the same parties and the executive has a power to ask this Court to revise its decision. If such power is read in Article 143 it would be a serious inroad into the independence of judiciary."

42. Eventually, the reference was answered in respect of question No.3 in the following terms:-

> "Question No.3: (i) A Water Disputes Tribunal constituted under the Act is competent to grant any interim relief to the parties to the dispute when a reference for such relief is made by the Central Government;
>
> (ii) whether the Tribunal has power to grant interim relief when no reference is made by the Central Government for such relief is a question which does not arise in the facts and circumstances under which the Reference is made. Hence we do not deem it necessary to answer the same."

43. The main emphasis of Mr. Soli Sorabjee was on the second part of paragraph 85, which, according to him, prohibits this Court from overruling a view expressed by it previously under Article 143(1). We are not persuaded to agree with the learned senior counsel. The paragraph has to be read carefully. Sawant J. first considers the case of a "decision" of this Court whereas in the subsequent sentence he considers a "view of law" expressed by the Court, and attempts to explain the difference between the approaches to these two situations. These words are sometimes used interchangeably but not hereinabove. We believe that Justice Sawant consciously draws a difference between the two by using the words "When, further, this Court overrules the view of law…" after discussing the case of a "decision".

44. Black's Law Dictionary defines a "decision" as "a determination arrived at after consideration of facts, and, in legal context, law"; an "opinion" as "the statement by a judge or court of the decision reached in regard to a cause tried or argued before them, expounding the law as applied to the case, and detailing the reasons upon which the judgment is based"; and explains the difference between a "decision" and "opinion" as follows:

> "Decision is not necessarily synonymous with 'opinion'. A decision of the Court is its judgment; the opinion is the reasons given for that judgment, or the expression of the views of the judge."

45. Therefore, references in Para 85 to "decision" and "view of law" must be severed from each other. The learned Judge observes that in case of a decision, the appellate structure is exhausted after a pronouncement by the Supreme Court. Therefore, the only option left to the parties is of review or curative jurisdiction (a remedy carved out in the judgment in *Rupa Ashok Hurra Vs. Ashok Hurra & Anr.*[15]). After the exercise of those limited options, the concerned parties have absolutely no relief with regard to the dispute; it is considered settled for eternity in the eyes of the law. However what is not eternal and still malleable in the eyes of law is the opinion or "view of law" pronounced in the course of reaching the decision. Justice Sawant clarifies that unlike this Court's appellate power, its power to overrule a previous precedent is an outcome of its inherent power when he says, "…it does not do so sitting in appeal and exercising an appellate jurisdiction over the earlier decision. It does so in exercise of its inherent power and only in exceptional circumstances…." This Court has pointed out the difference between the two expressions in *Rupa Ashok Hurra* (supra), in the following words:

> "24. There is no gainsaying that the Supreme Court is the court of last resort - the final court on questions both of fact and of law including constitutional law. The law declared by this Court is the law of the land; it is precedent for itself and for all the courts/tribunals and authorities in India. In a judgment there will be declaration of law and its application to the facts of the case to render a decision on the dispute between the parties to the lis. It is necessary to bear in mind that the principles in regard to the highest court departing from its binding precedent are different from the grounds on which a final judgment between the parties, can be reconsidered. Here, we are mainly concerned with the latter. However, when reconsideration of a judgment of this Court is sought the finality attached both to the law declared as well as to the decision made in the case, is normally brought under challenge…"

Therefore, there are two limitations - one jurisdictional and the other self-imposed.

46. The first limitation is that a decision of this Court can be reviewed only under Article 137 or a Curative Petition and in no other way. It was in this context that in para 85 of Cauvery II, this Court had stated that the President can refer a question of law when this Court has not decided it. Mr. Harish Salve, learned senior counsel, is right when he argues that once a lis between parties is decided, the operative decree can only be opened in review. Overruling the judgment - as a precedent - does not reopen the decree.

47. The second limitation, a self imposed rule of judicial discipline, was that overruling the opinion of the Court on a legal issue does not constitute sitting in appeal, but is done only in exceptional circumstances, such as when the earlier decision is per incuriam or is delivered in the absence of relevant or material facts or if it is manifestly wrong and capable of causing public mischief. For this proposition, the Court relied upon the judgment in the Bengal Immunity case (supra) wherein it was held that when Article 141 lays down that the law declared by

15. (2002) 4 SCC 388.

this Court shall be binding on all courts within the territory of India, it quite obviously refers to courts other than this Court; and that the Court would normally follow past precedents save and except where it was necessary to reconsider the correctness of law laid down in that judgment. In fact, the overruling of a principle of law is not an outcome of appellate jurisdiction but a consequence of its inherent power. This inherent power can be exercised as long as a previous decree vis-à-vis lis inter partes is not affected. It is the attempt to overturn the decision of a previous case that is problematic which is why the Court observes that "under the Constitution such appellate jurisdiction does not vest in this Court, nor can it be vested in it by the President under Article 143."

48. Therefore, the controversy in Cauvery II was covered by the decision rendered by this Court in Cauvery I between the parties and the decision operated as res judicata and hence, it was opined that discretion under Article 143(1) could not be exercised. It has also been observed that this Court had analysed the relevant provisions of the Inter-State Water Disputes Act, 1956 and thereafter had come to the conclusion that the Tribunal had jurisdiction to grant interim relief if the question of granting interim relief formed part of the reference. On this bedrock it was held that the decision operated as res judicata. It is, therefore, manifest from Cauvery II that the Court was clearly not opposed to clarifying the ratio of a previous judgment in Cauvery I, in the course of an advisory jurisdiction. Afore-extracted para 85 of Cauvery II, restricts this Court's advisory jurisdiction on the limited point of overturning a decided issue vis-à-vis a 'dispute' or lis inter partes.

49. Finally a seven Judge Bench of this Court has clearly held that this Court, under Article 143(1), does have the power to overrule a previous view delivered by it. Justice Chandrachud, C.J. in *In re: The Special Courts Bill* (supra) held:

> "101…We are inclined to the view that though it is always open to this Court to re-examine the question already decided by it and to overrule, if necessary, the view earlier taken by it, insofar as all other courts in the territory of India are concerned they ought to be bound by the view expressed by this Court even in the exercise of its advisory jurisdiction under Article 143(1) of the Constitution."

50. There is a catena of pronouncements in which this Court has either explained, clarified or read down the ratio of previous judgments. In the very first reference, *In Re: Delhi Laws Act, 1912* (supra), the reference was made by reason of a judgment of the Federal Court in *Jatindra Nath Gupta Vs. The Province of Bihar & Ors.*[16]. The background of that reference was explained by Mukherjea, J. as under:

> "The necessity of seeking the advisory opinion of this Court is stated to have arisen from the fact that because of the decision of the Federal Court in *Jatindra Nath Gupta v. The Province of Bihar,* which held the proviso to sub-section (3) of Section 1 of the Bihar Maintenance of Public Order Act, 1947, ultra vires the Bihar Provincial Legislature, by reason of its amounting to a delegation of its legislative powers to an extraneous authority, doubts have arisen regarding the validity of the three legislative provisions mentioned above, the legality of the first and the second being actually called in question in certain judicial proceedings which are pending before some of the High Courts in India."

Justice Das in the same opinion, while noting that reliance was placed by learned counsel for the interveners on the judgment of the Federal Court in *Jatindra Nath Gupta* (supra), recorded that the learned Attorney General had strenuously challenged the correctness of the decision of the majority of the Federal Court in that case. Inter-alia, observing that the reference was

16. [1949-50] F.C.R. 595.

in a way occasioned by that decision, the learned Judge held as follows:

> "I feel bound to say, with the utmost humility and for reasons given already, that the observations of the majority of the Federal Court in that case went too far and, in agreement with the learned Attorney-General, I am unable to accept them as correct exposition of the principles relating to the delegation of legislative power."

51. In this context, it would be beneficial to refer to *Keshav Singh's* case. In the said case, a reference was made by the President which fundamentally pertained to the privileges of the Legislative Assembly and exercise of jurisdiction by a Bench of the High Court. The High Court entertained a writ petition under Article 226 of the Constitution, challenging the decision of the Assembly committing one Keshav Singh, who was not one of its members, to prison for its contempt. The issue was whether by entertaining the writ petition, the Judges of the High Court were in contempt of the Legislature for infringement of its privileges and immunities. For the same, this Court proceeded to construe the relevant provisions contained in Article 194(3) and its harmonization with other Articles of the Constitution, especially Articles 19(1)(a), 21 & 22. In that context, the decision in "Sharma" (supra) came up for consideration. One of the questions that arose in Sharma's case was the impact of Articles 19(1)(a) and 21 on the provisions contained in the latter part of Article 194(3). The majority view was that the privilege in question was subsisting at the relevant time and must, therefore, deemed to be included under the latter part of Article 194(3). It was held that Article 19(1)(a) did not apply under the rule of harmonious construction, where Article 19(1)(a) was in direct conflict with Article 194(3). The particular provision in the latter Article would prevail over the general provision contained in the former. It was further held that though Article 21 applied, it had not been contravened. The minority view, on the other hand, held that the privilege in question had

not been established; even assuming the same was established and it was to be included in the latter part of Article 194(3), yet it must be controlled by Article 19(1)(a) on the ground that Fundamental Rights guaranteed by Part III of the Constitution were of paramount importance and must prevail over a provision like the one contained in Article 194(3) which may be inconsistent with them. The majority decision also commented on the decision in *Gunupati Keshavram Reddy Vs. Nafisul Hasan & the State of U.P.*[17] and observed that the said decision was based entirely on a concession and could not, therefore, be deemed to be a considered decision of this Court.

52. The decision in *Keshavram Reddy* (supra) dealt with the applicability of Article 22(2) to a case falling under the latter part of Article 194(3). It is worth noting that the minority opinion of Sharma treated *Keshavram Reddy,* as expressing a considered opinion, which was binding on the Court. In *Keshav Singh* it was opined that in *Sharma's* case, the majority decision held in terms that Article 21 was applicable to the contents of Article 194(3), but on merits, it came to the conclusion that the alleged contravention had not been proved. Commenting on the minority view it was opined that it was unnecessary to consider whether Article 21 as such applied because the said view treated all the Fundamental Rights guaranteed by Part III as paramount, and therefore, each one of them could control the provisions of Article 194(3).

53. At that juncture, the Bench stated that in the case of *Sharma*, contentions urged by the petitioner did not raise a general issue as to the relevance and applicability of all the fundamental rights guaranteed by Part III at all. The contravention of only two Articles was pleaded and they were Articles 19(1)(a) and 21. Strictly speaking, it was, therefore, unnecessary to consider the larger issue as to whether the latter part of Article 194(3) was subject to the fundamental rights in general, and indeed, even on the majority view it could not be

17. AIR 1954 SC 636.

said that the said view excluded the application of all fundamental rights, for the obvious and simple reason that Article 21 was held to be applicable and the merits of the petitioner's arguments about its alleged contravention in his case were examined and rejected. Therefore, it was not right to read the majority decision as laying down a general proposition that whenever there is a conflict between the provisions of the latter part of Article 194(3) and any of the provisions of the fundamental rights guaranteed by Part III, the latter must always yield to the former. It was further observed that the majority decision had incidentally commented on the decision in *Keshavram Reddy's* case (supra). Apart from that there was no controversy about the applicability of Article 22 in that case, and, therefore, the comment made by the majority judgment on the earlier decision was partly not accurate. Their Lordships adverted to the facts in Sharma's case wherein the majority judgment had observed that it "proceeded entirely on a concession of counsel and cannot be regarded as a considered opinion on the subject." After so stating, the Bench opined thus:

> "…There is no doubt that the first part of this comment is not accurate. A concession was made by the Attorney-General not on a point of law which was decided by the Court, but on a point of fact; and so, this part of the comment cannot strictly be said to be justified. It is, however, true that there is no discussion about the merits of the contention raised on behalf of Mr. Mistry and to that extent, it may have been permissible to the majority judgment to say that it was not a considered opinion of the Court. But, as we have already pointed out, it was hardly necessary for the majority decision to deal with the point pertaining to the applicability of Article 22(2), because that point did not arise in the proceedings before the Court in Pandit Sharma's case. That is why we wish to make it clear that the obiter observations made in the majority judgment about the validity or correctness of the earlier decision of

> this Court in Gunupati Keshavram Reddy's case should not be taken as having decided the point in question. In other words, the question as to whether Article 22(2) would apply to such a case may have to be considered by this Court if and when it becomes necessary to do so."

54. From the aforesaid decision it is clear that while exercising jurisdiction under Article 143(1) of the Constitution this Court can look into an earlier decision for the purpose of whether the contentions urged in the previous decision did raise a general issue or not; whether it was necessary to consider the larger issue that did not arise; and whether a general proposition had been laid down. It has also been stated that where no controversy arose with regard to applicability of a particular facet of constitutional law, the comments made in a decision could be treated as not accurate; and further it could be opined that in an earlier judgment there are certain obiter observations.

55. Thus, in *Keshav Singh,* a seven-Judge Bench, while entertaining a reference under Article 143(1), dealt with a previous decision in respect of its interpretation involving a constitutional principle in respect of certain Articles, and proceeded to opine that the view expressed in *Sharma's* case, in relation to a proposition laid down in *Keshavram Reddy's* case, was inaccurate.

56. At this stage, it is worthy to refer to *Supreme Court Advocates-on-Record Association and Ors. Vs. Union of India*[18]. J.S. Verma, J., (as his Lordship then was) speaking for the majority, apart from other conclusions relating to appointment of Judges and the Chief Justices, while dealing with transfer, expressed thus:

> "(8) Consent of the transferred Judge/Chief Justice is not required for either the first or any subsequent transfer from one High Court to another.

18. (1993) 4 SCC 441.

(9) Any transfer made on the recommendation of the Chief Justice of India is not to be deemed to be punitive, and such transfer is not justiciable on any ground.

(10) In making all appointments and transfers, the norms indicated must be followed. However, the same do not confer any justiciable right in anyone.

(11) Only limited judicial review on the grounds specified earlier is available in matters of appointments and transfers."

As far as the ground of limited judicial review is concerned the majority opined thus:

"481. These guidelines in the form of norms are not to be construed as conferring any justiciable right in the transferred Judge. Apart from the constitutional requirement of a transfer being made only on the recommendation of the Chief Justice of India, the issue of transfer is not justiciable on any other ground, including the reasons for the transfer or their sufficiency. The opinion of the Chief Justice of India formed in the manner indicated is sufficient safeguard and protection against any arbitrariness or bias, as well as any erosion of the independence of the judiciary.

482. …Except on the ground of want of consultation with the named constitutional functionaries or lack of any condition of eligibility in the case of an appointment, or of a transfer being made without the recommendation of the Chief Justice of India, these matters are not justiciable on any other ground, including that of bias, which in any case is excluded by the element of plurality in the process of decision-making."

57. In *Special Reference No. 1 of 1998,* (commonly referred as the "Second Judges Case"), question No. 2 reads as follows:

"(2) Whether the transfer of Judges is judicially reviewable in the light of the observation of the Supreme Court in the aforesaid judgment that 'such transfer is not justiciable on any ground' and its further observation that limited judicial review is available in matters of transfer, and the extent and scope of judicial review."

While answering the same, the Bench opined thus:

"37. It is to our mind imperative, given the gravity involved in transferring High Court Judges, that the Chief Justice of India should obtain the views of the Chief Justice of the High Court from which the proposed transfer is to be effected as also the Chief Justice of the High Court to which the transfer is to be effected. This is in accord with the majority judgment in the *Second Judges* case which postulates consultation with the Chief Justice of another High Court. The Chief Justice of India should also take into account the views of one or more Supreme Court Judges who are in a position to provide material which would assist in the process of deciding whether or not a proposed transfer should take place. These views should be expressed in writing and should be considered by the Chief Justice of India and the four seniormost puisne Judges of the Supreme Court. These views and those of each of the four seniormost puisne Judges should be conveyed to the Government of India along with the proposal of transfer. Unless the decision to transfer has been taken in the manner aforestated, it is not decisive and does not bind the Government of India."

In the conclusion their Lordships clearly state as follows:

"1. The expression "consultation with the Chief Justice of India" in Articles 217(1) and 222(1) of the Constitution of India requires consultation with a plurality of Judges in the formation of the opinion of the Chief Justice of India. The sole individual opinion of the Chief Justice of India does

not constitute "consultation" within the meaning of the said articles.

2. The transfer of puisne Judges is judicially reviewable only to this extent: that the recommendation that has been made by the Chief Justice of India in this behalf has not been made in consultation with the four seniormost puisne Judges of the Supreme Court and/or that the views of the Chief Justice of the High Court from which the transfer is to be effected and of the Chief Justice of the High Court to which the transfer is to be effected have not been obtained."

58. From the aforesaid, it is demonstrable that while entertaining the reference under Article 143(1), this Court had analysed the principles enunciated in the earlier judgment and also made certain modifications. The said modifications may be stated as one of the mode or method of inclusion by way of modification without changing the ratio decidendi. For the purpose of validity of a reference, suffice it to say, dwelling upon an earlier judgment is permissible. That apart, one cannot be oblivious of the fact that the scope of limited judicial review, in the Second Judges Case, which otherwise is quite restricted, was slightly expanded in the Court's opinion to the Presidential reference.

59. It is of some interest to note that almost every reference, filed under Article 143(1), has witnessed challenge as to its maintainability on one ground or the other, but all the same, the references have been answered, except in *Dr. M. Ismail Faruqui & Ors.* (supra), which was returned unanswered, mainly on the ground that the reference did not serve a constitutional purpose.

60. From the aforesaid analysis, it is quite vivid that this Court would respectfully decline to answer a reference if it is improper, inadvisable and undesirable; or the questions formulated have purely socio-economic or political reasons,

which have no relation whatsoever with any of the provisions of the Constitution or otherwise are of no constitutional significance; or are incapable of being answered; or would not subserve any purpose; or there is authoritative pronouncement of this Court which has already decided the question referred.

61. In the case at hand, it is to be scrutinized whether the 2G Case is a decision which has dealt with and decided the controversy encapsulated in question No. 1 or meets any of the criteria mentioned above. As we perceive, the question involves interpretation of a constitutional principle inherent under Article 14 of the Constitution and it is of great public importance as it deals with allocation/alienation/disposal/ distribution of natural resources. Besides, the question whether the 2G Case is on authoritative pronouncement in that regard, has to be looked into and only then an opinion can be expressed. For the said purpose all other impediments do not remotely come into play in the present Reference.

62. We are, therefore, of the view that as long as the decision with respect to the allocation of spectrum licenses is untouched, this Court is within its jurisdiction to evaluate and clarify the ratio of the judgment in the 2G Case. For the purpose of this stage of argumentation, it needs little emphasis, that we have the jurisdiction to clarify the ratio of the judgment in 2G Case, irrespective of whether we actually choose to do so or not. Therefore, the fact that this Reference may require us to say something different to what has been enunciated in the 2G Case as a proposition of law, cannot strike at the root of the maintainability of the Reference. Consequently, we reject the preliminary objection and hold that this Reference is maintainable, notwithstanding its effect on the ratio of the 2G Case, as long as the decision in that case qua lis inter partes is left unaffected.

ON MERITS:

63. This leads us to the merits of the controversy disclosed

in the questions framed in the Reference for our advisory opinion.

64. As already pointed out, the judgment in the 2G Case triggered doubts about the validity of methods other than 'auction' for disposal of natural resources which, ultimately led to the filing of the present Reference. Therefore, before we proceed to answer question No.1, it is imperative to understand what has been precisely stated in the 2G Case and decipher the law declared in that case.

65. All the counsel agreed that paragraphs 94 to 96 in the said decision are the repository of the ratio vis-à-vis disposal of natural resources in the 2G Case. On the one hand it was argued that these paragraphs lay down, as a proposition of law, that all natural resources across all sectors, and in all circumstances are to be disposed of by way of public auction, and on the other, it was urged that the observations therein were made only qua spectrum. Before examining the strength of the rival stands, we may briefly recapitulate the principles that govern the determination of the 'law declared' by a judgment and its true ratio.

66. Article 141 of the Constitution lays down that the 'law declared' by the Supreme Court is binding upon all the courts within the territory of India. The 'law declared' has to be construed as a principle of law that emanates from a judgment, or an interpretation of a law or judgment by the Supreme Court, upon which, the case is decided. [See: *Fida Hussain & Ors. Vs. Moradabad Development Authority & Anr.*[19]]. Hence, it flows from the above that the 'law declared' is the principle culled out on the reading of a judgment as a whole in light of the questions raised, upon which the case is decided. [Also see: *Ambica Quarry Works Vs. State of Gujarat & Ors.*[20] and *Commissioner of Income Tax Vs. Sun Engineering Works (P) Ltd.*[21]]. In other words, the 'law declared' in a judgment, which

19. (2011) 12 SCC 615.

20. (1987) 1 SCC 213.

21. (1992) 4 SCC 363.

is binding upon courts, is the ratio decidendi of the judgment. It is the essence of a decision and the principle upon which, the case is decided, which has to be ascertained in relation to the subject-matter of the decision.

67. Each case entails a different set of facts and a decision is a precedent on its own facts; not everything said by a Judge while giving a judgment can be ascribed precedental value. The essence of a decision that binds the parties to the case is the principle upon which the case is decided and for this reason, it is important to analyse a decision and cull out from it, the ratio decidendi. In the matter of applying precedents, the erudite Justice Benjamin Cardozo in "The Nature of a Judicial Process", had said that "if the judge is to pronounce it wisely, some principles of selection there must be to guide him along all potential judgments that compete for recognition" and "almost invariably his first step is to examine and compare them;" "it is a process of search, comparison and little more" and ought not to be akin to matching "the colors of the case at hand against the colors of many sample cases" because in that case "the man who had the best card index of the cases would also be the wisest judge". Warning against comparing precedents with matching colours of one case with another, he summarized the process, in case the colours don't match, in the following wise words:-

> "It is when the colors do not match, when the references in the index fail, when there is no decisive precedent, that the serious business of the judge begins. He must then fashion law for the litigants before him. In fashioning it for them, he will be fashioning it for others. The classic statement is Bacon's: "For many times, the things deduced to judgment may be meum and tuum, when the reason and consequence thereof may trench to point of estate. The sentence of today will make the right and wrong of tomorrow."

68. With reference to the precedential value of decisions, in *State of Orissa & Ors. Vs. Md. Illiyas*[22] this Court observed:

> "…According to the well-settled theory of precedents, every decision contains three basic postulates: (i) findings of material facts, direct and inferential. An inferential finding of facts is the inference which the Judge draws from the direct, or perceptible facts; (ii) statements of the principles of law applicable to the legal problems disclosed by the facts; and (iii) judgment based on the combined effect of the above. A decision is an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically flows from the various observations made in the judgment…"

69. Recently, in *Union of India Vs. Amrit Lal Manchanda & Anr.*[23], this Court has observed as follows:

> "…Observations of courts are neither to be read as Euclid's theorems nor as provisions of the statute and that too taken out of their context. These observations must be read in the context in which they appear to have been stated. Judgments of courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for Judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes."

70. It is also important to read a judgment as a whole keeping in mind that it is not an abstract academic discourse with universal applicability, but heavily grounded in the facts and circumstances of the case. Every part of a judgment is intricately linked to others constituting a larger whole and thus, must be read keeping the logical thread intact. In this regard,

22. (2006) 1 SCC 275.

23. (2004) 3 SCC 75.

in *Islamic Academy of Education & Anr. Vs. State of Karnataka & Ors.*[24], the Court made the following observations:

> "The ratio decidendi of a judgment has to be found out only on reading the entire judgment. In fact, the ratio of the judgment is what is set out in the judgment itself. The answer to the question would necessarily have to be read in the context of what is set out in the judgment and not in isolation. In case of any doubt as regards any observations, reasons and principles, the other part of the judgment has to be looked into. By reading a line here and there from the judgment, one cannot find out the entire ratio decidendi of the judgment."

71. The ratio of the 2G Case must, therefore, be understood and appreciated in light of the above guiding principles.

72. In the 2G Case, the Bench framed five questions. Questions No. (ii) and (v) pertain to the factual matrix and are not relevant for settling the controversy at hand. The remaining three questions are reproduced below:

> "(i) Whether the Government has the right to alienate, transfer or distribute natural resources/national assets otherwise than by following a fair and transparent method consistent with the fundamentals of the equality clause enshrined in the Constitution?
>
> (iii) Whether the exercise undertaken by DoT from September 2007 to March 2008 for grant of UAS licences to the private respondents in terms of the recommendations made by TRAI is vitiated due to arbitrariness and mala fides and is contrary to public interest?
>
> (iv) Whether the policy of first-come-first-served followed by DoT for grant of licences is ultra vires the provisions of

24. (2003) 6 SCC 697.

Article 14 of the Constitution and whether the said policy was arbitrarily changed by the Minister of Communications and Information Technology (hereinafter referred to as "the Minister of Communications and Information Technology"), without consulting TRAI, with a view to favour some of the applicants?"

73. While dealing with question No.(i), the Court observed that the State is empowered to distribute natural resources as they constitute public property/national assets. Thereafter, the Bench observed as follows:

> "75.…while distributing natural resources the State is bound to act in consonance with the principles of equality and public trust and ensure that no action is taken which may be detrimental to public interest. Like any other State action, constitutionalism must be reflected at every stage of the distribution of natural resources. In Article 39(b) of the Constitution it has been provided that the ownership and control of the material resources of the community should be so distributed so as to best subserve the common good, but no comprehensive legislation has been enacted to generally define natural resources and a framework for their protection..."

74. The learned Judges adverted to the 'public trust doctrine' as enunciated in *The Illinois Central Railroad Co. Vs. The People of the State of Illinois*[25]; *M.C. Mehta Vs. Kamal Nath & Ors.*[26]*; Jamshed Hormusji Wadia Vs. Board of Trustees, Port of Mumbai & Anr.*[27]*; Intellectuals Forum, Tirupathi Vs. State of A.P. & Ors.*[28]*; Fomento Resorts And Hotels Limited & Anr. Vs. Minguel Martins & Ors.*[29] and

25. 36 L ED 1018 : 146 U.S. 387 (1892).
26. (1997) 1 SCC 388.
27. (2004) 3 SCC 214.
28. (2006) 3 SCC 549.
29. (2009) 3 SCC 571.

Reliance Natural Resources Limited Vs. Reliance Industries Limited[30] and held:

> "85. As natural resources are public goods, the doctrine of equality, which emerges from the concepts of justice and fairness, must guide the State in determining the actual mechanism for distribution of natural resources. In this regard, the doctrine of equality has two aspects: first, it regulates the rights and obligations of the State vis-à-vis its people and demands that the people be granted equitable access to natural resources and/or its products and that they are adequately compensated for the transfer of the resource to the private domain; and second, it regulates the rights and obligations of the State vis-à-vis private parties seeking to acquire/use the resource and demands that the procedure adopted for distribution is just, non-arbitrary and transparent and that it does not discriminate between similarly placed private parties."

Referring to the decisions of this Court in *Akhil Bhartiya Upbhokta Congress Vs. State of Madhya Pradesh & Ors.*[31] and *Sachidanand Pandey & Anr. Vs. State of West Bengal & Ors.*[32], the Bench ultimately concluded thus:

> "89. In conclusion, we hold that the State is the legal owner of the natural resources as a trustee of the people and although it is empowered to distribute the same, the process of distribution must be guided by the constitutional principles including the doctrine of equality and larger public good."

75. On a reading of the above paragraphs, it can be noticed that the doctrine of equality; larger public good, adoption of a transparent and fair method, opportunity of competition; and avoidance of any occasion to scuttle the claim

30. (2010) 7 SCC 1.
31. (2011) 5 SCC 29.
32. (1987) 2 SCC 295.

of similarly situated applicants were emphasised upon. While dealing with alienation of natural resources like spectrum, it was stated that it is the duty of the State to ensure that a non-discriminatory method is adopted for distribution and alienation which would necessarily result in the protection of national/public interest.

76. Paragraphs 85 and 89, while referring to the concept of 'public trust doctrine', lay emphasis on the doctrine of equality, which has been segregated into two parts - one is the substantive part and the other is the regulatory part. In the regulatory facet, paragraph 85 states that the procedure adopted for distribution should be just and non-arbitrary and must be guided by constitutional principles including the doctrine of equality and larger public good. Similarly, in paragraph 89 stress has been laid on transparency and fair opportunity of competition. It is further reiterated that the burden of the State is to ensure that a non-discriminatory method is adopted for distribution and alienation which would necessarily result in the protection of national and public interest.

77. Dealing with Questions No.(iii) and (iv) in paragraphs 94 to 96 of the judgment, the Court opined as follows:

> "94. There is a fundamental flaw in the first-come-first-served policy inasmuch as it involves an element of pure chance or accident. In matters involving award of contracts or grant of licence or permission to use public property, the invocation of first-come-first-served policy has inherently dangerous implications. Any person who has access to the power corridor at the highest or the lowest level may be able to obtain information from the government files or the files of the agency/instrumentality of the State that a particular public property or asset is likely to be disposed of or a contract is likely to be awarded or a licence or permission is likely to be given, he would immediately make an application and would

> become entitled to stand first in the queue at the cost of all others who may have a better claim.
>
> 95. This Court has repeatedly held that wherever a contract is to be awarded or a licence is to be given, the public authority must adopt a transparent and fair method for making selections so that all eligible persons get a fair opportunity of competition. To put it differently, the State and its agencies/ instrumentalities must always adopt a rational method for disposal of public property and no attempt should be made to scuttle the claim of worthy applicants. When it comes to alienation of scarce natural resources like spectrum, etc. it is the burden of the State to ensure that a non-discriminatory method is adopted for distribution and alienation, which would necessarily result in protection of national/public interest.
>
> 96. In our view, a duly publicised auction conducted fairly and impartially is perhaps the best method for discharging this burden and the methods like first-come-first-served when used for alienation of natural resources/public property are likely to be misused by unscrupulous people who are only interested in garnering maximum financial benefit and have no respect for the constitutional ethos and values. In other words, while transferring or alienating the natural resources, the State is duty-bound to adopt the method of auction by giving wide publicity so that all eligible persons can participate in the process."

78. Our reading of these paragraphs suggests that the Court was not considering the case of auction in general, but specifically evaluating the validity of those methods adopted in the distribution of spectrum from September 2007 to March 2008. It is also pertinent to note that reference to auction is made in the subsequent paragraph (96) with the rider 'perhaps'. It has been observed that "a duly publicized auction conducted fairly and impartially is perhaps the best method for discharging this burden." We are conscious that a judgment is

not to be read as a statute, but at the same time, we cannot be oblivious to the fact that when it is argued with vehemence that the judgment lays down auction as a constitutional principle, the word "perhaps" gains significance. This suggests that the recommendation of auction for alienation of natural resources was never intended to be taken as an absolute or blanket statement applicable across all natural resources, but simply a conclusion made at first blush over the attractiveness of a method like auction in disposal of natural resources. The choice of the word 'perhaps' suggests that the learned Judges considered situations requiring a method other than auction as conceivable and desirable.

79. Further, the final conclusions summarized in paragraph 102 of the judgment (SCC) make no mention about auction being the only permissible and intra vires method for disposal of natural resources; the findings are limited to the case of spectrum. In case the Court had actually enunciated, as a proposition of law, that auction is the only permissible method or mode for alienation/allotment of natural resources, the same would have found a mention in the summary at the end of the judgment.

80. Moreover, if the judgment is to be read as holding auction as the only permissible means of disposal of all natural resources, it would lead to the quashing of a large number of laws that prescribe methods other than auction, e.g., the MMRD Act. While dealing with the merits of the Reference, at a later stage, we will discuss whether or not auction can be a constitutional mandate under Article 14 of the Constitution, but for the present, it would suffice to say that no court would ever implicitly, indirectly, or by inference, hold a range of laws as ultra vires the Constitution, without allowing every law to be tested on its merits. One of the most profound tenets of constitutionalism is the presumption of constitutionality assigned to each legislation enacted. We find that the 2G Case does not even consider a plethora of laws and judgments that

prescribe methods, other than auction, for dispensation of natural resources; something that it would have done, in case, it intended to make an assertion as wide as applying auction to all natural resources. Therefore, we are convinced that the observations in Paras 94 to 96 could not apply beyond the specific case of spectrum, which according to the law declared in the 2G Case, is to be alienated only by auction and no other method.

81. Thus, having come to the conclusion that the 2G Case does not deal with modes of allocation for natural resources, other than spectrum, we shall now proceed to answer the first question of the Reference pertaining to other natural resources, as the question subsumes the essence of the entire reference, particularly the set of first five questions.

82. The President seeks this Court's opinion on the limited point of permissibility of methods other than auction for alienation of natural resources, other than spectrum. The question also harbours several concepts, which were argued before us through the hearing of the Reference, that require to be answered in order to derive a comprehensive answer to the parent question. Are some methods ultra vires and others intra vires the Constitution of India, especially Article 14? Can disposal through the method of auction be elevated to a Constitutional principle? Is this Court entitled to direct the executive to adopt a certain method because it is the 'best' method? If not, to what extent can the executive deviate from such 'best' method? An answer to these issues, in turn, will give an answer to the first question which, as noted above, will answer the Presidential Reference.

83. Before proceeding to answer these questions, we would like to dispose of a couple of minor objections. The first pertained to the classification of resources made in the 2G Case. Learned counsel appearing for CPIL argued that all that the judgment in the 2G Case has done is to carve out a special

category of cases where public auction is the only legally sustainable method of alienation viz. natural resources that are scarce, valuable and are allotted to private entities for commercial exploitation. The learned Attorney General, however, contested this claim and argued that no such proposition was laid down in the 2G judgment. He pointed out that the words "commercial exploitation" were not even used anywhere in the judgment except in an extract from another judgment in a different context. We agree that the judgment itself does not carve out any special case for scarce natural resources only meant for commercial exploitation. However, we feel, despite that, in this Reference, CPIL is not barred from making a submission drawing a distinction between natural resources meant for commercial exploitation and those meant for other purposes. This Court has the jurisdiction to classify the subject matter of a reference, if a genuine case for it exists.

84. Mr. Shanti Bhushan, learned Senior Counsel, in support of his stand that the first question of the Reference must be answered in a way so as to allow auction as the only mode for the disposal of natural resources, submitted that a combined reading of Article 14, which dictates non- arbitrariness in State action and equal opportunity to those similarly placed; Article 39(b) which is a Directive Principle of State Policy dealing with distribution of natural resources for the common good of the people; and the "trusteeship" principle found in the Preamble which mandates that the State holds all natural resources in the capacity of a trustee, on behalf of the people, would make auction a constitutional mandate under Article 14 of the Constitution. It is imperative, therefore, that we evaluate each of these principles before coming to any conclusion on the constitutional verdict on auction.

85. In the 2G Case, two concepts namely, "public trust doctrine" and "trusteeship" have been adverted to, which were also relied upon by learned counsel for CPIL, in defence of the argument that the State holds natural resources in a fiduciary relationship with the people. As far as "trusteeship" is

concerned, there is no cavil that the State holds all natural resources as a trustee of the public and must deal with them in a manner that is consistent with the nature of such a trust. However, what was asserted on behalf of CPIL was that all natural resources fall within the domain of the "public trust doctrine", and therefore, there is an obligation on the Government to ensure that their transfer or alienation for commercial exploitation is in a fair and transparent manner and only in pursuit of public good. The learned Attorney General on the other hand, zealously urged that the subject matter of the doctrine and the nature of restrictions, it imposes, are of limited scope; that the applicability of the doctrine is restricted to certain common properties pertaining to the environment, like rivers, seashores, forest and air, meant for free and unimpeded use of the general public and the restrictions it imposes is in the term of a complete embargo on any alienation of such resources, for private ownership. According to him, the extension of the public trust doctrine to all natural resources has led to a considerable confusion and needs to be clarified.

86. The doctrine of public trust enunciated more thoroughly by the United States Supreme Court in *Illinois* (supra) was introduced to Indian environmental jurisprudence by this Court in *M.C. Mehta* (supra). Speaking for the majority, Kuldip Singh, J. observed as follows :

> "25. The Public Trust Doctrine primarily rests on the principle that certain resources like air, sea, waters and the forests have such a great importance to the people as a whole that it would be wholly unjustified to make them a subject of private ownership. The said resources being a gift of nature, they should be made freely available to everyone irrespective of the status in life. The doctrine enjoins upon the Government to protect the resources for the enjoyment of the general public rather than to permit their use for private ownership or commercial purposes. According to Professor Sax the Public Trust Doctrine imposes the following restrictions on governmental authority:

'Three types of restrictions on governmental authority are often thought to be imposed by the public trust: first, the property subject to the trust must not only be used for a public purpose, but it must be held available for use by the general public; second, the property may not be sold, even for a fair cash equivalent; and third the property must be maintained for particular types of uses'."

The learned Judge further observed:-

"34. Our legal system - based on English common law - includes the public trust doctrine as part of its jurisprudence. The State is the trustee of all natural resources which are by nature meant for public use and enjoyment. Public at large is the beneficiary of the sea-shore, running waters, airs, forests and ecologically fragile lands. The State as a trustee is under a legal duty to protect the natural resources. These resources meant for public use cannot be converted into private ownership."

87. The judgment in *Kamal Nath's* case (supra) was explained in *Intellectuals Forum* (supra). Reiterating that the State is the trustee of all natural resources which are by nature meant for public use and enjoyment, the Court observed thus:

"76. The Supreme Court of California, in *National Audubon Society Vs. Superior Court of Alpine* Country also known as Mono Lake case summed up the substance of the doctrine. The Court said:

"Thus the public trust is more than an affirmation of State power to use public property for public purposes. It is an affirmation of the duty of the State to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering the right only in those rare cases when the abandonment of the right is consistent with the purposes of the trust."

This is an articulation of the doctrine from the angle of the affirmative duties of the State with regard to public trust. Formulated from a negatory angle, the doctrine does not exactly prohibit the alienation of the property held as a public trust. However, when the State holds a resource that is freely available for the use of the public, it provides for a high degree of judicial scrutiny on any action of the Government, no matter how consistent with the existing legislations, that attempts to restrict such free use. To properly scrutinise such actions of the Government, the courts must make a distinction between the Government's general obligation to act for the public benefit, and the special, more demanding obligation which it may have as a trustee of certain public resources…"

It was thus, held that when the affirmative duties are set out from a nugatory angle, the doctrine does not exactly prohibit the alienation of property held as a public trust, but mandates a high degree of judicial scrutiny.

88. In *Fomento* (supra), the Court was concerned with the access of the public to a beach in Goa. Holding that it was a public beach which could not be privatized or blocked denying traditional access, this Court reiterated the public trust doctrine as follows:

"52. The matter deserves to be considered from another angle. The public trust doctrine which has been invoked by Ms Indira Jaising in support of her argument that the beach in question is a public beach and the appellants cannot privatise the same by blocking/ obstructing traditional access available through Survey No. 803 (new No. 246/2) is implicitly engrafted by the State Government in Clause 4(ix) of the agreement. That doctrine primarily rests on the principle that certain resources like air, sea, waters and the forests have such a great importance to the people as a whole that it would be wholly unjustified to make them a subject of private ownership. These

resources are gift of nature, therefore, they should be freely available to everyone irrespective of one's status in life."

89. In *Reliance Natural Resources* (supra), it has been observed that even though the doctrine of pubic trust has been applied in cases dealing with environmental jurisprudence, "it has broader application". Referring to *Kamal Nath* (supra), the Court held that it is the duty of the Government to provide complete protection to the natural resources as a trustee of the people at large.

90. The public trust doctrine is a specific doctrine with a particular domain and has to be applied carefully. It has been seriously debated before us as to whether the doctrine can be applied beyond the realm of environmental protection. Richard J. Lazarus in his article, *"Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine",* while expressing scepticism over the 'liberation' of the doctrine, makes the following observations:-

> "The strength of the public trust doctrine necessarily lies in its origins; navigable waters and submerged lands are the focus of the doctrine, and the basic trust interests in navigation, commerce, and fishing are the object of its guarantee of public access. Commentators and judges alike have made efforts to "liberate", "expand", and "modify" the doctrine's scope yet its basic focus remains relatively unchanged. Courts still repeatedly return to the doctrine's historical function to determine its present role. When the doctrine is expanded, more often than not the expansions require tortured constructions of the present rather than repudiations of the doctrine's past."

However, we feel that for the purpose of the present opinion, it is not necessary to delve deep into the issue as in *Intellectuals Forum* (supra), the main departure from the principle explained by Joseph. L. Sax in his Article "The Public Trust Doctrine in Natural Resource Law: Effective Judicial

Intervention" is that public trust mandates a high degree of judicial scrutiny, an issue that we will anyway elaborately discuss while enunciating the mandate of Article 14 of the Constitution.

91. We would also like to briskly deal with a similar argument made by Mr. Shanti Bhushan. The learned senior counsel submitted that the repository of sovereignty in our framework is the people of this country since the opening words of the Constitution read "We The People of India… do hereby adopt, enact and give to ourselves this Constitution," and therefore the government, as the agent of the Sovereign, the people, while alienating natural resources, must heed to judicial care and due process. Firstly, this Court has held in *Raja Ram Pal Vs. Hon'ble Speaker, Lok Sabha & Ors*[33]*.* that the "Constitution is the supreme lex in this country" and "all organs of the State derive their authority, jurisdiction and powers from the Constitution and owe allegiance to it". Further, the notion that the Parliament is an agent of the people was squarely rebutted in In *Re: Delhi Laws Act, 1912* (supra), where it was observed that "the legislature as a body cannot be seen to be an agency of the electorate as a whole" and "acts on its own authority or power which it derives from the Constitution".

92. In *Municipal Corporation of Delhi Vs. Birla Cotton, Spinning and Weaving Mills, Delhi & Anr*[34]*.* this Court held that "the doctrine that it (the Parliament) is a delegate of the people coloured certain American decision does not arise here" and that in fact the "Parliament which by a concentration of all the powers of legislation derived from all the three Legislative Lists becomes the most competent and potent legislature it is possible to erect under our Constitution." We however, appreciate the concern of Mr. Shanti Bhushan that the lack of any such power in the hands of the people must not be a sanction for recklessness during disposal of natural resources.

33. (2007) 3 SCC 184; Para 21.

34. [1968] 3 SCR 251.

The legislature and the Executive are answerable to the Constitution and it is there where the judiciary, the guardian of the Constitution, must find the contours to the powers of disposal of natural resources, especially Article 14 and Article 39(b).

MANDATE OF ARTICLE 14:

93. Article 14 runs as follows:

"14. Equality before law. - The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

94. The underlying object of Article 14 is to secure to all persons, citizens or non-citizens, the equality of status and opportunity referred to in the preamble to our Constitution. The language of Article 14 is couched in negative terms and is in form, an admonition addressed to the State. It does not directly purport to confer any right on any person as some of the other Articles, e.g., Article 19, do. The right to equality before law is secured from all legislative and executive tyranny by way of discrimination since the language of Article 14 uses the word "State" which as per Article 12, includes the executive organ. [See: *Basheshar Nath Vs. The Commissioner of Income Tax, Delhi & Rajasthan & Anr.*[35]]. Besides, Article 14 is expressed in absolute terms and its effect is not curtailed by restrictions like those imposed on Article 19(1) by Articles 19(2)-(6).

35. 1959 Supp (1) SCR 528- "Coming then to the language of the Article it must be noted, first and foremost that this Article is, in form, an admonition addressed to the State and does not directly purport to confer any right on any person as some of the other Articles, e.g., Article 19, do. The obligation thus imposed on the State, no doubt, ensures for the benefit of all persons, for, as a necessary result of the operation of this Article, they all enjoy equality before the law. That is, however, the indirect, though necessary and inevitable, result of the mandate. The command of the Article is directed to the State and the reality of the obligation thus imposed on the State is the measure of the fundamental right which every person within the territory of India is to enjoy.".

However, notwithstanding the absence of such restrictions, certain tests have been devised through judicial decisions to test if Article 14 has been violated or not.

95. For the first couple of decades after the establishment of this Court, the 'classification' test was adopted which allowed for a classification between entities as long as it was based on an intelligible differentia and displayed a rational nexus with the ultimate objective of the policy. *Budhan Choudhry & Ors. Vs. State of Bihar*[36] referred to in *Shri Ram Krishna Dalmiya Vs. Shri Justice S.R. Tendolkar and Ors.*[37] explained it in the following terms:

"It is now well established that while article 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. In order, however, to pass the test of permissible classification two conditions must be fulfilled, namely, (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and, (ii) that that differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification may be founded on different bases, namely, geographical, or according to objects or occupations or the like. What is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration. It is also well established by the decisions of this Court that article 14 condemns discrimination not only by a substantive law but also by a law of procedure."

96. However, after the judgment of this Court in *E.P. Royappa Vs. State of Tamil Nadu & Anr*[38] the 'arbitrariness' doctrine was introduced which dropped a pedantic approach

36. AIR 1955 SC 191.

37. [1959] 1 SCR 279.

38. (1974) 4 SCC 3.

towards equality and held the mere existence of arbitrariness as violative of Article 14, however equal in its treatment. Justice Bhagwati (as his Lordship was then) articulated the dynamic nature of equality and borrowing from Shakespeare's Macbeth, said that the concept must not be "cribbed, cabined and confined" within doctrinaire limits: -

> "85. …Now, what is the content and reach of this great equalising principle? It is a founding faith, to use the words of Bose. J., "a way of life", and it must not be subjected to a narrow pedantic or lexicographic approach. We cannot countenance any attempt to truncate its all-embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be "cribbed, cabined and confined" within traditional and doctrinaire limits."

His Lordship went on to explain the length and breadth of Article 14 in the following lucid words:

> "85… From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14, and if it effects any matter relating to public employment, it is also violative of Article 16. Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment. They require that State action must be based on valid relevant principles applicable alike to all similarly situate and it must not be guided by any extraneous or irrelevant considerations because that would be denial of equality. Where the operative reason for State action, as distinguished from motive inducing from the antechamber of the mind, is not legitimate and relevant but is extraneous

> and outside the area of permissible considerations, it would amount to mala fide exercise of power and that is hit by Articles 14 and 16. Mala fide exercise of power and arbitrariness are different lethal radiations emanating from the same vice: in fact the latter comprehends the former. Both are inhibited by Articles 14 and 16."

97. Building upon his opinion delivered in *Royappa's* case (supra), Bhagwati, J., held in *Maneka Gandhi Vs. Union of India & Anr.*[39]*:*

> "The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14. It must be "right and just and fair" and not arbitrary, fanciful or oppressive."

98. In *Ajay Hasia & Ors. Vs. Khalid Mujib Sehravardi & Ors.*[40]*,* this Court said that the 'arbitrariness' test was lying "latent and submerged" in the "simple but pregnant" form of Article 14 and explained the switch from the 'classification' doctrine to the 'arbitrariness' doctrine in the following words:

> "16…The doctrine of classification which is evolved by the courts is not paraphrase of Article 14 nor is it the objective and end of that article. It is merely a judicial formula for determining whether the legislative or executive action in question is arbitrary and therefore constituting denial of equality. If the classification is not reasonable and does not satisfy the two conditions referred to above, the impugned legislative or executive action would plainly be arbitrary and the guarantee of equality under Article 14 would be breached. Wherever therefore there is arbitrariness in State action whether it be of the legislature

39. (1978) 1 SCC 248.

40. (1981) 1 SCC 722.

or of the executive or of an 'authority' under Article 12, Article 14 immediately springs into action and strikes down such State action. In fact, the concept of reasonableness and non-arbitrariness pervades the entire constitutional scheme and is a golden thread which runs through the whole of the fabric of the Constitution."

99. *Ramana Dayaram Shetty Vs. International Airport Authority of India & Ors.*[41] explained the limitations of Article 14 on the functioning of the Government as follows: -

"12…It must, therefore, be taken to be the law that where the Government is dealing with the public, whether by way of giving jobs or entering into contracts or issuing quotas or licences or granting other forms of largesse, the Government cannot act arbitrarily at its sweet will and, like a private individual, deal with any person it pleases, but its action must be in conformity with standard or norms which is not arbitrary, irrational or irrelevant. The power or discretion of the Government in the matter of grant of largesse including award of jobs, contracts, quotas, licences, etc. must be confined and structured by rational, relevant and non-discriminatory standard or norm and if the Government departs from such standard or norm in any particular case or cases, the action of the Government would be liable to be struck down, unless it can be shown by the Government that the departure was not arbitrary, but was based on some valid principle which in itself was not irrational, unreasonable or discriminatory."

100. Equality and arbitrariness were thus, declared "sworn enemies" and it was held that an arbitrary act would fall foul of the right to equality. Non-arbitrariness was equated with the rule of law about which Jeffrey Jowell in his seminal article *"The Rule of Law Today" said: -*

41. (1979) 3 SCC 489 : AIR 1979 SC 1628.

"Rule of law principle primarily applies to the power of implementation. It mainly represents a state of procedural fairness. When the rule of law is ignored by an official it may on occasion be enforced by courts."

101. As is evident from the above, the expressions 'arbitrariness' and 'unreasonableness' have been used interchangeably and in fact, one has been defined in terms of the other. More recently, in *Sharma Transport Vs. Government of A.P. & Ors.*[42], this Court has observed thus:

"25…In order to be described as arbitrary, it must be shown that it was not reasonable and manifestly arbitrary. The expression "arbitrarily" means: in an unreasonable manner, as fixed or done capriciously or at pleasure, without adequate determining principle, not founded in the nature of things, non-rational, not done or acting according to reason or judgment, depending on the will alone."

102. Further, even though the 'classification' doctrine was never overruled, it has found less favour with this Court as compared to the 'arbitrariness' doctrine. In *Om Kumar & Ors. Vs. Union of India*[43], this Court held thus:

"59. But, in E.P. Royappa v. State of T. N. Bhagwati, J laid down another test for purposes of Article 14. It was stated that if the administrative action was "arbitrary", it could be struck down under Article 14. This principle is now uniformly followed in all courts more rigorously than the one based on classification. Arbitrary action by the administrator is described as one that is irrational and not based on sound reason. It is also described as one that is unreasonable."

103. However, this Court has also alerted against the arbitrary use of the 'arbitrariness' doctrine. Typically, laws are

42. (2002) 2 SCC 188.

43. (2001) 2 SCC 386.

struck down for violating Part III of the Constitution of India, legislative incompetence or excessive delegation. However, since *Royappa's* case (supra), the doctrine has been loosely applied. This Court in *State of A.P. & Ors. Vs. McDowell & Co. & Ors.*[44] stressed on the need for an objective and scientific analysis of arbitrariness, especially while striking down legislations. Justice Jeevan Reddy observed:

> "43…The power of Parliament or for that matter, the State Legislatures is restricted in two ways. A law made by Parliament or the legislature can be struck down by courts on two grounds and two grounds alone, viz., (1) lack of legislative competence and (2) violation of any of the fundamental rights guaranteed in Part III of the Constitution or of any other constitutional provision. There is no third ground. We do not wish to enter into a discussion of the concepts of procedural unreasonableness and substantive unreasonableness - concepts inspired by the decisions of United States Supreme Court. Even in U.S.A., these concepts and in particular the concept of substantive due process have proved to be of unending controversy, the latest thinking tending towards a severe curtailment of this ground (substantive due process). The main criticism against the ground of substantive due process being that it seeks to set up the courts as arbiters of the wisdom of the legislature in enacting the particular piece of legislation. It is enough for us to say that by whatever name it is characterised, the ground of invalidation must fall within the four corners of the two grounds mentioned above. In other words, say, if an enactment is challenged as violative of Article 14, it can be struck down only if it is found that it is violative of the equality clause/equal protection clause enshrined therein. Similarly, if an enactment is challenged as violative of any of the fundamental rights guaranteed by clauses (a) to (g) of Article 19(1), it can be struck down only if it is found not saved by any of the clauses (s) to (6) of Article 19 and so on. No enactment can be struck down by just saying that it is arbitrary** or unreasonable. Some or other constitutional infirmity has to be found before invalidating an Act. An enactment cannot be struck down on the ground that court thinks it unjustified. Parliament and the legislatures, composed as they are of the representatives of the people, are supposed to know and be aware of the needs of the people and what is good and bad for them. The court cannot sit in judgment over their wisdom. In this connection, it should be remembered that even in the case of administrative action, the scope of judicial review is limited to three grounds, viz., (i) unreasonableness, which can more appropriately be called irrationality, (ii) illegality and (iii) procedural impropriety (see Council of Civil Service Unions v. Minister for Civil Service which decision has been accepted by this Court as well).
>
> **An expression used widely and rather indiscriminately - an expression of inherently imprecise import. The extensive use of this expression in India reminds one of what Frankfurter, J said in Hattie Mae Tiller v. Atlantic Coast Line Railroad Co., 87 L ED 610 : 318 US 54 (1943). "The phrase begins life as a literary expression; its felicity leads to its lazy repetition and repetition soon establishes it as a legal formula, undiscriminatingly used to express different and sometimes contradictory ideas", said the learned Judge."

44. (1996) 3 SCC 709.

104. Therefore, ever since the *Royappa era,* the conception of 'arbitrariness' has not undergone any significant change. Some decisions have commented on the doctrinal looseness of the arbitrariness test and tried keeping its folds within permissible boundaries. For instance, cases where legislation or rules have been struck down as being arbitrary in the sense of being unreasonable [See: *Air India Vs. Nergesh*

Meerza[45] (SCC at pp. 372-373)] only on the basis of "arbitrariness", as explained above, have been doubted in *McDowell's* case (supra). But otherwise, the subject matter, content and tests for checking violation of Article 14 have remained, more or less, unaltered.

105. From a scrutiny of the trend of decisions it is clearly perceivable that the action of the State, whether it relates to distribution of largesse, grant of contracts or allotment of land, is to be tested on the touchstone of Article 14 of the Constitution. A law may not be struck down for being arbitrary without the pointing out of a constitutional infirmity as McDowell's case (supra) has said. Therefore, a State action has to be tested for constitutional infirmities qua Article 14 of the Constitution. The action has to be fair, reasonable, non-discriminatory, transparent, non-capricious, unbiased, without favouritism or nepotism, in pursuit of promotion of healthy competition and equitable treatment. It should conform to the norms which are rational, informed with reasons and guided by public interest, etc. All these principles are inherent in the fundamental conception of Article 14. This is the mandate of Article 14 of the Constitution of India.

WHETHER 'AUCTION' A CONSTITUTIONAL MANDATE:

106. Such being the constitutional intent and effect of Article 14, the question arises - can auction as a method of disposal of natural resources be declared a constitutional mandate under Article 14 of the Constitution of India? We would unhesitatingly answer it in the negative since any other answer would be completely contrary to the scheme of Article 14. Firstly, Article 14 may imply positive and negative rights for an individual, but with respect to the State, it is only couched in negative terms; like an admonition against the State which prohibits the State from taking up actions that may be arbitrary, unreasonable, capricious or discriminatory. Article 14, therefore, is an injunction to the State against taking certain type of actions rather than commanding it to take particular steps. Reading the mandate of auction into its scheme would thus, be completely contrary to the intent of the Article apparent from its plain language.

45. (1981) 4 SCC 335.

107. Secondly, a constitutional mandate is an absolute principle that has to be applied in all situations; it cannot be applied in some and not tested in others. The absolute principle is then applied on a case by case basis to see which actions fulfill the requirements of the constitutional principle and which do not.

108. Justice K. Subba Rao in his lectures compiled in a book titled *"Some Constitutional Problems",* critically analyzing the trends of Indian constitutional development, stated as follows:

> "If the Courts, instead of limiting the scope of the articles by construction, exercise their jurisdiction in appropriate cases, I have no doubt that the arbitrariness of the authorities will be minimised. If these authorities entrusted with the discretionary powers, realize that their illegal orders infringing the rights of the people would be quashed by the appropriate authority, they would rarely pass orders in excess of their powers. If they knew that not only the form but the substance of the orders would be scrutinized in open court, they would try to keep within their bounds. The fear of ventilation of grievance in public has always been an effective deterrent. The apprehension that the High Courts would be swamped with writs has no basis."

109. Similar sentiments were expressed by Justice K. K. Mathew in series of lectures incorporated in the form of a book titled "Democracy, Equality and Freedom" in which it is stated that "the strength of judicial review lies in case to case adjudication." This is precisely why this Court in His Holiness Kesavananda *Bharti Sripadagalvaru Vs. State of Kerala &*

Anr[46]. quoting from an American decision, observed as follows:

> "1695…The reason why the expression "due process" has never been defined is that it embodies a concept of fairness which has to be decided with reference to the facts and circumstances of each case and also according to the mores for the time being in force in a society to which the concept has to be applied. As Justice Frankfurter said, "due process" is not a technical conception with a fixed content unrelated to time, place and circumstances [*See Joint Anti-Fascist Refugee Committee v. McGrath* 341 U.S. 123]".

110. Equality, therefore, cannot be limited to mean only auction, without testing it in every scenario. In *The State of West Bengal Vs. Anwar Ali Sarkar*[47], this Court, quoting from *Kotch Vs. Pilot Comm'rs*[48], had held that "the constitutional command for a State to afford equal protection of the laws sets a goal not attainable by the invention and application of a precise formula. This Court has never attempted that impossible task". One cannot test the validity of a law with reference to the essential elements of ideal democracy, actually incorporated in the Constitution. (See: *Indira Nehru Gandhi Vs. Raj Narain*[49]). The Courts are not at liberty to declare a statute void, because in their opinion it is opposed to the spirit of the Constitution. Courts cannot declare a limitation or constitutional requirement under the notion of having discovered some ideal norm. Further, a constitutional principle must not be limited to a precise formula but ought to be an abstract principle applied to precise situations. The repercussion of holding auction as a constitutional mandate would be the voiding of every action that deviates from it, including social endeavours, welfare schemes

46. (1973) 4 SCC 225.

47. 1952 SCR 284 at pp. 297.

48. 330 U.S. 552.

49. 1975 (Supp) SCC 1.

and promotional policies, even though CPIL itself has argued against the same, and asked for making auction mandatory only in the alienation of scarce natural resources meant for private and commercial business ventures. It would be odd to derive auction as a constitutional principle only for a limited set of situations from the wide and generic declaration of Article 14. The strength of constitutional adjudication lies in case to case adjudication and therefore auction cannot be elevated to a constitutional mandate.

111. Finally, reading auction as a constitutional mandate would be impermissible because such an approach may distort another constitutional principle embodied in Article 39(b). The said article enumerating certain principles of policy, to be followed by the State, reads as follows:

> "The State shall, in particular, direct its policy towards securing -
>
> (a) … … …
>
> (b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;
>
> … … …"

The disposal of natural resources is a facet of the use and distribution of such resources. Article 39(b) mandates that the ownership and control of natural resources should be so distributed so as to best subserve the common good. Article 37 provides that the provisions of Part IV shall not be enforceable by any Court, but the principles laid down therein are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.

112. Therefore, this Article, in a sense, is a restriction on 'distribution' built into the Constitution. But the restriction is

imposed on the object and not the means. The overarching and underlying principle governing 'distribution' is furtherance of common good. But for the achievement of that objective, the Constitution uses the generic word 'distribution'. Distribution has broad contours and cannot be limited to meaning only one method i.e. auction. It envisages all such methods available for distribution/allocation of natural resources which ultimately subserve the "common good".

113. In *State of Tamil Nadu & Ors. Vs. L. Abu Kavur Bai & Ors.*[50], this Court explained the broad-based concept of 'distribution' as follows:

> "89. …The word 'distribution' used in Article 39(b) must be broadly construed so that a court may give full and comprehensive effect to the statutory intent contained in Article 39 (b). A narrow construction of the word 'distribution' might defeat or frustrate the very object which the Article seeks to subserve…"

114. After noting definitions of 'distribution' from different dictionaries, this Court held:

> "92. It is obvious, therefore, that in view of the vast range of transactions contemplated by the word 'distribution' as mentioned in the dictionaries referred to above, it will not be correct to construe the word 'distribution' in a purely literal sense so as to mean only division of a particular kind or to particular persons. The words, apportionment, allotment, allocation, classification, clearly fall within the broad sweep of the word 'distribution'. So construed, the word 'distribution' as used in Article 39(b) will include various facets, aspects, methods and terminology of a broad-based concept of distribution…"

115. It can thus, be seen from the afore-quoted paragraphs that the term "distribute" undoubtedly, has wide

50. (1984) 1 SCC 515.

amplitude and encompasses all manners and methods of distribution, which would include classes, industries, regions, private and public sections, etc. Having regard to the basic nature of Article 39(b), a narrower concept of equality under Article 14 than that discussed above, may frustrate the broader concept of distribution, as conceived in Article 39(b). There cannot, therefore, be a cavil that "common good' and "larger public interests" have to be regarded as constitutional reality deserving actualization.

116. Learned counsel for CPIL argued that revenue maximization during the sale or alienation of a natural resource for commercial exploitation is the only way of achieving public good since the revenue collected can be channelized to welfare policies and controlling the burgeoning deficit. According to the learned counsel, since the best way to maximize revenue is through the route of auction, it becomes a constitutional principle even under Article 39(b). However, we are not persuaded to hold so. Auctions may be the best way of maximizing revenue but revenue maximization may not always be the best way to subserve public good. "Common good" is the sole guiding factor under Article 39(b) for distribution of natural resources. It is the touchstone of testing whether any policy subserves the "common good" and if it does, irrespective of the means adopted, it is clearly in accordance with the principle enshrined in Article 39(b).

117. In *The State of Karnataka and Anr. Vs. Shri Ranganatha Reddy and Anr.*[51], Justice Krishna Iyer observed that keeping in mind the purpose of an Article like 39(b), a broad rather than a narrow meaning should be given to the words of that Article. In his inimitable style, his Lordship opined thus:

> "83. Two conclusions strike us as quintessential. Part IV, especially Article 39(b) and (c), is a futuristic mandate to

51. (1977) 4 SCC 471.

the state with a message of transformation of the economic and social order. Firstly, such change calls for collaborative effort from all the legal institutions of the system: the legislature, the judiciary and the administrative machinery. Secondly and consequentially, loyalty to the high purpose of the Constitution, viz., social and economic justice in the context of material want and utter inequalities on a massive scale, compels the court to ascribe expansive meaning to the pregnant words used with hopeful foresight, not to circumscribe their connotation into contradiction of the objectives inspiring the provision. To be Pharisaic towards the Constitution through ritualistic construction is to weaken the social-spiritual thrust of the founding fathers' dynamic faith."

118. In the case of *Bennett Coleman & Co. and Ors. Vs. Union of India and Ors*[52]*.,* it has been held by this Court that "the only norm which the Constitution furnishes for distribution of material resources of the community is elastic norm of common good." Thus "common good" is a norm in Article 39(b) whose applicability was considered by this Court on the facts of the case. Even in that case, this Court did not evolve economic criteria of its own to achieve the goal of "common good" in Article 39(b), which is part of the Directive Principles.

119. The norm of "common good" has to be understood and appreciated in a holistic manner. It is obvious that the manner in which the common good is best subserved is not a matter that can be measured by any constitutional yardstick - it would depend on the economic and political philosophy of the government. Revenue maximization is not the only way in which the common good can be subserved. Where revenue maximization is the object of a policy, being considered qua that resource at that point of time to be the best way to subserve the common good, auction would be one of the preferable methods, though not the only method. Where revenue

52. (1972) 2 SCC 788.

maximization is not the object of a policy of distribution, the question of auction would not arise. Revenue considerations may assume secondary consideration to developmental considerations.

120. Therefore, in conclusion, the submission that the mandate of Article 14 is that any disposal of a natural resource for commercial use must be for revenue maximization, and thus by auction, is based neither on law nor on logic. There is no constitutional imperative in the matter of economic policies- Article 14 does not pre-define any economic policy as a constitutional mandate. Even the mandate of 39(b) imposes no restrictions on the means adopted to subserve the public good and uses the broad term 'distribution', suggesting that the methodology of distribution is not fixed. Economic logic establishes that alienation/allocation of natural resources to the highest bidder may not necessarily be the only way to subserve the common good, and at times, may run counter to public good. Hence, it needs little emphasis that disposal of all natural resources through auctions is clearly not a constitutional mandate.

LEGITIMATE DEVIATIONS FROM AUCTION

121. As a result, this Court has, on a number of occasions, delivered judgments directing means for disposal of natural resources other than auction for different resources in different circumstances. It would be profitable to refer to a few cases and appreciate the reasons this Court has adopted for deviating from the method of auction.

122. In *M/s Kasturi Lal Lakshmi Reddy Vs. State of Jammu & Kashmir & Anr.*[53]*,* while comparing the efficacy of auction in promoting a domestic industry, P.N. Bhagwati, J. observed: -

"22. …If the State were giving tapping contract simpliciter

53. (1980) 4 SCC 1.

there can be no doubt that the State would have to auction or invite tenders for securing the highest price, subject, of course, to any other relevant overriding considerations of public weal or interest, but in a case like this where the State is allocating resources such as water, power, raw materials etc. for the purpose of encouraging setting up of industries within the State, we do not think the State is bound to advertise and tell the people that it wants a particular industry to be set up within the State and invite those interested to come up with proposals for the purpose. The State may choose to do so, if it thinks fit and in a given situation, it may even turn out to be advantageous for the State to do so, but if any private party comes before the State and offers to set up an industry, the State would not be committing breach of any constitutional or legal obligation if it negotiates with such party and agrees to provide resources and other facilities for the purpose of setting up the industry. The State is not obliged to tell such party: "Please wait I will first advertise, wee whether any other offers are forthcoming and then after considering all offers, decide whether I should let you set up the industry"...The State must be free in such a case to negotiate with a private entrepreneur with a view to inducing him to set up an industry within the State and if the State enters into a contract with such entrepreneur for providing resources and other facilities for setting up an industry, the contract cannot be assailed as invalid so long as the State has acted bona fide, reasonably and in public interest. If the terms and conditions of the contract or the surrounding circumstances show that the State has acted mala fide or out of improper or corrupt motive or in order to promote the private interests of someone at the cost of the State, the court will undoubtedly interfere and strike down State action as arbitrary, unreasonable or contrary to public interest. But so long as the State action is bona fide and reasonable, the court will not interfere merely on

the ground that no advertisement was given or publicity made or tenders invited."

123. In *Sachidanand Pandey* (supra) after noticing Kasturi Lal's case (supra), it was concluded as under:

"40. On a consideration of the relevant cases cited at the Bar the following propositions may be taken as well established: State-owned or public-owned property is not to be dealt with at the absolute discretion of the executive. Certain precepts and principles have to be observed. Public interest is the paramount consideration. One of the methods of securing the public interest, when it is considered necessary to dispose of a property, is to sell the property by public auction or by inviting tenders. Though that is the ordinary rule, it is not an invariable rule. There may be situations where there are compelling reasons necessitating departure from the rule but then the reasons for the departure must be rational and should not be suggestive of discrimination. Appearance of public justice is as important as doing justice. Nothing should be done which gives an appearance of bias, jobbery or nepotism."

124. In *Haji T.M. Hassan Rawther Vs. Kerala Financial Corpn.*[54], after an exhaustive review of the law including the decisions in *Kasturi Lal* (supra) and *Sachidanand Pandey* (supra), it was held that public disposal of State owned properties is not the only rule. It was, inter-alia, observed that:

"14. The public property owned by the State or by any instrumentality of the State should be generally sold by public auction or by inviting tenders. This Court has been insisting upon that rule, not only to get the highest price for the property but also to ensure fairness in the activities of the State and public authorities. They should undoubtedly act fairly. Their actions should be legitimate. Their dealings

54. (1988) 1 SCC 166.

should be aboveboard. Their transactions should be without aversion or affection. Nothing should be suggestive of discrimination. Nothing should be done by them which gives an impression of bias, favouritism or nepotism. Ordinarily these factors would be absent if the matter is brought to public auction or sale by tenders. That is why the court repeatedly stated and reiterated that the State-owned properties are required to be disposed of publicly. But that is not the only rule. As O. Chinnappa Reddy, J. observed "that though that is the ordinary rule, it is not an invariable rule". There may be situations necessitating departure from the rule, but then such instances must be justified by compulsions and not by compromise. It must be justified by compelling reasons and not by just convenience."

Here, the Court added to the previous decisions and said that a blithe deviation from public disposal of resources would not be tolerable; such a deviation must be justified by compelling reasons and not by just convenience.

125. In *M.P. Oil Extraction and Anr. Vs. State of M.P. & Ors.*[55], this Court held as follows:

"45. Although to ensure fair play and transparency in State action, distribution of largesse by inviting open tenders or by public auction is desirable, it cannot be held that in no case distribution of such largesse by negotiation is permissible. In the instant case, as a policy decision protective measure by entering into agreements with selected industrial units for assured supply of sal seeds at concessional rate has been taken by the Government. The rate of royalty has also been fixed on some accepted principle of pricing formula as will be indicated hereafter. Hence, distribution or allotment of sal seeds at the determined royalty to the respondents and other units

55. (1997) 7 SCC 592.

covered by the agreements cannot be assailed. It is to be appreciated that in this case, distribution by public auction or by open tender may not achieve the purpose of the policy of protective measure by way of supply of sal seeds at concessional rate of royalty to the industrial units covered by the agreements on being selected on valid and objective considerations."

126. In *Netai Bag & Ors. Vs. State of W.B. & Ors.*[56], this Court observed that non- floating of tenders or not holding of public auction would, not in all cases, be deemed to be the result of the exercise of the executive power in an arbitrary manner. It was stated:

"19. …There cannot be any dispute with the proposition that generally when any State land is intended to be transferred or the State largesse decided to be conferred, resort should be had to public auction or transfer by way of inviting tenders from the people. That would be a sure method of guaranteeing compliance with the mandate of Article 14 of the Constitution. Non-floating of tenders or not holding of public auction would not in all cases be deemed to be the result of the exercise of the executive power in an arbitrary manner. Making an exception to the general rule could be justified by the State executive, if challenged in appropriate proceedings. The constitutional courts cannot be expected to presume the alleged irregularities, illegalities or unconstitutionality nor the courts can substitute their opinion for the bona fide opinion of the State executive. The courts are not concerned with the ultimate decision but only with the fairness of the decision-making process.

This Court once again pointed out that there can be exceptions from auction; the ultimate test is only that of fairness of the decision making process and compliance with Article 14 of the Constitution.

56. (2000) 8 SCC 262.

127. In *M & T Consultants, Secunderabad Vs. S.Y. Nawab*[57], this Court again reiterated that non- floating of tenders does not always lead to the conclusion that the exercise of the power is arbitrary:

> "17. A careful and dispassionate assessment and consideration of the materials placed on record does not leave any reasonable impression, on the peculiar facts and circumstances of this case, that anything obnoxious which requires either public criticism or condemnation by courts of law had taken place. It is by now well settled that non-floating of tenders or absence of public auction or invitation alone is no sufficient reason to castigate the move or an action of a public authority as either arbitrary or unreasonable or amounting to mala fide or improper exercise or improper abuse of power by the authority concerned. Courts have always leaned in favour of sufficient latitude being left with the authorities to adopt their own techniques of management of projects with concomitant economic expediencies depending upon the exigencies of a situation guided by appropriate financial policy in the best interests of the authority motivated by public interest as well in undertaking such ventures."

128. In *Villianur Iyarkkai Padukappu Maiyam Vs. Union of India & Ors.*[58], a three Judge Bench of this Court was concerned with the development of the Port of Pondicherry where a contractor had been selected without floating a tender or holding public auction. It was held as under:

> "164. The plea raised by the learned counsel for the appellants that the Government of Pondicherry was arbitrary and unreasonable in switching the whole public tender process into a system of personal selection and, therefore, the appeals should be accepted, is devoid of

57. (2003) 8 SCC 100.

58. (2009) 7 SCC 561.

> merits. It is well settled that non-floating of tenders or not holding of public auction would not in all cases be deemed to be the result of the exercise of the executive power in an arbitrary manner.
>
> 171. In a case like this where the State is allocating resources such as water, power, raw materials, etc. for the purpose of encouraging development of the port, this Court does not think that the State is bound to advertise and tell the people that it wants development of the port in a particular manner and invite those interested to come up with proposals for the purpose. The State may choose to do so if it thinks fit and in a given situation it may turn out to be advantageous for the State to do so, but if any private party comes before the State and offers to develop the port, the State would not be committing breach of any constitutional obligation if it negotiates with such a party and agrees to provide resources and other facilities for the purpose of development of the port."

129. Hence, it is manifest that there is no constitutional mandate in favour of auction under Article 14. The Government has repeatedly deviated from the course of auction and this Court has repeatedly upheld such actions. The judiciary tests such deviations on the limited scope of arbitrariness and fairness under Article 14 and its role is limited to that extent. Essentially whenever the object of policy is anything but revenue maximization, the Executive is seen to adopt methods other than auction.

130. A fortiori, besides legal logic, mandatory auction may be contrary to economic logic as well. Different resources may require different treatment. Very often, exploration and exploitation contracts are bundled together due to the requirement of heavy capital in the discovery of natural resources. A concern would risk undertaking such exploration and incur heavy costs only if it was assured utilization of the resource discovered; a prudent business venture, would not like

to incur the high costs involved in exploration activities and then compete for that resource in an open auction. The logic is similar to that applied in patents. Firms are given incentives to invest in research and development with the promise of exclusive access to the market for the sale of that invention. Such an approach is economically and legally sound and sometimes necessary to spur research and development. Similarly, bundling exploration and exploitation contracts may be necessary to spur growth in a specific industry.

131. Similar deviation from auction cannot be ruled out when the object of a State policy is to promote domestic development of an industry, like in Kasturi Lal's case, discussed above. However, these examples are purely illustrative in order to demonstrate that auction cannot be the sole criteria for alienation of all natural resources.

POTENTIAL OF ABUSE

132. It was also argued that even if the method of auction is not a mandate under Article 14, it must be the only permissible method, due to the susceptibility of other methods to abuse. This argument, in our view, is contrary to an established position of law on the subject cemented through a catena of decisions.

133. In *R.K. Garg Vs. Union of India & Ors.* [59], Justice P. N. Bhagwati, speaking for a Constitution Bench of five learned Judges, held:

> "8.…The Court must always remember that "legislation is directed to practical problems, that the economic mechanism is highly sensitive and complex, that many problems are singular and contingent, that laws are not abstract propositions and do not relate to abstract units and are not to be measured by abstract symmetry"; "that exact wisdom and nice adaption of remedy are not always possible" and that "judgment is largely a prophecy based on meager and uninterpreted experience". Every legislation particularly in economic matters is essentially empiric and it is based on experimentation or what one may call trial and error method and therefore it cannot provide for all possible situations or anticipate all possible abuses. There may be crudities and inequities in complicated experimental economic legislation but on that account alone it cannot be struck down as invalid. The courts cannot, as pointed out by the United States Supreme Court in *Secretary of Agriculture v. Central Reig Refining Company*[60] be converted into tribunals for relief from such crudities and inequities. There may even be possibilities of abuse, but that too cannot of itself be a ground for invalidating the legislation, because it is not possible for any legislature to anticipate as if by some divine prescience, distortions and abuses of its legislation which may be made by those subject to its provisions and to provide against such distortions and abuses. Indeed, howsoever great may be the care bestowed on its framing, it is difficult to conceive of a legislation which is not capable of being abused by perverted human ingenuity. The Court must therefore adjudge the constitutionality of such legislation by the generality of its provisions and not by its crudities or inequities or by the possibilities of abuse of any of its provisions. If any crudities, inequities or possibilities of abuse come to light, the legislature can always step in and enact suitable amendatory legislation. That is the essence of pragmatic approach which must guide and inspire the legislature in dealing with complex economic issues."

134. Then again, in *D. K. Trivedi & Sons & Ors. Vs. State of Gujarat & Ors.*[61], while upholding the constitutional validity

59. (1981) 4 SCC 675.

60. 94 L Ed 381 : 338 US 604 (1950).

61. (1986) Supp SCC 20.

of Section 15(1) of the MMRD Act, this Court explained the principle in the following words:

> "50. Where a statute confers discretionary powers upon the executive or an administrative authority, the validity or constitutionality of such power cannot be judged on the assumption that the executive or such authority will act in an arbitrary manner in the exercise of the discretion conferred upon it. If the executive or the administrative authority acts in an arbitrary manner, its action would be bad in law and liable to be struck down by the courts but the possibility of abuse of power or arbitrary exercise of power cannot invalidate the statute conferring the power or the power which has been conferred by it."

135. Therefore, a potential for abuse cannot be the basis for striking down a method as ultra vires the Constitution. It is the actual abuse itself that must be brought before the Court for being tested on the anvil of constitutional provisions. In fact, it may be said that even auction has a potential of abuse, like any other method of allocation, but that cannot be the basis of declaring it as an unconstitutional methodology either. These drawbacks include cartelization, "winners curse" (the phenomenon by which a bidder bids a higher, unrealistic and unexecutable price just to surpass the competition; or where a bidder, in case of multiple auctions, bids for all the resources and ends up winning licenses for exploitation of more resources than he can pragmatically execute), etc. However, all the same, auction cannot be called ultra vires for the said reasons and continues to be an attractive and preferred means of disposal of natural resources especially when revenue maximization is a priority. Therefore, neither auction, nor any other method of disposal can be held ultra vires the Constitution, merely because of a potential abuse.

JUDICIAL REVIEW OF POLICY DECISIONS

136. The learned Attorney General also argued that

dictating a method of distribution for natural resources violates the age old established principle of non-interference by the judiciary in policy matters. Even though the contours of the power of judicial review of policy decisions has become a trite subject, as the Courts have repeatedly delivered opinions on it, we wish to reiterate some of the principles in brief, especially with regard to economic policy choices and pricing.

137. One of the earliest pronouncements on the subject came from this Court in *Rustom Cavasjee Cooper Vs. Union of India*[62] (commonly known as "Bank Nationalization Case") wherein this Court held that it is not the forum where conflicting policy claims may be debated; it is only required to adjudicate the legality of a measure which has little to do with relative merits of different political and economic theories. The Court observed:

> "63. This Court is not the forum in which these conflicting claims may be debated. Whether there is a genuine need for banking facility in the rural sector, whether certain classes of the community are deprived of the benefit of the resources of the banking industry, whether administration by the Government of the commercial banking sector will not prove beneficial to the community and will lead to rigidity in the administration, whether the Government administration will eschew the profit-motive, and even if it be eschewed, there will accrue substantial benefits to the public, whether an undue accent on banking as a means of social regeneration, especially in the backward areas, is a doctrinaire approach to a rational order of priorities for attaining the national objectives enshrined in our Constitution, and whether the policy followed by the Government in office or the policy propounded by its opponents may reasonably attain the national objectives are matters which have little relevance in determining the legality of the measure. It is again not for this Court to

62. (1970) 1 SCC 248.

consider the relative merits of the different political theories or economic policies. The Parliament has under Entry 45, List I the power to legislate in respect of banking and other commercial activities of the named banks necessarily incidental thereto: it has the power to legislate for acquiring the undertaking of the named banks under Entry 42, List III. Whether by the exercise of the power vested in the Reserve Bank under the pre-existing laws, results could be achieved which it is the object of the Act to achieve, is, in our judgment, not relevant in considering whether the Act amounts to abuse of legislative power. This Court has the power to strike down a law on the ground of want of authority, but the Court will not sit in appeal over the policy of the Parliament in enacting a law. The Court cannot find fault with the Act merely on the ground that it is inadvisable to take over the undertaking of banks which, it is said by the petitioner, by thrift and efficient management had set up an impressive and efficient business organization serving large sectors of industry."

138. In *R.K. Garg* (supra), this Court even observed that greater judicial deference must be shown towards a law relating to economic activities due to the complexity of economic problems and their fulfillment through a methodology of trial and error. As noted above, it was also clarified that the fact that an economic legislation may be troubled by crudities, inequities, uncertainties or the possibility of abuse cannot be the basis for striking it down. The following observations which refer to a couple of American Supreme Court decisions are a limpid enunciation on the subject :

"8. Another rule of equal importance is that laws relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion etc. It has been said by no less a person than Holmes, J., that the legislature should be allowed some play in the joints, because it has to deal with

complex problems which do not admit of solution through any doctrinaire or strait-jacket formula and this is particularly true in case of legislation dealing with economic matters, where, having regard to the nature of the problems required to be dealt with, greater play in the joints has to be allowed to the legislature. The court should feel more inclined to give judicial deference to legislative judgment in the field of economic regulation than in other areas where fundamental human rights are involved. Nowhere has this admonition been more felicitously expressed than in *Morey v. Doud*[63] where Frankfurter, J., said in his inimitable style:

'In the utilities, tax and economic regulation cases, there are good reasons for judicial self-restraint if not judicial deference to legislative judgment. The legislature after all has the affirmative responsibility. The courts have only the power to destroy, not to reconstruct. When these are added to the complexity of economic regulation, the uncertainty, the liability to error, the bewildering conflict of the experts, and the number of times the judges have been overruled by events - self-limitation can be seen to be the path to judicial wisdom and institutional prestige and stability'..."

139. In *Premium Granites & Anr. Vs. State of T.N. & Ors.*[64] this Court clarified that it is the validity of a law and not its efficacy that can be challenged:

"54. It is not the domain of the court to embark upon unchartered ocean of public policy in an exercise to consider as to whether a particular public policy is wise or a better public policy can be evolved. Such exercise must be left to the discretion of the executive and

63. 354 US 457.

64. (1994) 2 SCC 691.

legislative authorities as the case may be. The court is called upon to consider the validity of a public policy only when a challenge is made that such policy decision infringes fundamental rights guaranteed by the Constitution of India or any other statutory right..."

140. In *Delhi Science Forum & Ors. Vs. Union of India & Anr*[65]*.* a Bench of three learned Judges of this Court, while rejecting a claim against the opening up of the telecom sector reiterated that the forum for debate and discourse over the merits and demerits of a policy is the Parliament. It restated that the services of this Court are not sought till the legality of the policy is disputed, and further, that no direction can be given or be expected from the courts, unless while implementing such policies, there is violation or infringement of any of the constitutional or statutory provisions. It held thus:

"7. What has been said in respect of legislations is applicable even in respect of policies which have been adopted by Parliament. They cannot be tested in Court of Law. The courts cannot express their opinion as to whether at a particular juncture or under a particular situation prevailing in the country any such national policy should have been adopted or not. There may be views and views, opinions and opinions which may be shared and believed by citizens of the country including the representatives of the people in Parliament. But that has to be sorted out in Parliament which has to approve such policies…"

141. In *BALCO Employees' Union (Regd.) Vs. Union of India & Ors.*[66]*,* this Court further pointed out that the Court ought to stay away from judicial review of efficacy of policy matters, not only because the same is beyond its jurisdiction, but also because it lacks the necessary expertise required for such a task. Affirming the previous views of this Court, the Court

65. (1996) 2 SCC 405.

66. (2002) 2 SCC 333.

observed that while dealing with economic legislations, the Courts, while not jettisoning its jurisdiction to curb arbitrary action or unconstitutional legislation, should interfere only in those cases where the view reflected in the legislation is not possible to be taken at all. The Court went on to emphasize that unless the economic decision, based on economic expediencies, is demonstrated to be so violative of constitutional or legal limits on power or so abhorrent to reason, that the courts would decline to interfere.

142. In *BALCO* (supra), the Court took notice of the judgment in *Peerless General Finance and Investment Co. Ltd. & Anr. Vs. Reserve Bank of India*[67] and observed that some matters like price fixation are based on such uncertainties and dynamics that even experts face difficulty in making correct projections, making it all the more necessary for this Court to exercise non- interference:

"31. The function of the Court is to see that lawful authority is not abused but not to appropriate to itself the task entrusted to that authority. It is well settled that a public body invested with statutory powers must take care not to exceed or abuse its power. It must keep within the limits of the authority committed to it. It must act in good faith and it must act reasonably. Courts are not to interfere with economic policy which is the function of experts. It is not the function of the courts to sit in judgment over matters of economic policy and it must necessarily be left to the expert bodies. In such matters even experts can seriously and doubtlessly differ. Courts cannot be expected to decide them without even the aid of experts."

143. In an earlier case in *M/s Prag Ice & Oil Mills & Anr. Vs. Union of India*[68]*,* this Court had observed as under: (SCC p. 478, Para 24)

67. (1992) 2 SCC 343.

68. [1978] 3 SCC 459.

"We do not think that it is the function of this Court or of any court to sit in judgment over such matters of economic policy as must necessarily be left to the government of the day to decide. Many of them, as a measure of price fixation must necessarily be, are matters of prediction of ultimate results on which even experts can seriously err and doubtlessly by differ. Courts can certainly not be expected to decide them without even the aid of experts."

144. In *State of Madhya Pradesh Vs. Narmada Bachao Andolan & Anr.*[69], this Court said that the judiciary cannot engage in an exercise of comparative analysis over the fairness, logical or scientific basis, or wisdom of a policy. It held that the Court cannot strike down a policy decision taken by the Government merely because it feels that another decision would have been fairer, or more scientific or logical, or wiser. The wisdom and advisability of the policies are ordinarily not amenable to judicial review unless the policies are contrary to statutory or constitutional provisions or arbitrary or irrational or an abuse of power.

145. Mr. Subramanian Swamy also brought to our notice a Report on Allocation of Natural Resources, prepared by a Committee, chaired by Mr. Ashok Chawla (hereinafter referred to as the "Chawla Committee Report"), which has produced a copious conceptual framework for the Government of India on the allocation and pricing of scarce natural resources viz. coal, minerals, petroleum, natural gas, spectrum, forests, land and water. He averred to observations of the report in favour of auction as a means of disposal. However, since the opinion rendered in the Chawla Committee Report is pending acceptance by the Government, it would be inappropriate for us to place judicial reliance on it. Besides, the Report conducts an economic, and not legal, analysis of the means of disposal of natural resources. The purpose of this Reference would be

69. (2011) 7 SCC 639.

best served if this Court gave a constitutional answer rather than economic one.

146. To summarize in the context of the present Reference, it needs to be emphasized that this Court cannot conduct a comparative study of the various methods of distribution of natural resources and suggest the most efficacious mode, if there is one universal efficacious method in the first place. It respects the mandate and wisdom of the executive for such matters. The methodology pertaining to disposal of natural resources is clearly an economic policy. It entails intricate economic choices and the Court lacks the necessary expertise to make them. As has been repeatedly said, it cannot, and shall not, be the endeavour of this Court to evaluate the efficacy of auction vis-à-vis other methods of disposal of natural resources. The Court cannot mandate one method to be followed in all facts and circumstances. Therefore, auction, an economic choice of disposal of natural resources, is not a constitutional mandate. We may, however, hasten to add that the Court can test the legality and constitutionality of these methods. When questioned, the Courts are entitled to analyse the legal validity of different means of distribution and give a constitutional answer as to which methods are ultra vires and intra vires the provisions of the Constitution. Nevertheless, it cannot and will not compare which policy is fairer than the other, but, if a policy or law is patently unfair to the extent that it falls foul of the fairness requirement of Article 14 of the Constitution, the Court would not hesitate in striking it down.

147. Finally, market price, in economics, is an index of the value that a market prescribes to a good. However, this valuation is a function of several dynamic variables; it is a science and not a law. Auction is just one of the several price discovery mechanisms. Since multiple variables are involved in such valuations, auction or any other form of competitive bidding, cannot constitute even an economic mandate, much less a constitutional mandate.

148. In our opinion, auction despite being a more preferable method of alienation/allotment of natural resources, cannot be held to be a constitutional requirement or limitation for alienation of all natural resources and therefore, every method other than auction cannot be struck down as ultra-vires the constitutional mandate.

149. Regard being had to the aforesaid precepts, we have opined that auction as a mode cannot be conferred the status of a constitutional principle. Alienation of natural resources is a policy decision, and the means adopted for the same are thus, executive prerogatives. However, when such a policy decision is not backed by a social or welfare purpose, and precious and scarce natural resources are alienated for commercial pursuits of profit maximizing private entrepreneurs, adoption of means other than those that are competitive and maximize revenue may be arbitrary and face the wrath of Article 14 of the Constitution. Hence, rather than prescribing or proscribing a method, we believe, a judicial scrutiny of methods of disposal of natural resources should depend on the facts and circumstances of each case, in consonance with the principles which we have culled out above. Failing which, the Court, in exercise of power of judicial review, shall term the executive action as arbitrary, unfair, unreasonable and capricious due to its antimony with Article 14 of the Constitution.

150. In conclusion, our answer to the first set of five questions is that auctions are not the only permissible method for disposal of all natural resources across all sectors and in all circumstances.

151. As regards the remaining questions, we feel that answer to these questions would have a direct bearing on the mode of alienation of Spectrum and therefore, in light of the statement by the learned Attorney General that the Government is not questioning the correctness of judgment in the 2G Case,

we respectfully decline to answer these questions. The Presidential Reference is answered accordingly.

152. This opinion shall be transmitted to the President in accordance with the procedure prescribed in Part V of the Supreme Court Rules, 1966.

JAGDISH SINGH KHEHAR, J. 1. I have had the privilege of perusing the opinion rendered by my esteemed brother, D.K. Jain, J. Every bit of the opinion (which shall hereinafter be referred to by me, as the "main opinion") is based on settled propositions of law declared by this Court. There can, therefore, be no question of any disagreement therewith. I fully endorse the opinion expressed therein.

2. The first question posed in the Presidential reference, is in fact the reason, for my having to record, some other nuances on the subject whereof advice has been sought. The first question in the Presidential reference requires the Supreme Court to tender advice on, "Whether the only permissible method for disposal of all natural resources across all sectors and in all circumstances, is by the conduct of auctions?". It is of utmost importance to understand, the tenor of the first question in the Presidential reference. Take for instance a hypothetical situation where, the legality of 100 instances of disposal of different types of natural resources is taken up for consideration. If the first question is taken in its literal sense, as to whether the method of disposal of all natural resources in all circumstances is by auction alone, then, even if 99 out of the aforesaid 100 different natural resources are such, which can only be disposed of by way of auction, the answer to the first question would still be in the negative. This answer in the negative would give the erroneous impression, that it is not necessary to dispose of natural resources by way of auction. Surely, the Presidential reference has not been made, to seek such an innocuous advice. The instant reference has been made despite the Central Government being alive to

the fact, that there are natural resources which can only be disposed of by way of auction. A mining lease for coal under Section 11A of the Mines and Minerals (Development and Regulation) Act, 1957 can be granted, only by way of selection through auction by competitive bidding. Furthermore, the learned Attorney General for India informed us, about a conscious decision having been taken by the Central Government to henceforth allot spectrum only through competitive bidding by way of auction. Such instances can be multiplied. It is therefore obvious, that Government is alive to the fact, that disposal of some natural resources have to be made only by auction. If that is so, the first question in the reference does not seek a literal response. The first question must be understood to seek this Court's opinion on whether there are circumstances in which natural resources ought to be disposed of only by auction. Tendering an opinion, without a response to this facet of the matter, would not make the seeker of advice, any wiser. It is this aspect alone, which will be the main subject of focus of my instant opinion.

3. Before venturing into the area of consideration expressed in the foregoing paragraph, it is necessary to record, that there was extensive debate during the course of hearing, on whether, maximization of revenue must be the sole permissible consideration, for disposal of all natural resources, across all sectors and in all circumstances. During the course of this debate, the learned Attorney General for India acknowledged, that auction by way of competitive bidding, was certainly an indisputable means, by which maximization of revenue returns is assured. It is not as if, one would like to bind the learned Attorney General to the acquiesced proposition. During the course of the days and weeks of erudite debate, learned counsel emphasized, that disposal of assets by processes of tender, tender-cum-auction and auction, could assure maximization of revenue returns. Of course, there are a large variety of tender and auction processes, each one with its own nuances. And we were informed, that a rightful choice,

would assure maximization of revenue returns. The term "auction" expressed in my instant opinion, may therefore be read as a means to maximize revenue returns, irrespective of whether the means adopted should technically and correctly be described as tender, tender-cum-auction, or auction.

4. The concept of equality before the law and equal protection of the laws, emerges from the fundamental right expressed in Article 14 of the Constitution of India. Equality is a definite concept. The variation in its understanding may at best have reference to the maturity and evolution of the nation's thought. To start with, breach of equality was a plea advanced by individuals claiming fair treatment. Challenges were raised also on account of discriminatory treatment. Equality was sought by those more meritorious, when benefits were bestowed on those with lesser caliber. Gradually, judicial intervention came to be sought for equitable treatment, even for a section of the society put together. A jurisdiction, which in due course, came to be described as public interest litigation. It all started with a demand for the basic rights for respectable human existence. Over the years, the concept of determination of societal rights, has traversed into different directions and avenues. So much so, that now rights in equity, sometimes even present situations of conflict between individual rights and societal rights. The present adjudication can be stated to be a dispute of such nature. In a maturing society, individual rights and plural rights have to be balanced, so that the oscillating pendulum of rights, fairly and equally, recognizes their respective parameters. For a country like India, the pendulum must be understood to balance the rights of one citizen on the one side, and 124,14,91,960 (the present estimated population of India) citizens of the country on the other. The true effect of the Article 14 of the Constitution of India is to provide equality before the law and equal protection of the laws not only with reference to individual rights, but also by ensuring that its citizens on the other side of the balance are likewise not deprived of their right to equality before the law, and their right to equal protection of

the laws. An individual citizen cannot be a beneficiary, at the cost of the country (the remaining 124,14,91,960 citizens) i.e., the plurality. Enriching one at the cost of all others would amount to deprivation to the plurality i.e., the nation itself. The gist of the first question in the Presidential reference, raises the issue whether ownership rights over the nation's natural resources, vest in the citizens of the country. An answer to the instant issue in turn would determine, whether or not it is imperative for the executive while formulating a policy for the disposal of natural resources, to ensure that it subserves public good and public interest.

5. The introduction and acceptance of public interest litigation as a jurisprudential concept is a matter of extensive debate in India, and even more than that, outside India. This concept brings into focus the rights of the plurality (as against individual's right) specially when the plurality is, for one or the other reason, not in a position to seek redressal of its grievances. This inadequacy may not always emerge from financial constrains. It may sometimes arise out of lack of awareness. At other times merely from the overwhelming might of executive authority. The jurisprudential thought in this country, after the emergence of public interest litigation, is seeking to strike a balance between individual rights and the rights of the plurality. After all, all natural resources are the nation's collective wealth. This Court has had the occasion over the last few decades, to determine rights of citizens with reference to natural resources. The right of an individual citizen to those assets, as also, the rights of the remaining citizens of the country, have now emerged on opposite sides in a common litigation. One will endeavour to delineate the legal position expressed in decisions rendered by this Court, on issues relatable to disposal of resources by the State, to determine whether the instant issue stands settled, by law declared by this Court.

6(a) First of all reference was made to the decision of this Court in *S.G. Jaisinghani Vs. Union of India & Ors.,* AIR 1967

SC 1427, wherein this Court observed as under:

> "14. *In this context it is important to emphasize that the absence of arbitrary power is the first essential of the rule of law upon which our whole constitutional system is based. In a system governed by rule of law, discretion, when conferred upon executive authorities, must be confined within clearly defined limits. The rule of law from this point of view means that decisions should be made by the application of known principles and rules and, in general, such decisions should be predictable and the citizen should know where he is.* If a decision is taken without any principle or without any rule it is unpredictable and such a decision is the antithesis of a decision taken in accordance with the Rule of law. (See Dicey - Law of the Constitution - 10th Edn., Introduction cx). "Law has reached its finest moments," stated Douglas, J. in United States v. Wunderlich, (1951) 342 US 98, "when it has freed man from the unlimited discretion of some ruler.... Where discretion, is absolute, man has always suffered." It is in this sense that the rule of law may be said to be the sworn enemy of caprice. Discretion, as Lord Mansfield slated it in classic terms in the case of John Wilkes, (1770) 4 Burr 2528 at p. 2539 "means sound discretion guided by law. It must be governed by Rule, not by humour: it must not be arbitrary, vague, and fanciful."
>
> (emphasis is mine)

In the aforesaid case, it came to be emphasized that executive action should have clearly defined limits and should be predictable. In other words, the man on the street should know why the decision has been taken in favour of a particular party. What came to be impressed upon was, that lack of transparency in the decision making process would render it arbitrary.

(b) Also cited for our consideration was the judgment in

Rashbihari Panda etc. Vs. State of Orissa (1969) 1 SCC 414. In this case it was canvassed on behalf of the appellants, that the machinery devised by the Government for sale of *Kendu* leaves in which they had acquired a trade monopoly, was violative of the fundamental rights guaranteed under Articles 14 and 19(1)(g) of the Constitution. It was pointed out, that in the scheme of events the purchasers were merely nominees of the agents. It is also contended, that after the Supreme Court had struck down the policy under which the agents were to carry on business in *Kendu* leaves on their own and to make profit for themselves, the Government to help their party-men set up a body of persons who were to be purchasers to whom the monopoly sales were to be made at concessional rates and that the benefit which would have otherwise been earned by the State would now get diverted to those purchasers. It was held:

> "15. Section 10 of the Act is a counterpart of Section 3 and authorises the Government to sell or otherwise dispose of *Kendu* leaves in such manner as the Government may direct. If the monopoly of purchasing *Kendu* leaves by Section 3 is valid, insofar as it is intended to be administered only for the benefit of the State, the sale or disposal of *Kendu* leaves by the Government must also be in the public interest and not to serve the private interest of any person or class of persons. *It is true that it is for the Government, having regard to all the circumstances, to act as a prudent businessman would, and to sell or otherwise dispose of* Kendu *leaves purchased under the monopoly acquired under Section 3, but the profit resulting from the sale must be for the public benefit and not for private gain.* Section 11 which provides that out of the net profits derived by the Government from the trade in *Kendu* leaves an amount not less than one half is to be paid to the Samitis and Gram *Panchayats* emphasises the concept that the machinery of sale or disposal of *Kendu* leaves must also be quashed to serve the public interest. *If the scheme of disposal creates a class of middlemen*

> *who would purchase from the Government Kendu leaves at concessional rates and would earn large profits disproportionate to the nature of the service rendered or duty performed by them, it cannot claim the protection of Article 19(6)(ii).*
>
> 16. Section 10 leaves the method of sale or disposal of *Kendu* leaves to the Government as they think fit. *The action of the Government if conceived and executed in the interest of the general public is not open to judicial scrutiny. But it is not given to the Government thereby to create a monopoly in favour of third parties from their own monopoly.*
>
> 17. Validity of the schemes adopted by the Government of Orissa for sale of *Kendu* leaves must be adjudged in the light of Article 19(1)(g) and Article 14. Instead of inviting tenders the Government offered to certain old contractors the option to purchase *Kendu* leaves for the year 1968 on terms mentioned therein. The reason suggested by the Government that these offers were made because the purchasers had carried out their obligations in the previous year to the satisfaction of the Government is not of any significance. *From the affidavit filed by the State Government it appears that the price fetched at public auctions before and after January 1968, were much higher than the prices at which Kendu leaves were offered to the old contractors.* The Government realised that the scheme of offering to enter into contracts with the old licensees and to renew their terms was open to grave objection, since it sought arbitrarily to exclude many persons interested in the trade. The Government then decided to invite offers for advance purchases of *Kendu* leaves but restricted the invitation to those individuals who had carried out the contracts in the previous year without default and to the satisfaction of the Government. By the new scheme instead of the Government making an offer,

the existing contractors were given the exclusive right to make offers to purchase *Kendu* leaves. But insofar as the right to make tenders for the purchase of *Kendu* leaves was restricted to those persons who had obtained contracts in the previous year the scheme was open to the same objection. *The right to make offers being open to a limited class of persons it effectively shut out all other persons carrying on trade in Kendu leaves and also new entrants into that business. It was ex facie discriminatory, and imposed unreasonable restrictions upon the right of persons other than existing contractors to carry on business. In our view, both the schemes evolved by the Government were violative of the fundamental right of the petitioners under Article 19(1)(g) and Article 14 because the schemes gave rise to a monopoly in the trade in Kendu leaves to certain traders, and singled out other traders for discriminatory treatment.*

18. The classification based on the circumstance that certain existing contractors had carried out their obligations in the previous year regularly and to the satisfaction of the Government is not based on any real and substantial distinction bearing a just and reasonable relation to the object sought to be achieved i.e. effective execution of the monopoly in the public interest. Exclusion of all persons interested in the trade, who were not in the previous year licensees is ex facie arbitrary, it had no direct relation to the object of preventing exploitation of pluckers and growers of *Kendu* leaves, nor had it any just or reasonable relation to the securing of the full benefit from the trade to the State.

19. *Validity of the law by which the State assumed the monopoly to trade in a given commodity has to be judged by the test whether the entire benefit arising therefrom is to enure to the State, and the monopoly is not used as a cloak for conferring private benefit upon a limited class*

of persons. The scheme adopted by the Government first of offering to enter into contracts with certain named licensees, and later inviting tenders from licensees who had in the previous year carried out their contracts satisfactorily is liable to be adjudged void on the ground that it unreasonably excludes traders in *Kendu* leaves from carrying on their business. The scheme of selling *Kendu* leaves to selected purchasers or of accepting tenders only from a specified class of purchasers was not "integrally and essentially" connected with the creation of the monopoly and was not on the view taken by this Court in Akadasi Padhan case, (1963) Supp. 2 SCC 691, protected by Article 19(6)(ii): it had therefore to satisfy the requirement of reasonableness under the first part of Article 19(6). No attempt was made to support the scheme on the ground that it imposed reasonable restrictions on the fundamental rights of the traders to carry on business in *Kendu* leaves. The High Court also did not consider whether the restrictions imposed upon persons excluded from the benefit of trading satisfied the test of reasonableness under the first part of Article 19(6). The High Court examined the problem from the angle whether the action of the State Government was vitiated on account of any oblique motive, and whether it was such as a prudent person carrying on business may adopt.

20. *No explanation has been attempted on behalf of the State as to why an offer made by a well known manufacturer of bidis interested in the trade to purchase the entire crop of Kendu leaves for the year 1968 for rupees three crores was turned down. If the interests of the State alone were to be taken into consideration, the State stood to gain more than rupees one crore by accepting that offer.* We are not suggesting that merely because that offer was made, the Government was bound to accept it. The Government had to consider, as prudent businessman, whether, having regard to the

circumstances, it should accept the offer, especially in the light of the financial position of the offeror, the security which he was willing to give and the effect which the acceptance of the offer may have on the other traders and the general public interest.

21. The learned Judges of the High Court have observed that in their view the exercise of the discretion was not shown to be arbitrary, nor was the action shown to be lacking in bona fides. But that conclusion is open to criticism that the Government is not shown to have considered the prevailing prices of *Kendu* leaves about the time when offers were made, the estimated crop of *Kendu* leaves, the conditions in the market and the likelihood of offerers at higher prices carrying out their obligations, and whether it was in the interests of the State to invite tenders in the open market from all persons whether they had or had not taken contracts in the previous year. If the Government was anxious to ensure due performance by those who submitted tenders for purchase of *Kendu* leaves, it was open to the Government to devise adequate safeguards in that behalf. *In our judgment, the plea that the action of the Government was bona fide cannot be an effective answer to a claim made by a citizen that his fundamental rights were infringed by the action of the Government,* nor can the claim of the petitioners be defeated on the plea that the Government in adopting the impugned scheme committed an error of judgment.

22. That plea would have assisted the Government if the action was in law valid and the objection was that the Government erred in the exercise of its discretion. It is unnecessary in the circumstances to consider whether the Government acted in the interest of their party-men and to increase party funds in devising the schemes for sale of *Kendu* leaves in 1968.

23. During the pendency of these proceedings the entire year for which the contracts were given has expired. The persons to whom the contracts were given are not before us, and we cannot declare the contracts which had been entered into by the Government for the sale of *Kendu* leaves for the year 1968 unlawful in these proceedings. *Counsel for the appellants agrees that it would be sufficient if it be directed that the tenders for purchase of Kendu leaves be invited by the Government in the next season from all persons interested in the trade. We trust that in accepting tenders, the State Government will act in the interest of the general public and not of any class of traders so that in the next season the State may get the entire benefit of the monopoly in the trade in Kendu leaves and no disproportionate share thereof may be diverted to any private agency. Subject to these observations we make no further order in the petitions out of which these appeals arise."*

(emphasis is mine)

A perusal of the observations made by this Court reveal, that the Government must act as a prudent businessman, and that, the profit earned should be for public benefit and not for private gains. A plea of reasonable restriction raised under Article 19(6) of the Constitution of India to save the governmental action was rejected on the ground that the scheme created middlemen who would earn large disproportionate profits. This Court also held the action to be discriminatory because it excluded others like the petitioners from the zone of consideration. Finally, a direction came to be issued by this Court requiring the Government to act in the interest of the general public and to invite tenders so that the State may earn the entire benefit in a manner that no disproportionate profits are diverted to any private agency.

(c) Reliance was also placed on *Ramana Dayaram Shetty*

Vs. International Airport Authority of India & Ors., (1979) 3 SCC 489, wherein this Court held as under:

"21. This rule also flows directly from the doctrine of equality embodied in Article 14. It is now well-settled as a result of the decisions of this Court in *E.P. Royappa v. State of Tamil Nadu, (1974) 4 SCC 3, and Maneka Gandhi v. Union of India,* (1978) 1 SCC 248, that *Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. It requires that State action must not be arbitrary but must be based on some rational and relevant principle which is non-discriminatory: it must not be guided by any extraneous or irrelevant considerations, because that would be denial of equality.* The principle of reasonableness and rationality which is legally as well as philosophically an essential element of equality or non-arbitrariness is projected by Article 14 and it must characterise every State action, whether it be under authority of law or in exercise of executive power without making of law. The State cannot, therefore, act arbitrarily in entering into relationship, contractual or otherwise with a third party, but its action must conform to some standard or norm which is rational and non-discriminatory. This principle was recognised and applied by a Bench of this Court presided over by Ray, C.J., in *Erusian Equipment and Chemicals Ltd. v. State of West Bengal* (supra) where the learned Chief Justice pointed out that-

> *"the State can carry on executive function by making a law or without making a law. The exercise of such powers and functions in trade by the State is subject to Part III of the Constitution. Article 14 speaks of equality before the law and equal protection of the laws. Equality of opportunity should apply to matters of public contracts. The State has the right to trade. The State has there*

> *the duty to observe equality. An ordinary individual can choose not to deal with any person. The Government cannot choose to exclude persons by discrimination.* The order of blacklisting has the effect of depriving a person of equality of opportunity in the matter of public contract. A person who is on the approved list is unable to enter into advantageous relations with the Government because of the order of blacklisting .... A citizen has a right to claim equal treatment to enter into a contract which may be proper, necessary and essential to his lawful calling .... It is true that neither the petitioner nor the respondent has any right to enter into a contract but they are entitled to equal treatment with others who offer tender or quotations for the purchase of the goods".

It must, therefore follow as a necessary corollary from the principle of equality enshrined in Article 14 that though the State is entitled to refuse to enter into relationship with any one, yet if it does so, it cannot arbitrarily choose any person it likes for entering into such relationship and discriminate between persons similarly circumstanced, but it must act in conformity with some standard or principle which meets the test of reasonableness and non-discrimination and any departure from such standard or principle would be invalid unless it can be supported or justified on some rational and non discriminatory ground.

22. It is interesting to find that this rule was recognised and applied by a Constitution Bench of this Court in a case of sale of *kendu* leaves by the *Government of Orissa in Rashbihari Panda v. State of Orissa,* (1969) 1 SCC 414….. This decision wholly supports the view we are taking in regard to the applicability of the rule against arbitrariness in State action."

(emphasis is mine)

An analysis of the aforesaid determination by this Court would lead to the inference that the State has the right to trade. In executing public contracts in its trading activity the State must be guided by relevant principles, and not by extraneous or irrelevant consideration. The same should be based on reasonableness and rationality as well as non-arbitrariness. It came to be concluded, that the State while entering into a contractual relationship, was bound to maintain the standards referred to above. And any departure from the said standards would be invalid unless the same is supported by good reasons.

(d) Our attention was also invited to the decision rendered in *Kasturi Lal Lakshmi Reddy Vs. State of Jammu & Kashmir & Anr.,* (1980) 4 SCC 1, wherein the factual background as well as, the legal position came to be expressed in paragraph 19 of the judgment which is being set out below:

> "19. It is clear from the backdrop of the facts and circumstances in which the impugned Order came to be made and the terms and conditions set out in the impugned Order that it was not a tapping contract simpliciter which was intended to be given to the second respondents. The second respondents wanted to be assured of regular supply of raw material in the shape of resin before they could decide to set up a factory within the State and it was for the purpose of ensuring supply of such raw material that the impugned Order was made giving tapping contract to the second respondents. It was really by way of allocation of raw material for running the factory that the impugned Order was passed. The terms of the impugned Order show beyond doubt that the second respondents were under an obligation to set up a factory within the State and that 3500 metric tonnes of resin which was permitted to be retained by the second respondents out of the resin extracted by them was required to be utilised in the factory to be set up by them and it was provided that no part of the resin extracted should be allowed to be removed outside the State. The whole object of the impugned Order was to

> make available 3500 metric tonnes of resin to the second respondents for the purpose of running the factory to be set up by them. The advantage to the State was that a new factory for manufacture of rosin, turpentine oil and other derivatives would come up within its territories offering more job opportunities to the people of the State increasing their prosperity and augmenting the State revenues and in addition the State would be assured of a definite supply of at least 1500 metric tonnes of resin for itself without any financial involvement or risk and with this additional quantity of resin available to it, it would be able to set up another factory creating more employment opportunities and, in fact, as the counter-affidavit of Ghulam Rasul, Under-Secretary to the Government filed on behalf of the State shows the Government lost no time in taking steps to set up a public sector resin distillation plant in a far-flung area of the State, namely, Sundarbani, in Rajouri District. Moreover, the State would be able to secure extraction of resin from these inaccessible areas on the best possible terms instead of allowing them to remain unexploited or given over at ridiculously low royalty. We cannot accept the contention of the petitioners that under the impugned Order a huge benefit was conferred on the second respondents at the cost of the State. It is clear from the terms of the impugned Order that the second respondents would have to extract at least 5000 metric tonnes of resin from the blazes allotted to them in order to be entitled to retain 3500 metric tonnes. The counter-affidavit of Ghulam Rasul on behalf of the first respondent and Guran Devaya on behalf of the second respondents show that the estimated cost of extraction and collection of resin from these inaccessible areas would be at the least Rs 175 per quintal, though according to Guran Devaya it would be in the neighbourhood of Rs.200 per quintal, but even if we take the cost at the minimum figure of Rs.175 per quintal, the total cost of extraction and collection would come to Rs.87,50,000 and on this

investment of Rs.87,50,000 required to be made by the second respondents the amount of interest at the prevailing bank rate would work out to about Rs.13,00,000. Now, as against this expenditure of Rs 87,50,000 plus Rs.13,00,000 the second respondents would be entitled to claim from the State, in respect of 1500 metric tonnes of resin to be delivered to it only at the rate sanctioned by the Forest Department for the adjoining accessible forests which were being worked on wage-contract basis. It is stated in the counter-affidavits of Ghulam Rasul and Guran Devaya and this statement is not seriously challenged on behalf of the petitioners, that the cost of extraction and collection as sanctioned by the Forest Department for the adjoining accessible forests given on wage-contract basis in the year 1978-79 was Rs.114 per quintal and the second respondents would, thus, be entitled to claim from the State no more than Rs.114 per quintal in respect of 1500 metric tonnes to be delivered to it and apart from bearing the difference between the actual cost of extraction and collection and the amount received from the State at the rate of Rs.114 per quintal in respect of 1500 metric tonnes, the second respondents would have to pay the price of the remaining 3500 metric tonnes to be retained by them at the rate of Rs.350 per quintal. On this reckoning, the cost of 3500 metric tonnes to be retained by the second respondents would work out at Rs.474 per quintal. The result would be that under the impugned Order the State would get 1500 metric tonnes of resin at the rate of Rs.114 per quintal while the second respondents would have to pay at the rate of Rs.474 per quintal for the balance of 3500 metric tonnes retained by them. Obviously, a large benefit would accrue to the State under the impugned Order. If the State were to get the blazes in these inaccessible areas tapped through wage contract, the minimum cost would be Rs.175 per quintal, without taking into account the additional expenditure on account of interest, but under the impugned Order the State would get

1500 metric tonnes of resin at a greatly reduced rate of Rs.114 per quintal without any risk or hazard. The State would also receive for 3500 metric tonnes of resin retained by the second respondents price or royalty at the rate of Rs.474 per quintal which would be much higher than the rate of Rs.260 per quintal at which the State was allotting resin to medium scale industrial units and the rate of Rs.320 per quintal at which it was allotting resin to small scale units within the State. It is difficult to see how on these facts the impugned Order could be said to be disadvantageous to the State or in any way favouring the second respondents at the cost of the State. The argument of the petitioners was that at the auctions held in December 1978, January 1979 and April 1979, the price of resin realised was as much as Rs.484, Rs.520 and Rs.700 per quintal respectively and when the market price was so high, it was improper and contrary to public interest on the part of the State to sell resin to the second respondents at the rate of Rs.320 per quintal under the impugned Order. This argument, plausible though it may seem, is fallacious because it does not take into account the policy of the State not to allow export of resin outside its territories but to allot it only for use in factories set up within the State. It is obvious that, in view of this policy, no resin would be auctioned by the State and there would be no question of sale of resin in the open market and in this situation, it would be totally irrelevant to import the concept of market price with reference to which the adequacy of the price charged by the State to the 2nd respondents could be judged. If the State were simply selling resin, there can be no doubt that the State must endeavour to obtain the highest price subject, of course, to any other overriding considerations of public interest and in that event, its action in giving resin to a private individual at a lesser price would be arbitrary and contrary to public interest. But, where the State has, as a matter of policy, stopped selling resin to outsiders and decided to allot it only to industries

set up within the State for the purpose of encouraging industrialisation, there can be no scope for complaint that the State is giving resin at a lesser price than that which could be obtained in the open market. The yardstick of price in the open market would be wholly inept, because in view of the State policy, there would be no question of any resin being sold in the open market. The object of the State in such a case is not to earn revenue from sale of resin, but to promote the setting up of industries within the State. Moreover, the prices realised at the auctions held in December 1978, January 1979 and April 1979 did not reflect the correct and genuine price of resin, because by the time these auctions came to be held, it had become known that the State had taken a policy decision to ban export of resin from its territories with effect from 1979-80 and the prices realised at the auctions were therefore scarcity prices. In fact, the auction held in April 1979 was the last auction in the State and since it was known that in future no resin would be available for sale by auction in the open market to outsiders, an unduly high price of Rs.700 per quintal was offered by the factory owners having their factories outside the State, so that they would get as much resin for the purpose of feeding their industrial units for some time. The counter-affidavits show that, in fact, the average sale price of resin realised during the year 1978-79 was only Rs.433 per quintal and as compared to this price, the 2nd respondents were required to pay price or royalty at a higher rate of Rs.474 per quintal for 3500 metric tonnes of resin to be retained by them under the impugned Order. It is in the circumstances impossible to see how it can at all be said that any benefit was conferred on the second respondents at the cost of the State. The first head of challenge against the impugned Order must, therefore, be rejected."

(emphasis is mine)

An examination of the factual position of the controversy dealt with in the judgment extracted above reveals, that the State Government formulated a policy to set up a factory within the State, which would result in creation of more job opportunities for the people of the State. The setting up of the said factory would assure the State of atleast 1500 metric tones of resin without any financial involvement. This in turn would enable the State to set up another factory creating further employment opportunities for the people of the State. It is therefore, that this Court concluded that the impugned order passed by the State in favour of the second respondent could not be said to be disadvantageous to the State and favouring the second respondent. In a manner of understanding, this Court found no infirmity in the impugned order passed by the State Government because the State Government had given effect to a policy which would "best subserve the common good" of the inhabitants of the State (as in Article 39(b) of the Constitution of India) while assigning a material resource, though no reference was made to Article 39(b) of the Constitution of India in the judgment. What is also of importance is, that this Court expressly noticed, that if the State Government was simply selling resin, it was obliged to obtain the highest possible price.

(e) Reference was then made to *Dwarkadas Marfatia and Sons Vs. Board of Trustees of the Port of Bombay,* (1989) 3 SCC 293, wherein the case of the respondent was, that in his evidence it had been mentioned by Katara that the plot had been allotted to Dhanji Mavji since it was the policy of the Bombay Port Trust to allot a reconstituted plot to a person occupying a major portion of such plot. It was further asserted, that there was no challenge to this evidence in cross-examination. It was also asserted, that there was no evidence on the alleged policy of the Port Trust of giving plots on joint tenancy to all the occupants. According to learned counsel for the respondent, in the letters addressed by the Port Trust and in the letters by and on behalf of the appellant and/or their

alleged associate concerns they had specifically admitted, that there was a policy of the Port Trust to allot plots to the occupants of the major portions thereof and in fact a grievance was made by them, that in accordance with the said policy of the Bombay Port Trust, a plot was not being allotted to the associates of the appellant. In that view of the matter it was contended, that the issue whether the plot should have been given on joint tenancy or not, could not have been gone into by the court in exercise of its jurisdiction of judicial review. Reliance was placed on the observations of Lord Justice Diplock in Council of *Civil Service Unions v. Minister for the Civil Service,* (1984) 3 All ER 935, 950, where the learned Lord Justice classified 3 grounds subject to control of judicial review, namely, illegality, irrationality and procedural impropriety. In the aforesaid factual background this Court concluded as under:

> "21. We are unable to accept the submissions. Being a public body even in respect of its dealing with its tenant, it must act in public interest, and an infraction of that duty is amenable to examination either in civil suit or in writ jurisdiction.
>
> ….. …..
>
> 28. Learned Additional Solicitor General reiterated on behalf of the respondent that no question of mala fide had been alleged or proved in these proceedings. Factually, he is right. *But it has to be borne in mind that governmental policy would be invalid as lacking in public interest, unreasonable or contrary to the professed standards and this is different from the fact that it was not done bona fide.* It is true as learned Additional Solicitor General contended that there is always a presumption that a governmental action is reasonable and in public interest. It is for the party challenging its validity to show that the action is unreasonable, arbitrary or contrary to the professed norms or not informed by public interest, and the burden is a heavy one.

> ….. …..
>
> 37. As we look upon the facts of this case, there was an implied obligation in respect of dealings with the tenants/ occupants of the Port Trust authority to act in public interest/purpose. That requirement is fulfilled if it is demonstrated that the Port Trust authorities have acted in pursuance of a policy which is referable to public purpose. Once that norm is established whether that policy is the best policy or whether another policy was possible, is not relevant for consideration. It is, therefore, not necessary for our present purposes to dwell on the question whether the obligation of the Port Trust authorities to act in pursuance of a public purpose was a public law purpose or a private law purpose. Under the constitutional scheme of this country the Port Trust authorities were required by relevant law to act in pursuance of public purpose. We are satisfied that they have proceeded to so act.
>
> (emphasis is mine)

In the instant matter, even though the controversy pertained to a tenancy issue, this Court held, that a public body was bound to act in public interest.

(f) In chronological sequence, learned counsel then cited *Mahabir Auto Stores & Ors. Vs. Indian Oil Corporation & Ors.* (1990) 3 SCC 752. Relevant observations made therein, with reference to the present controversy, are being placed below:

> "12. It is well settled that every action of the State or an instrumentality of the State in exercise of its executive power, must be informed by reason. In appropriate cases, actions uninformed by reason may be questioned as arbitrary in proceedings under Article 226 or Article 32 of the Constitution. Reliance in this connection may be placed on the observations of this Court in *Radha Krishna Agarwal v. State of Bihar,* (1977) 3 SCC 457. It appears

to us, at the outset, that in the facts and circumstances of the case, the respondent company IOC is an organ of the State or an instrumentality of the State as contemplated under Article 12 of the Constitution. *The State acts in its executive power under Article 298 of the Constitution in entering or not entering in contracts with individual parties. Article 14 of the Constitution would be applicable to those exercises of power.* Therefore, the action of State organ under Article 14 can be checked. See *Radha Krishna Agarwal v. State of Bihar* at p. 462, but Article 14 of the Constitution cannot and has not been construed as a charter for judicial review of State action after the contract has been entered into, to call upon the State to account for its actions in its manifold activities by stating reasons for such actions. In a situation of this nature certain activities of the respondent company which constituted State under Article 12 of the Constitution may be in certain circumstances subject to Article 14 of the Constitution in entering or not entering into contracts and must be reasonable and taken only upon lawful and relevant consideration; it depends upon facts and circumstances of a particular transaction whether hearing is necessary and reasons have to be stated. In case any right conferred on the citizens which is sought to be interfered, such action is subject to Article 14 of the Constitution, and must be reasonable and can be taken only upon lawful and relevant grounds of public interest. Where there is arbitrariness in State action of this type of entering or not entering into contracts, Article 14 springs up and judicial review strikes such an action down. Every action of the State executive authority must be subject to rule of law and must be informed by reason. So, whatever be the activity of the public authority, in such monopoly or semi-monopoly dealings, it should meet the test of Article 14 of the Constitution. If a governmental action even in the matters of entering or not entering into contracts, fails to satisfy the test of reasonableness, the same would be unreasonable.

In this connection reference may be made to *E.P. Royappa v. State of Tamil Nadu,* (1974) 4 SCC 3, *Maneka Gandhi v. Union of India,* (1978) 1 SCC 248, *Ajay Hasia v. Khalid Mujib Sehravardi,* (1981) 1 SCC 722, *R.D. Shetty v. International Airport Authority of India,* (1979) 3 SCC 489, and also *Dwarkadas Marfatia and Sons v. Board of Trustees of the Port of Bombay,* (1989) 3 SCC 293. It appears to us that rule of reason and rule against arbitrariness and discrimination, rules of fair play and natural justice are part of the rule of law applicable in situation or action by State instrumentality in dealing with citizens in a situation like the present one. *Even though the rights of the citizens are in the nature of contractual rights, the manner, the method and motive of a decision of entering or not entering into a contract, are subject to judicial review on the touchstone of relevance and reasonableness, fair play, natural justice, equality and non-discrimination in the type of the transactions and nature of the dealing as in the present case.*

….. …..

17. We are of the opinion that in all such cases whether public law or private law rights are involved, depends upon the facts and circumstances of the case. The dichotomy between rights and remedies cannot be obliterated by any strait-jacket formula. It has to be examined in each particular case. Mr Salve sought to urge that there are certain cases under Article 14 of arbitrary exercise of such "power" and not cases of exercise of a "right" arising either under a contract or under a statute. We are of the opinion that that would depend upon the factual matrix.

18. *Having considered the facts and circumstances of the case and the nature of the contentions and the dealing between the parties and in view of the present state of law, we are of the opinion that decision of the State/public*

authority under Article 298 of the Constitution, is an administrative decision and can be impeached on the ground that the decision is arbitrary or violative of Article 14 of the Constitution of India on any of the grounds available in public law field. It appears to us that in respect of corporation like IOC when without informing the parties concerned, as in the case of the appellant-firm herein on alleged change of policy and on that basis action to seek to bring to an end to course of transaction over 18 years involving large amounts of money is not fair action, especially in view of the monopolistic nature of the power of the respondent in this field. *Therefore, it is necessary to reiterate that even in the field of public law, the relevant persons concerned or to be affected, should be taken into confidence. Whether and in what circumstances that confidence should be taken into consideration cannot be laid down on any strait-jacket basis. It depends on the nature of the right involved and nature of the power sought to be exercised in a particular situation. It is true that there is discrimination between power and right but whether the State or the instrumentality of a State has the right to function in public field or private field is a matter which, in our opinion, depends upon the facts and circumstances of the situation, but such exercise of power cannot be dealt with by the State or the instrumentality of the State without informing and taking* into confidence, the party whose rights and powers are affected or sought to be affected, into confidence. In such situations most often people feel aggrieved by exclusion of knowledge if not taken into confidence.

19. Such transaction should continue as an administrative decision with the organ of the State. *It may be contractual or statutory but in a situation of transaction between the parties for nearly two decades, such procedure should be followed which will be reasonable, fair and just, that is, the process which normally be accepted (sic is expected) to*

be followed by an organ of the State and that process must be conscious and all those affected should be taken into confidence.

20. Having regard to the nature of the transaction, we are of the opinion that it would be appropriate to state that in cases where the instrumentality of the state enters the contractual field, it should be governed by the incidence of the contract. It is true that it may not be necessary to give reasons but, in our opinion, in the field of this nature fairness must be there to the parties concerned, and having regard to the large number or the long period and the nature of the dealings between the parties, the appellant should have been taken into confidence. Equality and fairness at least demands this much from an instrumentality of the State dealing with a right of the State not to treat the contract as subsisting. We must, however, evolve such process which will work.

….. …..

23. *It is not our decision which is important but a decision on the above basis should be arrived at which should be fair, just and reasonable - and consistent with good government - which will be arrived at fairly and should be taken after taking the persons concerned whose rights/ obligations are affected, into confidence. Fairness in such action should be perceptible, if not transparent."*

(emphasis is mine)

What came to be concluded in the judgment extracted above can be described as an extension of the applicability of Article 14 of the Constitution of India on the subject of contractual agreements. Hithertobefore, an act of awarding contracts was adjudged on the touchstone of fairness. For the first time, even a decision of not entering into a contractual arrangement has been brought under the scope of judicial

review. The requirement of being fair, just and reasonable, i.e., principles applicable in good governance, have been held to be equally applicable for not entering into a contractual arrangement. Another facet of the aforesaid decision was, that this Court expressed, that the contracting party had the right to be informed (the right to know) why the contractual arrangement which had continued for long years (from 1965 to 1983) was being terminated.

(g) Much emphasis was placed on the judgment rendered by this Court in *Kumari Shrilekha Vidyarthi & Ors. Vs. State of U.P. & Ors.* (1991) 1 SCC 212. Observations which relied upon during the course of hearing are being set out hereinunder:

> 21. The Preamble of the Constitution of India resolves to secure to all its citizens Justice, social, economic and political; and Equality of status and opportunity. Every State action must be aimed at achieving this goal. Part IV of the Constitution contains 'Directives Principles of State Policy' which are fundamental in the governance of the country and are aimed at securing social and economic freedoms by appropriate State action which is complementary to individual fundamental rights guaranteed in Part III for protection against excesses of State action, to realise the vision in the Preamble. *This being the philosophy of the Constitution, can it be said that it contemplates exclusion of Article 14 - non-arbitrariness which is basic to rule of law - from State actions in contractual field when all actions of the State are meant for public good and expected to be fair and just? We have no doubt that the Constitution does not envisage or permit unfairness or unreasonableness in State actions in any sphere of its activity contrary to the professed ideals in the Preamble. In our opinion, it would be alien to the constitutional scheme to accept the argument of exclusion of Article 14 in contractual matters. The scope and permissible*

> *grounds of judicial review in such matters and the relief which may be available are different matters but that does not justify the view of its total exclusion. This is more so when the modern trend is also to examine the unreasonableness of a term in such contracts where the bargaining power is unequal so that these are not negotiated contracts but standard form contracts between unequals.*
>
> 22. *There is an obvious difference in the contracts between private parties and contracts to which the State is a party. Private parties are concerned only with their personal interest whereas the State while exercising its powers and discharging its functions, acts indubitably, as is expected of it, for public good and in public interest. The impact of every State action is also on public interest. This factor alone is sufficient to import at least the minimal requirements of public law obligations and impress with this character the contracts made by the State or its instrumentality.* It is a different matter that the scope of judicial review in respect of disputes falling within the domain of contractual obligations may be more limited and in doubtful cases the parties may be relegated to adjudication of their rights by resort to remedies provided for adjudication of purely contractual disputes. *However, to the extent, challenge is made on the ground of violation of Article 14 by alleging that the impugned act is arbitrary, unfair or unreasonable, the fact that the dispute also falls within the domain of contractual obligations would not relieve the State of its obligation to comply with the basic requirements of Article 14.* To this extent, the obligation is of a public character invariably in every case irrespective of there being any other right or obligation in addition thereto. An additional contractual obligation cannot divest the claimant of the guarantee under Article 14 of non-arbitrariness at the hands of the State in any of its actions.

23. *Thus, in a case like the present, if it is shown that the impugned State action is arbitrary and, therefore, violative of Article 14 of the Constitution, there can be no impediment in striking down the impugned act irrespective of the question whether an additional right, contractual or statutory, if any, is also available to the aggrieved persons.*

24. The State cannot be attributed the split personality of Dr Jekyll and Mr Hyde in the contractual field so as to impress on it all the characteristics of the State at the threshold while making a contract requiring it to fulfil the obligation of Article 14 of the Constitution and thereafter permitting it to cast off its garb of State to adorn the new robe of a private body during the subsistence of the contract enabling it to act arbitrarily subject only to the contractual obligations and remedies flowing from it. It is really the nature of its personality as State which is significant and must characterize all its actions, in whatever field, and not the nature of function, contractual or otherwise, which is decisive of the nature of scrutiny permitted for examining the validity of its act. The requirement of Article 14 being the duty to act fairly, justly and reasonably, there is nothing which militates against the concept of requiring the State always to so act, even in contractual matters. There is a basic difference between the acts of the State which must invariably be in pubic interest and those of a private individual, engaged in similar activities, being primarily for personal gain, which may or may not promote public interest. Viewed in this manner, in which we find no conceptual difficulty or anachronism, we find no reason why the requirement of Article 14 should not extend even in the sphere of contractual matters for regulating the conduct of the State activity.

25. In Wade: Administrative Law (6th edn.) after indicating that 'the powers of public authorities are essentially

different from those of private persons', it has been succinctly stated at pp. 400-01 as under:

> "... The whole conception of unfettered discretion is inappropriate to a public authority, which possesses powers solely in order that it may use them for the public good.
>
> There is nothing paradoxical in the imposition of such legal limits. It would indeed be paradoxical if they were not imposed. Nor is this principle an oddity of British or American law: it is equally prominent in French law. Nor is it a special restriction which fetters only local authorities: it applies no less to ministers of the Crown. Nor is it confined to the sphere of administration: it operates wherever discretion is given for some public purpose, for example where a judge has a discretion to order jury trial. It is only where powers are given for the personal benefit of the person empowered that the discretion is absolute. Plainly this can have no application in public law.
>
> For the same reasons there should in principle be no such thing as unreviewable administrative discretion, which should be just as much a contradiction in terms as unfettered discretion. The question which has to be asked is what is the scope of judicial review, and in a few special cases the scope for the review of discretionary decisions may be minimal. It remains axiomatic that all discretion is capable of abuse, and that legal limits to every power are to be found somewhere.
>
> The view, we are taking, is, therefore, in consonance with the current thought in this field. We have no doubt that the scope of judicial review may vary with reference to the type of matter involved, but the fact that the action is reviewable, irrespective of the sphere in which it is exercised, cannot be doubted.

26. A useful treatment of the subject is to be found in an article *"Judicial Review and Contractual Powers of Public Authorities",* (1990) 106 LQR 277-92. The conclusion drawn in the article on the basis of recent English decisions is that "public law principles designed to protect the citizens should apply because of the public nature of the body, and they may have some role in protecting the public interest". The trend now is towards judicial review of contractual powers and the other activities of the government. Reference is made also to the recent decision of the Court of Appeal in *Jones v. Swansea City Council,* (1990) 1 WLR 54, where the court's clear inclination to the view that contractual powers should generally be reviewable is indicated, even though the Court of Appeal faltered at the last step and refrained from saying so. *It is significant to note that emphasis now is on reviewability of every State action because it stems not from the nature of function, but from the public nature of the body exercising that function; and all powers possessed by a public authority, howsoever conferred, are possessed 'solely in order that it may use them for the public good'. The only exception limiting the same is to be found in specific cases where such exclusion may be desirable for strong reasons of public policy. This, however, does not justify exclusion of reviewability in the contractual field involving the State since it is no longer a mere private activity to be excluded from public view or scrutiny.*

27. Unlike a private party whose acts uninformed by reason and influenced by personal predilections in contractual matters may result in adverse consequences to it alone without affecting the public interest, any such act of the State or a public body even in this field would adversely affect the public interest. Every holder of a public office by virtue of which he acts on behalf of the State or public body is ultimately accountable to the people in whom the sovereignty vests. As such, all powers so vested

in him are meant to be exercised for public good and promoting the public interest. This is equally true of all actions even in the field of contract. Thus, every holder of a public office is a trustee whose highest duty is to the people of the country and, therefore, every act of the holder of a public office, irrespective of the label classifying that act, is in discharge of public duty meant ultimately for public good. With the diversification of State activity in a Welfare State requiring the State to discharge its wide ranging functions even through its several instrumentalities, which requires entering into contracts also, it would be unreal and not pragmatic, apart from being unjustified to exclude contractual matters from the sphere of State actions required to be non-arbitrary and justified on the touchstone of Article 14.

28. Even assuming that it is necessary to import the concept of presence of some public element in a State action to attract Article 14 and permit judicial review, we have no hesitation in saying that the ultimate impact of all actions of the State or a public body being undoubtedly on public interest, the requisite public element for this purpose is present also in contractual matters. We, therefore, find it difficult and unrealistic to exclude the State actions in contractual matters, after the contract has been made, from the purview of judicial review to test its validity on the anvil of Article 14.

29. It can no longer be doubted at this point of time that Article 14 of the Constitution of India applies also to matters of governmental policy and if the policy or any action of the government, even in contractual matters, fails to satisfy the test of reasonableness, it would be unconstitutional. [See *Ramana Dayaram Shetty v. International Airport Authority of India,* (1979) 3 SCC 489, and *Kasturi Lal Lakshmi Reddy v. State of Jammu and Kashmir,* (1980) 4 SCC 1]. In *Col. A.S. Sangwan v. Union*

of India, (1980) Supp. SCC 559, while the discretion to change the policy in exercise of the executive power, when not trammelled by the statute or rule, was held to be wide, it was emphasised as imperative and implicit in Article 14 of the Constitution that a change in policy must be made fairly and should not give the impression that it was so done arbitrarily or by any ulterior criteria. The wide sweep of Article 14 and the requirement of every State action qualifying for its validity on this touchstone, irrespective of the field of activity of the State, has long been settled. Later decisions of this Court have reinforced the foundation of this tenet and it would be sufficient to refer only to two recent decisions of this Court for this purpose.

….. …..

33. No doubt, it is true, as indicated by us earlier, that there is a presumption of validity of the State action and the burden is on the person who alleges violation of Article 14 to prove the assertion. However, where no plausible reason or principle is indicated nor is it discernible and the impugned State action, therefore, appears to be ex facie arbitrary, the initial burden to prove the arbitrariness is discharged shifting onus on the State to justify its action as fair and reasonable. If the State is unable to produce material to justify its action as fair and reasonable, the burden on the person alleging arbitrariness must be held to be discharged. The scope of judicial review is limited as indicated in Dwarkadas Marfatia case (supra) to oversee the State action for the purpose of satisfying that it is not vitiated by the vice of arbitrariness and no more. The wisdom of the policy or the lack of it or the desirability of a better alternative is not within the permissible scope of judicial review in such cases. It is not for the courts to recast the policy or to substitute it with another which is considered to be more appropriate, once the attack on the ground of arbitrariness is successfully repelled by showing

that the act which was done, was fair and reasonable in the facts and circumstances of the case. As indicated by Diplock, L.J., in Council of *Civil Service Unions v. Minister for the Civil Service,* (1984) 3 All ER 935, the power of judicial review is limited to the grounds of illegality, irrationality and procedural impropriety. In the case of arbitrariness, the defect of irrationality is obvious.

….. …..

36. The meaning and true import of arbitrariness is more easily visualized than precisely stated or defined. The question, whether an impugned act is arbitrary or not, is ultimately to be answered on the facts and in the circumstances of a given case. An obvious test to apply is to see whether there is any discernible principle emerging from the impugned act and if so, does it satisfy the test of reasonableness. Where a mode is prescribed for doing an act and there is no impediment in following that procedure, performance of the act otherwise and in a manner which does not disclose any discernible principle which is reasonable, may itself attract the vice of arbitrariness. Every State action must be informed by reason and it follows that an act uninformed by reason, is arbitrary. Rule of law contemplates governance by laws and not by humour, whims or caprices of the men to whom the governance is entrusted for the time being. It is trite that 'be you ever so high, the laws are above you'. This is what men in power must remember, always."

(emphasis is mine)

The legal proposition laid down in the instant judgment may be summarized as follows. Firstly, State action in the contractual field are meant for public good and in public interest and are expected to be fair and just. Secondly, it would be alien to the constitutional scheme to accept the argument of exclusion of Article 14 of the Constitution of India in contractual matters.

Thirdly, the fact that a dispute falls in the domain of contractual obligation, would make no difference, to a challenge raised under Article 14 of the Constitution of India on the ground that the impugned act is arbitrary, unfair and unreasonable. Fourthly, every State action must be informed of reason and it follows that an act uninformed by reason is arbitrary. Fifthly, where no plausible reason or principle is indicated (or is discernible), and where the impugned action ex facie appears to be arbitrary, the onus shifts on the State to justify its action as fair and reasonable. Sixthly, every holder of public office is accountable to the people in whom the sovereignty vests. All powers vested in a public office, even in the field of contract, are meant to be exercised for public good and for promoting public interest. And Seventhly, Article 14 of the Constitution of India applies also to matters of governmental policy even in contractual matters, and if the policy or any action of the government fails to satisfy the test of reasonableness, the same would be unconstitutional.

(h) Thereafter our attention was invited to the decision rendered in *Lucknow Development Authority Vs. M.K. Gupta,* (1994) 1 SCC 243. Seriously, the instant judgment has no direct bearing to the issue in hand. The judgment determines whether compensation can be awarded to an aggrieved consumer under the Consumer Protection Act, 1986. It also settles who should shoulder the responsibility of paying the compensation awarded. But all the same it has some interesting observations which may be noticed in the context of the matter under deliberation. Portions of the observations emphasized upon are being noticed below:

> "8. ….. Under our Constitution sovereignty vests in the people. Every limb of the constitutional machinery is obliged to be people oriented. No functionary in exercise of statutory power can claim immunity, except to the extent protected by the statute itself. Public authorities acting in violation of constitutional or statutory provisions oppressively are accountable for their behaviour before

> authorities created under the statute like the commission or the courts entrusted with responsibility of maintaining the rule of law. Each hierarchy in the Act is empowered to entertain a complaint by the consumer for value of the goods or services and compensation. The word 'compensation' is again of very wide connotation. It has not been defined in the Act. According to dictionary it means, 'compensating or being compensated; thing given as recompense;'. In legal sense it may constitute actual loss or expected loss and may extend to physical, mental or even emotional suffering, insult or injury or loss. Therefore, when the Commission has been vested with the jurisdiction to award value of goods or services and compensation it has to be construed widely enabling the Commission to determine compensation for any loss or damage suffered by a consumer which in law is otherwise included in wide meaning of compensation. The provision in our opinion enables a consumer to claim and empowers the Commission to redress any injustice done to him. Any other construction would defeat the very purpose of the Act. The Commission or the Forum in the Act is thus entitled to award not only value of the goods or services but also to compensate a consumer for injustice suffered by him.
>
> ….. …..
>
> 10. Who should pay the amount determined by the Commission for harassment and agony, the statutory authority or should it be realised from those who were responsible for it? Compensation as explained includes both the just equivalent for loss of goods or services and also for sufferance of injustice. For instance in Civil Appeal No. ... of 1993 arising out of SLP (Civil) No. 659 of 1991 the Commission directed the Bangalore Development Authority to pay Rs 2446 to the consumer for the expenses incurred by him in getting the lease-cum-sale agreement registered as it was additional expenditure for alternative site allotted to him. No misfeasance was found. The

moment the authority came to know of the mistake committed by it, it took immediate action by alloting alternative site to the respondent. It was compensation for exact loss suffered by the respondent. It arose in due discharge of duties. For such acts or omissions the loss suffered has to be made good by the authority itself. But when the sufferance is due to mala fide or oppressive or capricious acts etc. of a public servant, then the nature of liability changes. The Commission under the Act could determine such amount if in its opinion the consumer suffered injury due to what is called misfeasance of the officers by the English Courts. Even in England where award of exemplary or aggravated damages for insult etc. to a person has now been held to be punitive, exception has been carved out if the injury is due to, 'oppressive, arbitrary or unconstitutional action by servants of the Government' (Salmond and Heuston on the Law of Torts). Misfeasance in public office is explained by Wade in his book on Administrative Law thus:

> "Even where there is no ministerial duty as above, and even where no recognised tort such as trespass, nuisance, or negligence is committed, public authorities or officers may be liable in damages for malicious, deliberate or injurious wrong-doing. There is thus a tort which has been called misfeasance in public office, and which includes malicious abuse of power, deliberate maladministration, and perhaps also other unlawful acts causing injury." (p. 777)

The jurisdiction and power of the courts to indemnify a citizen for injury suffered due to abuse of power by public authorities is founded as observed by Lord Hailsham in *Cassell & Co. Ltd. v. Broome,* 1972 AC 1027, on the principle that, 'an award of exemplary damages can serve a useful purpose in vindicating the strength of law'. An

ordinary citizen or a common man is hardly equipped to match the might of the State or its instrumentalities. That is provided by the rule of law. It acts as a check on arbitrary and capricious exercise of power. In *Rookes v. Barnard,* 1964 AC 1129, it was observed by Lord Devlin, 'the servants of the government are also the servants of the people and the use of their power must always be subordinate to their duty of service'. A public functionary if he acts maliciously or oppressively and the exercise of power results in harassment and agony then it is not an exercise of power but its abuse. No law provides protection against it. He who is responsible for it must suffer it. Compensation or damage as explained earlier may arise even when the officer discharges his duty honestly and bona fide. But when it arises due to arbitrary or capricious behaviour then it loses its individual character and assumes social significance. Harassment of a common man by public authorities is socially abhorring and legally impermissible. It may harm him personally but the injury to society is far more grievous. Crime and corruption thrive and prosper in the society due to lack of public resistance. Nothing is more damaging than the feeling of helplessness. An ordinary citizen instead of complaining and fighting succumbs to the pressure of undesirable functioning in offices instead of standing against it. Therefore the award of compensation for harassment by public authorities not only compensates the individual, satisfies him personally but helps in curing social evil. It may result in improving the work culture and help in changing the outlook. Wade in his book Administrative Law has observed that it is to the credit of public authorities that there are simply few reported English decisions on this form of malpractice, namely, misfeasance in public offices which includes malicious use of power, deliberate maladministration and perhaps also other unlawful acts causing injury. One of the reasons for this appears to be

development of law which, apart, from other factors succeeded in keeping a salutary check on the functioning in the government or semi-government offices by holding the officers personally responsible for their capricious or even ultra vires action resulting in injury or loss to a citizen by awarding damages against them. Various decisions rendered from time to time have been referred to by Wade on Misfeasance by Public Authorities. We shall refer to some of them to demonstrate how necessary it is for our society. In *Ashby v. White,* (1703) 2 LD Raym 938, the House of Lords invoked the principle of ubi jus ibi remedium in favour of an elector who was wrongfully prevented from voting and decreed the claim of damages. The ratio of this decision has been applied and extended by English Courts in various situations.

11. Today the issue thus is not only of award of compensation but who should bear the brunt. The concept of authority and power exercised by public functionaries has many dimensions. It has undergone tremendous change with passage of time and change in socio-economic outlook. The authority empowered to function under a statute while exercising power discharges public duty. It has to act to subserve general welfare and common good. In discharging this duty honestly and bona fide, loss may accrue to any person. And he may claim compensation which may in circumstances be payable. But where the duty is performed capriciously or the exercise of power results in harassment and agony then the responsibility to pay the loss determined should be whose? In a modern society no authority can arrogate to itself the power to act in a manner which is arbitrary. It is unfortunate that matters which require immediate attention linger on and the man in the street is made to run from one end to other with no result. The culture of window clearance appears to be totally dead. Even in ordinary matters a common man who has neither the political backing nor the

financial strength to match the inaction in public oriented departments gets frustrated and it erodes the credibility in the system. Public administration, no doubt involves a vast amount of administrative discretion which shields the action of administrative authority. But where it is found that exercise of discretion was mala fide and the complainant is entitled to compensation for mental and physical harassment then the officer can no more claim to be under protective cover. When a citizen seeks to recover compensation from a public authority in respect of injuries suffered by him for capricious exercise of power and the National Commission finds it duly proved then it has a statutory obligation to award the same. It was never more necessary than today when even social obligations are regulated by grant of statutory powers. The test of permissive form of grant is over. It is now imperative and implicit in the exercise of power that it should be for the sake of society. When the court directs payment of damages or compensation against the State the ultimate sufferer is the common man. It is the tax payers' money which is paid for inaction of those who are entrusted under the Act to discharge their duties in accordance with law. It is, therefore, necessary that the Commission when it is satisfied that a complainant is entitled to compensation for harassment or mental agony or oppression, which finding of course should be recorded carefully on material and convincing circumstances and not lightly, then it should further direct the department concerned to pay the amount to the complainant from the public fund immediately but to recover the same from those who are found responsible for such unpardonable behaviour by dividing it proportionately where there are more than one functionaries."

(emphasis is mine)

The judgment brings out the foundational principle of

executive governance. The said foundational principle is based on the realization that sovereignty vests in the people. The judgment therefore records that every limb of the constitutional machinery is obliged to be people oriented. The fundamental principle brought out by the judgment is, that a public authority exercising public power discharges a public duty, and therefore, has to subserve general welfare and common good. All power should be exercised for the sake of society. The issue which was the subject matter of consideration, and has been noticed along with the citation, was decided by concluding that compensation shall be payable by the State (or its instrumentality) where inappropriate deprivation on account of improper exercise of discretion has resulted in a loss, compensation is payable by the State (or its instrumentality). But where the public functionary exercises his discretion capriciously, or for considerations which are malafide, the public functionary himself must shoulder the burden of compensation held as payable. The reason for shifting the onus to the public functionary deserves notice. This Court felt, that when a court directs payment of damages or compensation against the State, the ultimate sufferer is the common man, because it is tax payers money out of which damages and costs are paid.

(i) Next cited for our consideration was the judgment in Common Cause, *A Registered Society Vs. Union of India & Ors.,* (1996) 6 SCC 530. The instant case dealt with a challenge to the allotment of retail outlets for petroleum products (petrol pumps). Allotment was made in favour of 15 persons on the ground of poverty or unemployment. Rest of the relevant facts emerge from the extracts from the judgment reproduced below:

> "24. The orders of the Minister reproduced above read: "the applicant has no regular income to support herself and her family", "the applicant is an educated lady and belongs to Scheduled Tribe community", "the applicant is unemployed and has no regular source of income", "the applicant is an uneducated, unemployed Scheduled Tribe youth without regular source of livelihood", "the applicant is a housewife whose family is facing difficult financial circumstances" etc. etc. There would be literally millions of people in the country having these circumstances or worse. There is no justification whatsoever to pick up these persons except that they happen to have won the favour of the Minister on mala fide considerations. None of these cases fall within the categories placed before this Court in Centre for *Public Interest Litigation v. Union of India,* 1995 Supp. (3) SCC 382, but even if we assume for argument sake that these cases fall in some of those or similar guidelines the exercise of discretion was wholly arbitrary. Such a discretionary power which is capable of being exercised arbitrarily is not permitted by Article 14 of the Constitution of India. While Article 14 permits a reasonable classification having a rational nexus to the objective sought to be achieved, it does not permit the power to pick and choose arbitrarily out of several persons falling in the same category. A transparent and objective criteria/procedure has to be evolved so that the choice among the members belonging to the same class or category is based on reason, fair play and non-arbitrariness. It is essential to lay down as a matter of policy as to how preferences would be assigned between two persons falling in the same category. If there are two eminent sportsmen in distress and only one petrol pump is available, there should be clear, transparent and objective criteria/procedure to indicate who out of the two is to be preferred. Lack of transparency in the system promotes nepotism and arbitrariness. It is absolutely essential that the entire system should be transparent right from the stage of calling for the applications up to the stage of passing the orders of allotment. The names of the allottees, the orders and the reasons for allotment should be available for public knowledge and scrutiny. Mr Shanti Bhushan has suggested that the petrol pumps, agencies

etc. may be allotted by public auction - category wise amongst the eligible and objectively selected applicants. We do not wish to impose any procedure on the Government. It is a matter of policy for the Government to lay down. We, however, direct that any procedure laid down by the Government must be transparent, just, fair and non-arbitrary.

….. …..

26. With the change in socio-economic outlook, the public servants are being entrusted with more and more discretionary powers even in the field of distribution of government wealth in various forms. We take it to be perfectly clear, that if a public servant abuses his office either by an act of omission or commission, and the consequence of that is injury to an individual or loss of public property, an action may be maintained against such public servant. No public servant can say "you may set aside an order on the ground of mala fide but you cannot hold me personally liable". No public servant can arrogate to himself the power to act in a manner which is arbitrary."

(emphasis is mine)

This judgment has a direct bearing on the controversy in hand. It clearly delineates the manner in which discretion must be exercised, specially when the object of discretion is State largesse. A perusal of the observations reproduced above reveal, that the State largesse under reference (petrol pumps) were to be allotted on the ground of poverty and unemployment. Such an allotment was obviously based on a policy to "best subserve the common good" enshrined in Article 39(b) of the Constitution of India. This Court found no fault in the policy itself. The fault was with the manner of giving effect to the policy. It was held, that a transparent and objective criteria/procedure has to be evolved, so that the choice out of those who are eligible can be made fairly and without any arbitrariness. The

exercise of discretion which enables the competent authority to arbitrarily pick and choose out of several persons falling in the same category, according to the above decision would be arbitrary, and as such violative of Article 14 of the Constitution of India.

(j) Out of the more recent judgments our attention was invited to *Meerut Development Authority Vs. Association of Management Studies & Anr. etc.,* (2009) 6 SCC 171. The controversy adjudicated upon in this case emerges from the decision of the appellant to allotment of 2 plots of land. For the said purpose the appellant invited tenders from interested persons. In response the respondent submitted its tender. After the allotment of one of the plots to the respondent, the respondent raised an objection that the appellant had fixed the reserved price of the second plot at a rate much higher than its adjoining plots. The respondent assailed the action of the appellant in issuing a fresh advertisement for the allotment of the second plot. In the course of determination of the aforesaid controversy this Court held:

"26. A tender is an offer. It is something which invites and is communicated to notify acceptance. Broadly stated it must be unconditional; must be in the proper form, the person by whom tender is made must be able to and willing to perform his obligations. The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. However, a limited judicial review may be available in cases where it is established that the terms of the invitation to tender were so tailor-made to suit the convenience of any particular person with a view to eliminate all others from participating in the bidding process.

27. *The bidders participating in the tender process have no other right except the right to equality and fair treatment in the matter of evaluation of competitive bids offered by interested persons in response to notice*

inviting tenders in a transparent manner and free from hidden agenda. One cannot challenge the terms and conditions of the tender except on the abovestated ground, the reason being the terms of the invitation to tender are in the realm of the contract. No bidder is entitled as a matter of right to insist the authority inviting tenders to enter into further negotiations unless the terms and conditions of notice so provided for such negotiations.

28. *It is so well settled in law and needs no restatement at our hands that disposal of the public property by the State or its instrumentalities partakes the character of a trust. The methods to be adopted for disposal of public property must be fair and transparent providing an opportunity to all the interested persons to participate in the process.*

29. The Authority has the right not to accept the highest bid and even to prefer a tender other than the highest bidder, if there exist good and sufficient reasons, such as, the highest bid not representing the market price but there cannot be any doubt that the Authority's action in accepting or refusing the bid must be free from arbitrariness or favouritism.

….. …..

39. The law has been succinctly stated by Wade in his treatise, Administrative Law:

"The powers of public authorities are therefore essentially different from those of private persons. A man making his will may, subject to any rights of his dependants, dispose of his property just as he may wish. He may act out of malice or a spirit of revenge, but in law this does not affect his exercise of his power. In the same way a private person has an absolute power to allow whom he likes to use his land, to release a debtor, or, where the law permits, to evict

a tenant, regardless of his motives. This is unfettered discretion. But a public authority may do none of these things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest. So a city council acted unlawfully when it refused unreasonably to let a local rugby football club use the city's sports ground, though a private owner could of course have refused with impunity. Nor may a local authority arbitrarily release debtors, and if it evicts tenants, even though in accordance with a contract, it must act reasonably and 'within the limits of fair dealing'. The whole conception of unfettered discretion is inappropriate to a public authority, which possesses powers solely in order that it may use them for the public good.", Administrative Law, 9th Edn. H.W.R. Wade and C.F. Forsyth.

40. There is no difficulty to hold that the authorities owe a duty to act fairly but it is equally well settled in judicial review, the court is not concerned with the merits or correctness of the decision, but with the manner in which the decision is taken or the order is made. The court cannot substitute its own opinion for the opinion of the authority deciding the matter.

41. The distinction between appellate power and a judicial review is well known but needs reiteration. By way of judicial review, the court cannot examine the details of the terms of the contract which have been entered into by the public bodies or the State. The courts have inherent limitations on the scope of any such enquiry. If the contract has been entered into without ignoring the procedure which can be said to be basic in nature and after an objective consideration of different options available taking into account the interest of the State and the public, then the court cannot act as an appellate court by substituting its opinion in respect of selection made for entering into such contract. But at the same time the courts can certainly

examine whether the "decision-making process" was reasonable, rational, not arbitrary and violative of Article 14. (See *Sterling Computers Ltd. Vs. M&N Publications Ltd.,* (1993) 1 SCC 445).

….. …..

50. We are, however, of the opinion that the effort, if any, made by MDA to augment its financial resources and revenue itself cannot be said to be an unreasonable decision. It is well said that the struggle to get for the State the full value of its resources is particularly pronounced in the sale of State-owned natural assets to the private sector. Whenever the Government or the authorities get less than the full value of the asset, the country is being cheated; there is a simple transfer of wealth from the citizens as a whole to whoever gets the assets "at a discount". Most of the times the wealth of the State goes to the individuals within the country rather than to multinational corporations; still, wealth slips away that ought to belong to the nation as a whole.

(emphasis is mine)

In the instant judgment this Court laid down, that in a tender process, a tenderer has the right to fair treatment and the right to be treated equally. The evaluation of tenders, it has been held, must be transparent and free from any hidden agenda. The view expressed in Wades Tretise on Administrative Law, that public authorities cannot act in a manner which is open to private persons, was accepted. Public authorities, it was held, can neither act out of malice nor a spirit of revenge. A public authority is ordained to act, reasonably and in good faith and upon lawful and relevant grounds of public interest. Most importantly it was concluded, that the State "must" get the "full value" of the resources, specially when State owned assets are passed over to private individuals/entities. Not stopping there the Court added further, that whoever pays less than the full

value, get the assets belonging to the citizens "at a discount", and as such the wealth that belongs to the nation slips away.

(k) Also cited for our consideration was the judgment in *Reliance Natural Resources Ltd. Vs. Reliance Industries Ltd. etc.,* (2010) 7 SCC 1. The Court's attention was invited to the following:

"33. Mr R.F. Nariman, learned Senior Counsel appearing for RIL concentrated his argument with reference to Sections 391 to 394 of the Companies Act. According to him, Section 392 of the Act had no predecessors either in English law or in the Companies Act of 1913. The reason why the legislature appears to have felt the necessity of enacting Section 392 is to bring Section 391 on a par with Section 394. Section 394 applies only to companies which are reconstructing and or amalgamating, involving the transfer of assets and liabilities to another company. It is thus, applicable to a species of the genus of company referred to under Section 391. Section 394, sub-section 1 specifically gives the Company Court the power not merely to sanction the compromise or arrangement but also gives the Company Court the power, by a subsequent order, to make provisions for "such incidental, consequential and supplemental matters as are necessary to secure that the reconstruction or amalgamation shall be fully and effectively carried out" [Section 394(1)(vi)]. This power is absent in Section 391, so that companies falling within Section 391, but not within Section 394, would not be amenable to the Company Court's jurisdiction to enforce a compromise or arrangement made under Section 391 and to see that they are fully carried out. Hence, the power under Section 392 has to be understood in the above context, and is of the same quality as the power expressly given to the Company Court post-sanction under Section 394.

….. …..

122. From the above analysis, the following are the broad sustainable conclusions which can be derived from the position of the Union:

(1) The natural resources are vested with the Government as a matter of trust in the name of the people of India. Thus, it is the solemn duty of the State to protect the national interest.

(2) Even though exploration, extraction and exploitation of natural resources are within the domain of governmental function, the Government has decided to privatise some of its functions. For this reason, the constitutional restrictions on the Government would equally apply to the private players in this process. Natural resources must always be used in the interests of the country, and not private interests.

(3) The broader constitutional principles, the statutory scheme as well as the proper interpretation of the PSC mandates the Government to determine the price of the gas before it is supplied by the contractor.

(4) The policy of the Government, including the gas utilisation policy and the decision of EGOM would be applicable to the pricing in the present case.

(5) The Government cannot be divested of its supervisory powers to regulate the supply and distribution of gas.

….. …..

128. *In a constitutional democracy like ours, the national assets belong to the people. The Government holds such natural resources in trust. Legally, therefore, the Government owns such assets for the purposes of*

developing them in the interests of the people. In the present case, the Government owns the gas till it reaches its ultimate consumer. A mechanism is provided under the PSC between the Government and the contractor (RIL, in the present case). The PSC shall override any other contractual obligation between the contractor and any other party.

….. …..

243. The structure of our Constitution is not such that it permits the reading of each of the Directive Principles of State Policy, that have been framed for the achievement of conditions of social, economic and political justice in isolation. The structural lines of logic, of ethical imperatives of the State and the lessons of history flow from one to the other. In the quest for national development and unity of the nation, it was felt that the "ownership and control of the material resources of the community" if distributed in a manner that does not result in common good, it would lead to derogation from the quest for national development and the unity of the nation. Consequently, Article 39(b) of the Constitution should be construed in light of Article 38 of the Constitution and be understood as placing an affirmative obligation upon the State to ensure that distribution of material resources of the community does not result in heightening of inequalities amongst people and amongst regions. In line with the logic of the constitutional matrix just enunciated, and in the sweep of the quest for national development and unity, is another provision. Inasmuch as inequalities between people and regions of the nation are inimical to those goals, Article 39(c) posits that the "operation of the economic system" when left unattended and unregulated, leads to "concentration of wealth and means of production to the common detriment" and commands the State to ensure that the same does not occur.

….. …..

250 We hold that with respect to the natural resources extracted and exploited from the geographic zones specified in Article 297 the Union may not:

(1) transfer title of those resources after their extraction unless the Union receives just and proper compensation for the same;

(2) allow a situation to develop wherein the various users in different sectors could potentially be deprived of access to such resources;

(3) allow the extraction of such resources without a clear policy statement of conservation, which takes into account total domestic availability, the requisite balancing of current needs with those of future generations, and also India's security requirements;

(4) allow the extraction and distribution without periodic evaluation of the current distribution and making an assessment of how greater equity can be achieved, as between sectors and also between regions;

(5) allow a contractor or any other agency to extract and distribute the resources without the explicit permission of the Union of India, which permission can be granted only pursuant to a rationally framed utilisation policy; and

(6) no end user may be given any guarantee for continued access and of use beyond a period to be specified by the Government.

Any contract including a PSC which does not take into its ambit stated principles may itself become vulnerable and fall foul of Article 14 of the Constitution.

(emphasis is mine)

Interestingly, in this case the position adopted by the Union needs to be highlighted. This Court was informed, that natural resources are vested in the Government, as a matter of trust, in the name of the people of India. And that, it was the solemn duty of the State to protect the national interest. The most significant assertion expressed on behalf of the Union was, that natural resources must always be used in the interest of the country and not in private interest. It is in the background of the stance adopted by the Union, that this Court issued the necessary directions extracted above.

(l) Last of all reference was made to the decision of this Court in *Akhil Bhartiya Upbhokta Congress Vs. State of Madhya Pradesh & Ors.,* (2011) 5 SCC 29:

> 65. What needs to be emphasised is that the State and/or its agencies/instrumentalities cannot give largesse to any person according to the sweet will and whims of the political entities and/or officers of the State. Every action/decision of the State and/or its agencies/instrumentalities to give largesse or confer benefit must be founded on a sound, transparent, discernible and well-defined policy, which shall be made known to the public by publication in the Official Gazette and other recognised modes of publicity and such policy must be implemented/executed by adopting a non-discriminatory and non-arbitrary method irrespective of the class or category of persons proposed to be benefited by the policy. The distribution of largesse like allotment of land, grant of quota, permit licence, etc. by the State and its agencies/instrumentalities should always be done in a fair and equitable manner and the element of favouritism or nepotism shall not influence the exercise of discretion, if any, conferred upon the particular functionary or officer of the State.
>
> 66. We may add that there cannot be any policy, much less, a rational policy of allotting land on the basis of

applications made by individuals, bodies, organisations or institutions dehors an invitation or advertisement by the State or its agency/instrumentality. By entertaining applications made by individuals, organisations or institutions for allotment of land or for grant of any other type of largesse the State cannot exclude other eligible persons from lodging competing claim. Any allotment of land or grant of other form of largesse by the State or its agencies/instrumentalities by treating the exercise as a private venture is liable to be treated as arbitrary, discriminatory and an act of favouritism and/or nepotism violating the soul of the equality clause embodied in Article 14 of the Constitution.

67. This, however, does not mean that the State can never allot land to the institutions/organisations engaged in educational, cultural, social or philanthropic activities or are rendering service to the society except by way of auction. Nevertheless, it is necessary to observe that once a piece of land is earmarked or identified for allotment to institutions/organisations engaged in any such activity, the actual exercise of allotment must be done in a manner consistent with the doctrine of equality. The competent authority should, as a matter of course, issue an advertisement incorporating therein the conditions of eligibility so as to enable all similarly situated eligible persons, institutions/organisations to participate in the process of allotment, whether by way of auction or otherwise. In a given case the Government may allot land at a fixed price but in that case also allotment must be preceded by a wholesome exercise consistent with Article 14 of the Constitution."

(emphasis is mine)

The observations of this Court in the judgment extracted above neither need any summarization, nor any further elaboration.

(m) Surely, there cannot be any escape from a reference to the judgment rendered by this Court in Centre for Public Interest Litigation and others v. Union of India & Ors., (2012) 3 SCC 1, which according to the preamble of the Presidential reference, seems to be the reason why the reference came to be made. During the course of hearing extensive debate, between rival parties, ensued on the effect of the observations recorded by this Court in paragraphs 95 and 96 of the judgment. The aforesaid paragraphs are being extracted hereinbelow:

"95. This Court has repeatedly held that wherever a contract is to be awarded or a licence is to be given, the public authority must adopt a transparent and fair method for making selections so that all eligible persons get a fair opportunity of competition. To put it differently, the State and its agencies/instrumentalities must always adopt a rational method for disposal of public property and no attempt should be made to scuttle the claim of worthy applicants. When it comes to alienation of scarce natural resources like spectrum etc., it is the burden of the State to ensure that a non-discriminatory method is adopted for distribution and alienation, which would necessarily result in protection of national/public interest.

96. In our view, a duly publicized auction conducted fairly and impartially is perhaps the best method for discharging this burden and the methods like first-come-first-served when used for alienation of natural resources/public property are likely to be misused by unscrupulous people who are only interested in garnering maximum financial benefit and have no respect for the constitutional ethos and values. In other words, while transferring or alienating the natural resources, the State is duty bound to adopt the method of auction by giving wide publicity so that all eligible persons can participate in the process."

In so far as the controversy in the aforesaid case is concerned, it would be relevant to mention that the petitioner

approached this Court by invoking the extraordinary writ jurisdiction of this Hon'ble Court under Article 32 of the Constitution of India. The petition came to be filed as a cause in public interest. The reason which promoted the petitioner to approach this Court was that the Union had adopted the policy of "first come first serve" for allocation of licences of spectrum. It was alleged that the aforesaid policy involved the element of pure chance or accident. It was asserted on behalf of the petitioners that invocation of the principles of "first come first serve" for permission to use natural resources had inherently dangerous implications. The implications expressed by the petitioners were duly taken into consideration and the plea raised on behalf of the petitioners was accepted. Thereupon, the following directions came to be issued in paragraph 102 of the judgment:

> "102. In the result, the writ petitions are allowed in the following terms:
>
> (i) The licences granted to the private Respondents on or after 10.1.2008 pursuant to two press releases issued on 10.1.2008 and subsequent allocation of spectrum to the licensees are declared illegal and are quashed.
>
> (ii) The above direction shall become operative after four months.
>
> (iii) Keeping in view the decision taken by the Central Government in 2011, TRAI shall make fresh recommendations for grant of licence and allocation of spectrum in 2G band in 22 Service Areas by auction, as was done for allocation of spectrum in 3G band.
>
> (iv) The Central Government shall consider the recommendations of TRAI and take appropriate

> decision within next one month and fresh licences be granted by auction.
>
> (v) Respondent Nos. 2, 3 and 9 who have been benefited at the cost of Public Exchequer by a wholly arbitrary and unconstitutional action taken by the DoT for grant of UAS Licences and allocation of spectrum in 2G band and who off-loaded their stakes for many thousand crores in the name of fresh infusion of equity or transfer of equity shall pay cost of Rs. 5 crores each. Respondent Nos. 4, 6, 7 and 10 shall pay cost of Rs. 50 lakhs each because they too had been benefited by the wholly arbitrary and unconstitutional exercise undertaken by the DoT for grant of UAS Licences and allocation of spectrum in 2G band. We have not imposed cost on the Respondents who had submitted their applications in 2004 and 2006 and whose applications were kept pending till 2007.
>
> (vi) Within four months, 50% of the cost shall be deposited with the Supreme Court Legal Services Committee for being used for providing legal aid to poor and indigent litigants. The remaining 50% cost shall be deposited in the funds created for Resettlement and Welfare Schemes of the Ministry of Defence.
>
> (vii) However, it is made clear that the observations made in this judgment shall not, in any manner, affect the pending investigation by the CBI, Directorate of Enforcement and Ors. agencies or cause prejudice to those who are facing prosecution in the cases registered by the CBI or who may face prosecution on the basis of chargesheet(s) which may be filed by the CBI in future and the Special Judge, CBI shall decide the matter uninfluenced by this judgment. We also

make it clear that this judgment shall not prejudice any person in the action which may be taken by other investigating agencies under Income Tax Act, 1961, Prevention of Money Laundering Act, 2002 and other similar statutes."

It needs to be noticed that a review petition came to be filed by the Union against the instant judgment. The same, however, came to be withdrawn without any reservations. During the course of hearing of the instant petition, the Learned Attorney General for India informed this Court that the Union had decided to give effect to the judgment, in so far as the allocation of spectrum is concerned. In the above view of the matter, one only needs to notice the observations recorded by this Court in paragraphs 95 and 96 extracted hereinabove. A perusal of the aforesaid paragraphs reveals, that in line with the judgments rendered by this Court interpreting Article 14 of the Constitution of India, this Court yet again held, that while awarding a contact or a licence, the executive must adopt a transparent and fair method. The executive must ensure, that all eligible persons get a fair opportunity to compete. For awarding contracts or licences, the executive should adopt a rational method, so as to ensure that claims of worthy applicants are not scuttled. On the subject of natural resources like spectrum, etc., this Court held that it was the bounden duty of the State to ensure the adoption of a non-discriminatory method which would result in protection of national/public interest. This Court also expressed the view that "perhaps" the best method for doing so would be through a duly publicized auction conducted fairly and impartially. Thus viewed, it was affirmed, that the State was duty bound to adopt the method of auction by giving wide publication while alienating natural resources, so as to ensure that all eligible persons can participate in the process.

7. The parameters laid by this Court on the scope of applicability of Article 14 of the Constitution of India, in matters

where the State, its instrumentalities, and their functionaries, are engaged in contractual obligations (as they emerge from the judgments extracted in paragraph 6 above) are being briefly paraphrased. For an action to be able to withstand the test of Article 14 of the Constitution of India, it has already been expressed in the "main opinion" that it has to be fair, reasonable, non-discriminatory, transparent, non-capricious, unbiased, without favouritism or nepotism, in pursuit of promotion of healthy competition and equitable treatment. The judgments referred to, endorse all those requirements where the State, its instrumentalities, and their functionaries, are engaged in contractual transactions. Therefore, all "governmental policy" drawn with reference to contractual matters, it has been held, must conform to the aforesaid parameters. While Article 14 of the Constitution of India permits a reasonable classification having a rational nexus to the object sought to be achieved, it does not permit the power of pick and choose arbitrarily out of several persons falling in the same category. Therefore, a criteria or procedure has to be adopted so that the choice among those falling in the same category is based on reason, fair play and non-arbitrariness. Even if there are only two contenders falling in the zone of consideration, there should be a clear, transparent and objective criteria or procedure to indicate which out of the two is to be preferred. It is this, which would ensure transparency.

8. Another aspect which emerges from the judgments (extracted in paragraph 6 above) is that, the State, its instrumentalities and their functionaries, while exercising their executive power in matters of trade or business etc. including making of contracts, should be mindful of public interest, public purpose and public good. This is so, because every holder of public office by virtue of which he acts on behalf of the State, or its instrumentalities, is ultimately accountable to the people in whom sovereignty vests. As such, all powers vested in the State are meant to be exercised for public good and in public interest. Therefore, the question of unfettered discretion in an

executive authority, just does not arise. The fetters on discretion are - a clear, transparent and objective criteria or procedure which promotes public interest, public purpose and public good. A public authority is ordained, therefore to act, reasonably and in good faith and upon lawful and relevant grounds of public interest.

9. Observations recorded by this Court on the subject of revenue returns, during the course of the States engagements in commercial ventures (emerging from the judgments extracted in paragraph 6 above), are being summarized hereunder. It has been held, where the Sate is simply selling a product, there can be no doubt that the State must endeavour to obtain the highest price, subject of course to any other overriding public consideration. The validity of a trading agreement executed by the Government has to be judged by the test, that the entire benefit arising therefrom enures to the State, and is not used as a cloak for conferring private benefits on a limited class of persons. If a contract has been entered into, taking in account the interest of the State and the public, the same would not be interfered with by a Court, by assuming the position of an appellate authority. The endeavour to get the State the "full value" of its resources, it has been held, is particularly pronounced in the sale of State owned natural resources, to the private sector. Whenever the State gets less than the full value of the assets, it has been inferred, that the country has been cheated, in a much as, it amounts to a simple transfer of wealth, from the citizens as a whole, to whoever gets the assets at a discount. And in that sense, it has been concluded, the wealth that belongs to the nation is lost. In *Reliance Natural Resources Ltd.'s* case (supra), the Union of India adopted the position, that natural resources are vested in the State as a matter of trust, for and on behalf of the citizens of the country. It was also acknowledged, that it was the solemn duty of the State, to protect those natural resources. More importantly, it was accepted, that natural resources must

always be used in the common interest of the citizens of the country, and not for private interest.

10. Based on the legal/constitutional parameters/ requirements culled out in the preceding three paragraphs, I shall venture an opinion on whether there are circumstances in which natural resources ought to be disposed of only by ensuring maximum returns. For this, I shall place reliance on a conclusion drawn in the "main opinion", namely, "Distribution of natural resources is a policy decision, and the means adopted for the same are thus, executive prerogatives. However, when such a policy decision is not backed by a social or welfare purpose, and precious and scarce natural resources are alienated for commercial pursuits of profit maximizing private entrepreneurs, adoption of means other than those that are competitive and maximize revenue, may be arbitrary and face the wrath of Article 14 of the Constitution." (refer to paragraph 149 of the "main opinion"). I am in respectful agreement with the aforesaid conclusion, and would accordingly opine, that when natural resources are made available by the State to private persons for commercial exploitation exclusively for their individual gains, the State's endeavour must be towards maximization of revenue returns. This alone would ensure, that the fundamental right enshrined in Article 14 of the Constitution of India (assuring equality before the law and equal protection of the laws), and the directive principle contained in Article 39(b) of the Constitution of India (that material resources of the community are so distributed as best to subserve the common good), have been extended to the citizens of the country.

11. A similar conclusion would also emerge in a slightly different situation. This Court in a case dealing with a challenge to the allotment of retail outlets for petroleum products *[Common Cause, A Registered Society Vs. Union of India & Ors.,* (1996) 6 SCC 530] has held, that Article 14 of the Constitution of India, does not countenance discretionary power

which is capable of being exercised arbitrarily. While accepting that Article 14 of the Constitution of India permits a reasonable classification having a rational nexus to the object sought to be achieved, it was held that Article 14 of the Constitution of India does not permit the State to pick and choose arbitrarily out of several persons falling in the same category. A transparent and objective criteria/procedure has to be evolved so that the choice amongst those belonging to the same class or category is based on reason, fair play, and non-arbitrariness. Envisage a situation as the one expressed above, where by reasonable classification based on some public purpose, the choice is limited to a set of private persons, amongst whom alone, the State has decided to dispose of natural resources. Herein again, in my opinion, if the participation of private persons is for commercial exploitation exclusively for their individual gains, then the State's endeavour to maximize revenue alone, would satisfy the constitutional mandate contained in Articles 14 and 39(b) of the Constitution of India.

12. In the "main opinion", it has been concluded, that auction is not a constitutional mandate, in the nature of an absolute principle which has to be applied in all situations. And as such, auction cannot be read into Article 14 of the Constitution of India, so as to be applied in all situations (refer to paragraph 107 of the "main opinion"). Auction is certainly not a constitutional mandate in the manner expressed, but it can surely be applied in some situations to maximize revenue returns, to satisfy legal and constitutional requirements. It is, therefore, that I have chosen to express the manner of disposal of natural resources by using the words "maximization of revenue" in place of the term "auction", in the foregoing two paragraphs. But it may be pointed out, the Attorney General for India had acknowledged during the course of hearing, that auction by way of competitive bidding was certainly an indisputable means, by which maximization of revenue returns is assured (in this behalf other observations recorded by me in paragraph 3 above may also be kept in mind). In the

aforesaid view of the matter, all that needs to be stated is, that if the State arrives at the conclusion, in a given situation, that maximum revenue would be earned by auction of the natural resource in question, then that alone would be the process which it would have to adopt, in the situations contemplated in the foregoing two paragraphs.

13. One is compelled to take judicial notice of the fact, that allotment of natural resources is an issue of extensive debate in the country, so much so, that the issue of allocation of such resources had recently resulted in a washout of two sessions of Parliament. The current debate on allotment of material resources has been prompted by a report submitted by the Comptroller and Auditor General, asserting extensive loss in revenue based on inappropriate allocations. The report it is alleged, points out that private and public sector companies had made windfall gains because the process of competitive bidding had not been adopted. The country witnessed a similar political spat a little while earlier, based on the allocation of the 2G spectrum. On that occasion the controversy was brought to this Court by way of a public interest litigation, the judgment whereof is reported as *Centre for Public Interest Litigation Vs. Union of India,* (2012) 3 SCC 1. Extensive revenue loss, in the course of allocation of the 2G spectrum was duly noticed. On each occasion when the issue of allocation of natural resources, results in an alleged loss of revenue, it is portrayed as a loss to the nation. The issue then becomes a subject matter of considerable debate at all levels of the Indian polity. Loss of one, essentially entails a gain to the other. On each such occasion loss to the nation, translates into the identification of private players as the beneficiaries. If one were to accept the allegations appearing in the media, on account of defects in the disposal mechanism, private parties have been beneficiaries to the tune of lakhs of crores of Indian Rupees, just for that reason. In the current debate, rival political parties have made allegations against those responsible, which have been repudiated with counter allegations. This Court is not, and

should never be seen to be, a part of that debate. But it does seem, that the Presidential reference is aimed at invoking this Court's advisory jurisdiction to iron out the creases, so that legal and constitutional parameters are correctly understood. This would avoid such controversies in future. It is therefore, that an opinion is also being rendered by me, on the fourth question, namely, "What is the permissible scope for interference by courts with policy making by the Government including methods for disposal of natural resources?" On this the advice tendered in the "main opinion" inter alia expresses, "We may, however, hasten to add that the Court can test the legality and constitutionality of these methods. When questioned, the

Courts are entitled to analyse the legal validity of different means of distribution and give a constitutional answer as to which methods are ultra vires and intra vires the provisions of the Constitution. Nevertheless, it cannot and will not compare which policy is fairer than the other, but, if a policy or law is patently unfair to the extent that it falls fouls of the fairness requirement of Article 14 of the Constitution, the Court would not hesitate in striking it down.", (refer to paragraph 146 of the "main opinion"). While fully endorsing the above conclusion, I wish to further elucidate the proposition.

Before adverting to anything else, it is essential to refer to Article 39 (b) of the Constitution of India.

> **"39. Certain principles of policy to be followed by the State -** The State shall in particular, direct its policy towards securing -
>
> (b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;
>
> (emphasis is mine)

The mandate contained in the Article extracted above envisages, that all material resources ought to be distributed

in a manner which would "best subserve the common good". It is therefore apparent, that governmental policy for distribution of such resources should be devised by keeping in mind the "common good" of the community i.e., the citizens of this country. It has been expressed in the "main opinion", that matters of policy fall within the realm of the legislature or the executive, and cannot be interfered with, unless the policy is in violation of statutory law, or is ultra vires the provision(s) of the Constitution of India. It is not within the scope of judicial review for a Court to suggest an alternative policy, which in the wisdom of the Court could be better suited in the circumstances of a case. Thus far the position is clearly unambiguous.

The legality and constitutionality of policy is one matter, and the manner of its implementation quite another. Even at the implementation stage a forthright and legitimate policy, may take the shape of an illegitimate stratagem (which has been illustrated at a later juncture hereinafter). Since the Presidential reference is not based on any concrete fact situation, it would be appropriate to hypothetically create one. This would enable those responsible for decision making, to be able to appreciate the options available to them, without the fear of trespassing beyond the limitations of legality and constitutionality. This would also ensure that a truly meaningful opinion has been rendered. The illustration, that has been chosen is imaginary, and therefore, should not be taken as a reference to any similar real life situation(s)/circumstance(s). The focus in the instant consideration is limited to allocation of natural resources for private commercial exploitation, i.e., where a private player will be the beneficiary of such allocation, and will exploit the natural resource to make personal profits therefrom.

The illustration chosen will be used to express an opinion on matters which are governed by statutory provisions, as also, those which are based on governmental policy. This is so because in so far as the present controversy is concerned, the parameters for distribution of natural resources must be

examined under these two heads separately.

Coal is a natural resource. It shall constitute the illustrative natural resource for the present consideration. Let us assume a governmental decision to allocate coal lots for private commercial exploitation. First, the legislative policy angle. Reference may be made to the Mines and Minerals (Development and Regulation) Act, 1957 (hereinafter referred to as, the MMDR Act). The enactment deals exclusively with natural resources. Section 11A of the MMDR Act has been chosen as the illustrative provision, to demonstrate how a forthright legitimate legislative policy, may take the shape of an illegitimate stratagem. The choice of Section 11A aforesaid is on account of the fact that it was added to the MMDR Act only on 13.2.2012, and as such, there may not have been, as of now, any actual allocation of coal lots based thereon. Section 11A of the MMDR Act, is being placed hereunder :

"11A. Procedure in respect of coal or lignite - The Central Government may, for the purpose of granting reconnaissance permit, prospecting licence or mining lease in respect of an area containing coal or lignite, select, through auction by competitive bidding on such terms and conditions as may be prescribed, a company engaged in, -

(i) production of iron and steel;

(ii) generation of power;

(iii) washing of coal obtained from a mine; or

(iv) such other end use as the Central Government may, by notification in the Official Gazette, specify, and the State Government shall grant such reconnaissance permit, prospecting licence or mining lease in respect of coal or lignite to such company as selected through auction by competitive bidding under this section:

Provided that the auction by competitive bidding shall not be applicable to an area containing coal or lignite,-

(a) where such area is considered for allocation to a Government company or corporation for mining or such other specified end use;

(b) where such area is considered for allocation to a company or corporation that has been awarded a power project on the basis of competitive bids for tariff (including Ultra Mega Power Projects)."

Explanation - For the purposes of this section "company" means a company as defined in section 3 of the Companies Act, 1956 and includes a foreign company within the meaning of section 591 of that Act.

(emphasis is mine)

For the grant of a mining lease in respect of an area containing coal, the provision leaves no room for any doubt, that selection would be made through auction by competitive bidding. No process other than auction, can therefore be adopted for the grant of a coal mining lease.

Section 11A of the MMDR Act also defines the zone of eligibility, for participation in such competitive bidding. To be eligible, the contender must be engaged in the production of iron and steel, or generation of power, or washing of coal obtained from a mine, or an activity notified by the Central Government. Only those satisfying the legislatively prescribed zone of eligibility, are permitted to compete for a coal mining lease. For the sake of fairness, and to avoid arbitrariness, the provision contemplates, that the highest bidder amongst those who participate in the process of competitive bidding, would succeed in obtaining the concerned coal mining lease. The legislative policy limiting the zone of consideration could be subject matter of judicial review. It could be assailed, in case of violation of a legal or constitutional provision. As expressed

in the "main opinion" the facts of each individual case, will be the deciding factor for such determination. In the absence of any such challenge, the legislative policy would be binding and enforceable. In such an eventuality, those who do not fall within the zone of consideration, would be precluded from the process of competitive bidding for a mining lease over an area having coal deposits. In the process of auction through competitive bidding, if the objective is to best subserve the common good (as in Article 39(b) of the Constitution of India) the legislative policy would be fully legitimate. If however, the expressed legislative policy has no nexus to any legitimate objective, or it transgresses the mandate of distribution of material resources to "best subserve the common good", it may well be unfair, unreasonable or discriminatory.

For an effective analysis, Section 11A of the MMDR Act needs a further closer examination. Section 11A aforesaid, as an exception to the legislative policy referred to in the foregoing paragraph, also provides for the grant of a mining lease for coal to a private player, without following the auction route. The provision contemplates the grant of a mining lease for coal, without any reciprocal monetary or other consideration from the lessee. The proviso in section 11A of the MMDR Act, excludes the auction route where the beneficiary is engaged in power generation. Such exclusion, is contemplated only when the power generating concern, was awarded the power project, on the basis of "competitive bids for tariff". It is important to highlight, that there is no express assurance in section 11A aforesaid, that every entrepreneur who sets up a power project, having succeeded on the basis of competitive bidding, would be allotted a coal mining lease. But if such an allotment is actually made, it is apparent, that such entrepreneur would get the coal lot, without having to participate in an auction, free of cost. The legislative policy incorporated in Section 11A of the MMDR Act, if intended to best subserve the common good, may well be valid, even in a situation where the material resource is being granted free of cost. What appears to be free of cost

in the proviso in Section 11A of the MMDR Act, is in actuality consideration enmeshed in providing electricity at a low tariff. The aforesaid proviso may be accepted as fair, and may not violate the mandate contained in Article 14 of the Constitution of India, or even the directive principles contained in Article 39(b) of the Constitution of India.

Hypothetically, assume a competitive bidding process for tariff, amongst private players interested in a power generation project. The private party which agrees to supply electricity at the lowest tariff would succeed in such an auction. The important question is, if the private party who succeeds in the award of the project, is granted a mining lease in respect of an area containing coal, free of cost, would such a grant satisfy the test of being fair, reasonable, equitable and impartial. The answer to the instant query would depend on the facts of each individual case. Therefore, the answer could be in the affirmative, as well as, in the negative. Both aspects of the matter are being explained in the succeeding paragraph.

Going back to the hypothetical illustration based on Section 11A of the MMDR Act. One would add some further facts so as to be able to effectively project the legal point of view. If the bidding process to determine the lowest tariff has been held, and the said bidding process has taken place without the knowledge, that a coal mining lease would be allotted to the successful bidder, yet the successful bidder is awarded a coal mining lease. Would such a grant be valid? In the aforesaid fact situation, the answer to the question posed, may well be in the negative. This is so because, the competitive bidding for tariff was not based on the knowledge of gains, that would come to the vying contenders, on account of grant of a coal mining lease. Such a grant of a coal mining lease would therefore have no nexus to the "competitive bid for tariff". Grant of a mining lease for coal in this situation would therefore be a windfall, without any nexus to the object sought to be achieved. In the bidding process, the parties concerned had no occasion

to bring down the electricity tariff, on the basis of gains likely to accrue to them, from the coal mining lease. In this case, a material resource would be deemed to have been granted without a reciprocal consideration i.e., free of cost. Such an allotment may not be fair and may certainly be described as arbitrary, and violative of the Article 14 of the Constitution of India. Such an allotment having no nexus to the objective of subserving the common good, would fall foul even of the directive principle contained in Article 39(b) of the Constitution of India. Therefore, a forthright and legitimate policy, on account of defective implementation, may become unacceptable in law.

In a slightly changed factual scenario, the conclusion may well be different. If before the holding the process of auction, for the award of a power project (based on competitive bids for tariff), it is made known to the contenders, that the successful bidder would be entitled to a mining lease over an area containing coal, those competing for the power project would necessarily incorporate the profit they were likely to make from such mining lease. While projecting the tariff at which they would supply electricity, they would be in a position to offset such profits from their costs. This would result in an in an opportunity to the contenders to lower the tariff to a level lower than would have been possible without the said lease. In such a situation the gains from the coal mining lease, would be enmeshed in the competitive bidding for tariff. Therefore, it would not be just to assume in the instant sequence of facts, that the coal lot has been granted free of cost. One must read into the said grant, a reciprocal consideration to provide electricity at a lower tariff. In the instant factual scenario, the allotment of the mining lease would be deemed to be aimed at "subserving the common good" in terms of Article 39(b) of the Constitution of India. Therefore even the allotment of such a mining lease, which appears to result in the allocation of a natural resource free of cost, may well satisfy the test of fairness and reasonableness contemplated in Article 14 of the Constitution of India. Moreso, because a fair playing field having been made available to all

those competing for the power project, by making them aware of the grant of a coal mining lease, well before the bidding process. The question of favouritism therefore would not arise. Would such a grant of a natural resource, free of cost, be valid? The answer to the query, in the instant fact situation, may well be in the affirmative.

The policy of allocation of natural resources for public good can be defined by the legislature, as has been discussed in the foregoing paragraphs. Likewise, policy for allocation of natural resources may also be determined by the executive. The parameters for determining the legality and constitutionality of the two are exactly the same. In the aforesaid view of the matter, there can be no doubt about the conclusion recorded in the "main opinion" that auction which is just one of the several price recovery mechanisms, cannot be held to be the only constitutionally recognized method for alienation of natural resources. That should not be understood to mean, that it can never be a valid method for disposal of natural resources (refer to paragraphs 10 to 12 of my instant opinion).

I would therefore conclude by stating that no part of the natural resource can be dissipated as a matter of largess, charity, donation or endowment, for private exploitation. Each bit of natural resource expended must bring back a reciprocal consideration. The consideration may be in the nature of earning revenue or may be to "best subserve the common good". It may well be the amalgam of the two. There cannot be a dissipation of material resources free of cost or at a consideration lower than their actual worth. One set of citizens cannot prosper at the cost of another set of citizens, for that would not be fair or reasonable.

R.P. Reference answered partly.

BABY DEVASSY CHULLY @ BOBBY

v.

UNION OF INDIA & ORS.

(Criminal Appeal No. 866 of 2008)

OCTOBER 12, 2012

[P. SATHASIVAM AND RANJAN GOGOI, JJ.]

Conservation of Foreign Exchange and Prevention of Smuggling Acitivties Act, 1974 – s. 3(1) – Arrest of detenu under Customs Act – Granted bail in the case – But did not avail of the same – While in jail, detention order under COFEPOSA – Writ Petition challenging detention order – High Court dismissing the petition – On appeal, held: Detention order was necessary in view of the facts of the case – Detenu was having bail order and thus there was possibility of his coming out and indulge in prejudicial activities – It is subjective satisfaction of Determining Authority to invoke order of detention – Customs Act, 1962.

Res Judicata – Petition u/Art. 226 challenging detention order – Earlier petition u/Art. 32 challenging the same detention dismissed – Whether petition u/Art. 226 barred by res judicata – Held: Doctrine of res judicata would be inapplicable to cases where the two forums have separate and independent jurisdictions – Res Judicata also not applicable in the instant case because in the petition u/Art. 226, additional grounds were raised.

Practice and Procedure – Preventive detention for one year – Petition challenging the detention – High Court reserving the order and pronouncing the same after 5 months – Held: In a matter affecting personal liberty of a citizen, it is duty of the courts to take all endeavours and efforts for an early decision – Courts to give priority for disposal of the matters relating to personal liberty.

Appellant-accused and five co-accused were arrested in respect of smuggling of diesel oil on the basis of the statements of the co-accused. The co-accused subsequently retracted from their statements. The appellant-accused was granted bail on 12.4.2005, but he did not avail of the same. On 3.5.2005 detention order was passed against him u/s. 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974. Appellant-accused filed writ petition under Article 226 of the Constitution challenging the detention order. The petition was dismissed by High Court.

In appeal to this Court, the appellant (detenu) contended that there was no compelling reason to detain him as on the date of detention order, he was in jail; that reliance on the retraction statement of the co-accused by the Detaining Authority without adverting to their confessional statement, vitiates the detention order.

Detaining Authority contended that the writ petition under Article 226 was barred by *res judicata* as the same detention was challenged in a writ petition under Article 32 and the same was dismissed by this Court.

Dismissing the appeal, the Court

HELD: 1. The right to liberty is guaranteed by Article 21 of the Constitution of India. At the same time, Article 22(3)(b) of the Constitution permits preventive detention. It is the subjective satisfaction of the Detaining Authority whether a person has to be detained for a particular period of time or not. In the impugned grounds of detention, the Detaining Authority has narrated all the reasons for passing the detention order detaining the appellant with a view to prevent him from abetting the smuggling of goods in future. [Paras 7 and 8] [524-B-D]

Rekha vs. State of Tamil Nadu Through Secretary to Governmentand Anr. **(2011) 5 SCC 244: 2011 (4) SCR 740 – referred to.**

2. The Detaining Authority was conscious of all relevant aspects and passed the impugned order of detention in order to prevent the appellant from abetting the smuggling of goods in future. It is true that though the detenu was granted bail on 12.04.2005, for the reasons best known to him, he did not avail such benefit and continued to be in jail on the date of the detention, i.e., 03.05.2005. It is true that this aspect has not been mentioned in the detention order, however, on the other hand, it is not in dispute that the grounds of detention which forms part of the Detention Order clearly mention the details about the bail order dated 12.04.2005 and non-availing of the same on the date of detention order. [Paras 9 and 10] [524-F-H; 526-B]

3. If a person concerned is in custody and there is no imminent possibility of his being released, the rule is that the power of preventive detention should not be exercised. But, in the present case, it is not in dispute that on 12.04.2005 itself, the competent Court has granted bail but the appellant did not avail such benefit. In other words, on the date of the detention order, i.e., 03.05.2005, by virtue of the order granting bail even on 12.04.2005, it would be possible for the detenu to come out without any difficulty. In such circumstances, it is presumed that at any moment, it would be possible for him to come out and indulge in prejudicial activities. [Para 10] [525-F-H]

Binod Singh vs. District Magistrate, Dhanbad, Bihar and Ors. **(1986) 4 SCC 416: 1986 (3) SCR 906 – distinguished.**

4. In view of the various grounds/details/materials adverted to in the impugned order it cannot be claimed that there was no compelling necessity to pass the order

of detention. It is the subjective satisfaction of the Detaining Authority whether the order of detention is to be invoked or not. [Para 11] [526-C-D]

5. All the documents which are relevant, which have bearing on the issue, which are likely to affect the mind of the Detaining Authority should be placed before it. But a document which has no link with the issue cannot be construed as relevant. In the present case what the Detaining Authority has stated in paragraph 10 of the grounds of detention is a mere reference and no reliance can be based on the same. However, it is not in dispute that the appellant-detenu was supplied even the retraction statement referred to in paragraph 10 along with the grounds of detention. In such circumstance, it cannot be said that without adverting to the confessional statement of the co-accused, reliance based upon retraction statement is not maintainable. [Para 12] [526-E-F; 527-E-F]

A. Sowkath Ali vs. Union of India and Ors. **(2000) 7 SCC 148: 2000 (2) Suppl. SCR 48 – referred to.**

6. The doctrine of *res judicata* would be inapplicable to cases where the two forums have separate and independent jursidctions. In view of the same and in the light of the additional grounds raised and also of the fact that the issue relates to personal liberty of a citizen, the present appeal cannot be dismissed on the grounds of *res judicata*. [Para 13] [529-A-B]

Kirit Kumar Chaman Lal Kundaliya vs. *Union of India and Ors.* **(1981) 2 SCC 436 – relied on.**

7. In the present case writ petition under Article 226 of the Constitution of India was filed before the High Court on 02.06.2005 immediately after passing of the detention order ie. On 3.5.2005. The High Court reserved

its orders on 24.10.2005 and pronounced its orders only on 16.03.2006, i.e., nearly after a period of 5 months. He pointed out that because of the same, the detenu could not know the fate of his petition for a period of 5 months when the detention period was for one year. All the High Courts are reminded that in a matter of this nature affecting the personal liberty of a citizen, it is the duty of the Courts to take all endeavours and efforts for an early decision. In the present case keeping the writ petition pending after hearing the parties and compelling the detenu to wait for 5 months to know the result of his petition, cannot be accepted. All the High Courts are requested to give priority for the disposal of the matters relating to personal liberty of a citizen, particularly, when the detention period is for one year or less than a year and, more so, after hearing the parties, the decision must be known to the affected party without unreasonable delay. [Paras 14 and 15] [529-C-F]

Case Law Reference:

2011 (4) SCR 740	**Referred to.**	**Para 7**
1986 (3) SCR 906	**Distinguished.**	**Para 9**
2000 (2) Suppl. SCR 48	**Referred to.**	**Para 12**
(1981) 2 SCC 436	**Relied on.**	**Para 13**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 866 of 2008.

From the Judgment & Order dated 16.3.2005 of the High Court of Judicature at Bombay in Criminal Writ Petition No. 1500 of 2005.

K.K. Mani, Abhishek Krishna, Prakash Kumar Singh, Satish Pandey for the Appellant.

K. Swami, B. Krishna Prasad, A.K. Sharma, Rashmi Malhotra, Asha Gopalan Nair for the Respodents.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. This appeal is directed against the final judgment and order dated 16.03.2006 passed by the High Court of Judicature at Bombay in Criminal Writ Petition No. 1500 of 2005 whereby the High Court dismissed the petition filed by the appellant herein.

2. Brief facts:

(a) According to the appellant, the Directorate of Revenue Intelligence (DRI), Mumbai Zonal Unit, Mumbai, received an intelligence that one sea-faring vessel by name M.T. AL SHAHABA (a motor tanker) carrying approximately 700 metric tons (MT) of Diesel Oil of foreign origin is arriving into Indian Customs Waters on or around 20th or 21st December, 2004 and the said diesel oil would be smuggled into India. The officers of the DRI, Mumbai, therefore, kept surveillance in that area and on 21.12.2004, the officers spotted the said vessel. They noticed two self propelled barges and two dumb barges each towed by a tow boat were around the said vessel. They also noticed that pipes were attached from the said vessel to the barges and oil was being pumped into the barges from the vessel. The officers of the DRI boarded the said vessel and took control of the same. The vessel and barges were found to be of Mumbai coast within the Indian territorial waters. When the officers made enquiry with the Captain of the vessel - Fouad Ahmed Al Manie, he informed that the vessel was carrying High Speed Diesel (HSD) from Muscat. The Captain was not holding any legal documents for import of the said diesel oil into India. The Captain informed the officers that he has already discharged around 250 MTs of oil from the vessel into three barges before they boarded the vessel. The officers, therefore, brought the said vessel and barges to the P and V Anchorage of Port Trust, Mumbai. Two independent panchas were brought

and detailed inventory was prepared and after conducting search of the said vessel and barges, panchnamas were drawn. The officers of the DRI seized the said diesel oil weighing about 770 MTs, worth Rs. 2 crores, under the Customs Act, 1962.

(b) During the course of investigation, the officers came to know the name of the appellant-detenu and one Chand as the persons behind the said smuggling. On 22/23.12.2004, the statement of the Captain of the vessel was recorded wherein he stated that he was asked by his master to take the vessel to the Indian Coast and to deliver the consignment to one Bobby-the detenu in India. On the same day, the statement of Sayyed Hussain Madar @ Chand was also recorded wherein he, inter alia, stated that he was to purchase the said Diesel Oil brought by Bobby in India and sell the same.

(c) During the course of follow-up action of the said seizure of the vessel, the officers of the DRI, Mumbai seized about 5.127 MTs of previously smuggled diesel oil stored in two barges at Reti Bunder, Belapur and arrested Chand, Captain Fouad Ahmed Al Manie, Shaikh Ahmedali, Murugan Murugeshan and Sadiq Anwar under Section 104 of the Customs Act, 1962 on 23.12.2004 and were produced before the Addl. CMM, Esplanade, Mumbai on 24.12.2004 and were later released on bail on 09.02.2005. However, subsequently, all of them retracted their statements. On 04.03.2005, residential premises of the appellant-Bobby were searched and finally he was traced on 14.03.2005. On the same day, he moved an anticipatory bail application in the Sessions Court, Mumbai which was rejected on 24.03.2005. On 24.03.2005, the statement of Bobby was recorded under Section 108 of the Customs Act, 1962. On the basis of his statement, the officers arrested the appellant on 25.03.2005. On 12.04.2005, he was granted bail by the Addl. CMM, Mumbai but he did not avail of the same. On 03.05.2005, the Joint Secretary to the Government of India, after considering the appellant's high propensity and potentiality to indulge in prejudicial activities and

with a view to prevent him from abetting the smuggling of goods in future, passed the detention order against him under Section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as "the COFEPOSA Act").

(d) Being aggrieved by the said order, on 02.06.2005, the appellant filed Criminal Writ Petition No. 1500 of 2005 before the Bombay High Court. The High Court, finding no substance in the writ petition, by impugned judgment dated 16.03.2006, dismissed the same.

(e) Aggrieved by the said judgment, the appellant has filed this appeal by way of special leave before this Court. On 09.05.2008, leave was granted.

3. Heard Mr. K.K. Mani, learned counsel for the appellant, Mr. K. Swami, learned counsel for respondent Nos. 1 & 2 and Ms. Asha Gopalan Nair, learned counsel for Respondent No.4-State.

4. Mr. K.K. Mani, learned counsel for the appellant, after taking us through the detention order dated 03.05.2005 and the grounds of detention as well as the impugned order of the High Court dismissing the writ petition raised the following contentions:

(i) inasmuch as on the date of passing of the detention order, i.e., 03.05.2005, the appellant was in jail, in that event there is no compelling necessity to detain him under the provisions of the COFEPOSA Act ;

(ii) the Detaining Authority failed to take note of relevant aspect, i.e., the detenu was in custody, hence, the Detention Order is liable to be quashed on the ground of non-application of mind; and

(iii) the Detaining Authority relied upon the retraction

statement of co-accused without adverting to their confessional statement which vitiates the detention order.

5. Mr. K. Swami, learned counsel for respondent Nos. 1 & 2-Detaining Authority, submitted as under:-

(i) taking note of prejudicial activities and with a view to prevent the appellant from involving/abetting the smuggling of goods, the Detaining Authority rightly invoked the provisions of the COFEPOSA Act;

(ii) all the procedural safeguards have been strictly adhered to by the Detaining Authority; and

(iii) all the points raised by the learned counsel for the appellant before this Court had already been considered and negatived by the High Court, hence, there is no ground for interference.

6. We have carefully considered the rival contentions, perused the detention order, grounds of detention and all the connected materials.

7. At the foremost, Mr. K.K. Mani, learned counsel for the appellant pressed into service the decision of this Court in *Rekha vs. State of Tamil Nadu Through Secretary to Government and Anr.,* (2011) 5 SCC 244. He very much relied on paragraph 29 of the said decision which reads as under:

> "29. Preventive detention is, by nature, repugnant to democratic ideas and an anathema to the rule of law. No such law exists in the USA and in England (except during war time). Since, however, Article 22(3)(b) of the Constitution of India permits preventive detention, we cannot hold it illegal but we must confine the power of preventive detention within very narrow limits, otherwise we will be taking away the great right to liberty guaranteed by Article 21 of the Constitution of India which was won after long, arduous and historic struggles. It follows, therefore, that if the ordinary law of the land (the Penal Code and other penal statutes) can deal with a situation, recourse to a preventive detention law will be illegal."

We are conscious of the fact that the right to liberty is guaranteed by Article 21 of the Constitution of India. At the same time, Article 22(3)(b) of the Constitution permits preventive detention. Keeping the above principles in mind, let us consider whether the impugned detention order is sustainable in law or not.

8. In a series of decisions, this Court has held that it is the subjective satisfaction of the Detaining Authority whether a person has to be detained for a particular period of time or not. In the impugned grounds of detention, the Detaining Authority has narrated all the reasons for passing the detention order detaining the appellant with a view to prevent him from abetting the smuggling of goods in future.

9. With regard to non-application of mind, Mr. K.K. Mani, learned counsel for the appellant pointed out that on the date of passing of the detention order, i.e., 03.05.2005, the detenu was in prison though he was granted bail on 12.04.2005, he had not availed the same and continued in prison on the date of order. According to him, this aspect was not reflected in the detention order which, according to him, vitiates the detention on the principle of non-application of mind. It is true that though the detenu was granted bail on 12.04.2005, for the reasons best known to him, he did not avail such benefit and continued to be in jail on the date of the detention, i.e., 03.05.2005. It is true that this aspect has not been mentioned in the detention order, however, on the other hand, it is not in dispute that the grounds of detention which forms part of the Detention Order dated 03.05.2005 clearly mention the details about the bail order dated 12.04.2005 and non-availing of the same on the date of detention order, i.e., 03.05.2005. In this regard, learned counsel for the appellant relied on a decision of this Court in *Binod Singh vs. District Magistrate, Dhanbad, Bihar & Ors.,*

(1986) 4 SCC 416 wherein the contention of the petitioner therein was that the order of preventive detention could only be justified against a person in detention if the Detaining Authority was satisfied that his release from detention was imminent and the order of detention was necessary for putting him back in jail. He also contented that the service of order of detention on the petitioner while he was in jail was futile and useless since such an order had no application under Section 3(2) of the National Security Act, 1980. While considering the said claim, this Court, in paragraph 7, held as under:

> "7. It is well settled in our constitutional framework that the power of directing preventive detention given to the appropriate authorities must be exercised in exceptional cases as contemplated by the various provisions of the different statutes dealing with preventive detention and should be used with great deal of circumspection. There must be awareness of the facts necessitating preventive custody of a person for social defence. If a man is in custody and there is no imminent possibility of his being released, the power of preventive detention should not be exercised……."

10. It is clear that if a person concerned is in custody and there is no imminent possibility of his being released, the rule is that the power of preventive detention should not be exercised. In the case on hand, it is not in dispute that on 12.04.2005 itself, the competent Court has granted bail but the appellant did not avail such benefit. In other words, on the date of the detention order, i.e., 03.05.2005, by virtue of the order granting bail even on 12.04.2005, it would be possible for the detenu to come out without any difficulty. In such circumstances, while reiterating the principle of this Court enunciated in the above decision and in view of the fact that the detenu was having the order of bail in his hand, it is presumed that at any moment, it would be possible for him to come out and indulge in prejudicial activities, hence, the said decision is not helpful

to the case of the appellant. In view of the above circumstances and of the fact that the Detaining Authority was aware of the grant of bail and clearly stated the same in the grounds of detention, we reject the contra arguments made by the learned counsel for the appellant. On the other hand, we hold that the Detaining Authority was conscious of all relevant aspects and passed the impugned order of detention in order to prevent the appellant from abetting the smuggling of goods in future.

11. For the same reason, the other contention, namely, that no compelling necessity to pass the order of detention is to be rejected. As a matter of fact, learned counsel for the Detaining Authority took us through various grounds/details/materials adverted to in the impugned order and we are satisfied that it cannot be claimed that there was no compelling necessity to pass the order of detention. We have already pointed out that it is the subjective satisfaction of the Detaining Authority whether the order of detention is to be invoked or not. Accordingly, we reject the above contention also.

12. The next contention, namely, the Detaining Authority relied on the retraction statement of co-accused without looking into their confession, it is argued by the learned counsel for the appellant that without adverting to confessional statement of the co-accused, reliance based upon the retraction statement is not maintainable. It is true that in paragraph 10 of the grounds of detention, the Detaining Authority has stated as under:-

> "Chand, Capt. Fouad Ahmed and Sadruddin B. Khan have retracted their statements after arrest before the Magistrate. However, a rebuttal to these retractions was filed before the Magistrate. No correspondence has been received from the said persons or the Advocate's on the rebuttal filed by DRI."

It is equally true that there is no reference to confessional statement of the co-accused. As rightly pointed out by the learned counsel for respondent Nos. 1 & 2 that what the

Detaining Authority has stated in paragraph 10, extracted above, is only mere reference or narration of fact for completion of the proceedings. In other words, we are satisfied that it is not relied upon statement/document as claimed by the learned counsel for the appellant. No doubt, by drawing our attention to the decision in *A. Sowkath Ali vs. Union of India & Ors.,* (2000) 7 SCC 148, Mr. K.K. Mani, learned counsel for the appellant contended that both the confessional and retraction statements ought to have been placed and furnished to the appellant. In the said decision, this Court has held that the confessional statement and the retraction statement both constituting a composite relevant fact should have been placed. It was further held that if any one of the two documents alone is placed, without the other, it would affect the subjective satisfaction of the Detaining Authority. Therefore, it was held that non-placement of the retraction affects the subjective satisfaction of the Detaining Authority. There is no quarrel as to the proposition, in fact, the sponsoring authority has to place all the relevant documents before the Detaining Authority. We reiterate that all the documents which are relevant, which have bearing on the issue, which are likely to affect the mind of the Detaining Authority should be placed before it. Further, a document which has no link with the issue cannot be construed as relevant. In the case on hand, we have already observed that what the Detaining Authority has stated in paragraph 10 of the grounds is only a mere reference and no reliance can be based on the same. However, it is not in dispute that the appellant-detenu was supplied even the retraction statement referred to in paragraph 10 along with the grounds of detention. In such circumstance, this contention is also rejected.

13. Learned counsel appearing for respondent Nos. 1 & 2 has brought to our notice that on earlier occasion, i.e., 27.02.2006, the present appellant challenged the very same detention order by way of filing a writ petition being W.P.(Crl.) No. D-5620 of 2006 under Article 32 of the Constitution before this Court. By order dated 06.03.2006, this Court dismissed

the said petition, hence, according to the learned counsel for the respondents, the appellant is debarred from filing the present appeal against the dismissal of the writ petition by the High Court of Bombay. Similar issue was considered by this Court relating to filing of Habeas Corpus petition under Article 32 of the Constitution of India in *Kirit Kumar Chaman Lal Kundaliya vs. Union of India & Ors.* (1981) 2 SCC 436 wherein this Court held in paragraph 10 as under:

> "10. ……..The doctrine of finality of judgment or the principles of res judicata are founded on the basic principle that where a Court of competent jurisdiction has decided an issue, the same ought not allowed to be agitated again and again. Such a doctrine would be wholly inapplicable to cases where the two forums have separate and independent jurisdictions. In the instant case, the High Court decided the petition of the detenu under Article 226 which was a discretionary jurisdiction whereas the jurisdiction to grant relief in a petition under Article 32 filed in the Supreme Court is guaranteed by the Constitution and once the court finds that there has been a violation of Article 22(5) of the Constitution, then it has no discretion in the matter but is bound to grant the relief to the detenu by setting aside the order of detention. The doctrine of res judicata or the principles of finality of judgment cannot be allowed to whittle down or override the express constitutional mandate to the Supreme Court enshrined in Article 32 of the Constitution. In a recent decision in the case of *Santosh Anand v. Union of India,* (1981) 2 SCC 420 this Court has pointed out that the concept of liberty has now been widened by *Maneka Gandhi* case (1978) 1 SCC 248 where Article 21 as construed by this Court has added new dimensions to the various features and concepts of liberty as enshrined in Articles 21 and 22 of the Constitution. For these reasons, therefore, we overruled the preliminary objection taken by the respondents."

In view of the same and in the light of the additional grounds raised and also of the fact that the issue relates to personal liberty of a citizen, we reject the objection of the respondents and hold that the present appeal cannot be dismissed on the grounds of res judicata.

14. Before winding up, it is our duty to refer one factual aspect pointed out by the learned counsel for the appellant. It is seen that immediately after passing of the detention order on 03.05.2005, a writ petition under Article 226 of the Constitution of India was filed before the High Court of Bombay on 02.06.2005. It is the claim of the appellant that after hearing all the parties, the High Court reserved its orders on 24.10.2005 and according to the learned counsel for the appellant, the High Court pronounced its orders only on 16.03.2006, i.e., nearly after a period of 5 months. He pointed out that because of the same, the detenu could not know the fate of his petition for a period of 5 months when the detention period was for one year.

15. By this appeal, we remind all the High Courts that in a matter of this nature affecting the personal liberty of a citizen, it is the duty of the Courts to take all endeavours and efforts for an early decision. In the case on hand, we feel that keeping the writ petition pending after hearing the parties and compelling the detenu to wait for 5 months to know the result of his petition, cannot be accepted. We request all the High Courts to give priority for the disposal of the matters relating to personal liberty of a citizen, particularly, when the detention period is for one year or less than a year and, more so, after hearing the parties, the decision must be known to the affected party without unreasonable delay.

16. In the light of the above discussion, we are unable to accept any of the contentions raised by the appellant. Consequently, the appeal fails and the same is dismissed.

K.K.T. Appeal dismissed.

REV. MOTHER MARYKUTTY

v.

RENI C. KOTTARAM & ANOTHER

(Criminal Appeal No. 1594 of 2012)

OCTOBER 12, 2012

[DR. B.S. CHAUHAN AND FAKKIR MOHAMED IBRAHIM KALIFULLA, JJ.]

Negotiable Instruments Act, 1881 – ss.138, 139 and 142 – Dishonour of cheque – Presumption to be drawn – Standard of proof – Preponderance of probabilities – Complaint by respondent alleging that appellant had entrusted it with some construction work and in that regard issued a cheque in his favour for Rs.25 lakhs but the cheque was dishonoured – Acquittal of accused-appellant by trial court – Reversed by High Court – Justification – Held: Elaborate consideration was made by the trial Court for acquitting the appellant – The conclusions of the trial court were drawn by adducing cogent and convincing reasoning – Taking into account various reasons inter alia including a) that the final payment was to be settled only after completion of the work and that the respondent did not complete the work; b) that there was no evidence to conclude that any measurement of the work was done and the accounts were settled; c) that the cheque was not in the handwriting of the appellant which strengthened the defence version that it was not executed in favour of the respondent; d) that there was no reliable documentary evidence adduced by the respondent to hold that a sum of Rs.25 lakhs was due to him warranting execution of the cheque and e) that there was no amount legally due to the respondent to hold that the cheque was as a matter of fact issued by the appellant in favour of the respondent in order to hold that he was a holder of the cheque, the trial Court ultimately concluded that no offence was made out as against

the appellant under s.138 in order to convict her under s.142 – Appellant sufficiently rebutted the initial presumption as regards the issuance of the cheque under ss. 138 and 139 – The preponderance of probabilities also fully supported the stand of the appellant – Judgment of the High Court in having interfered with the order of acquittal by the trial court without proper reasoning, thus, liable to be set aside.

The respondent filed a complaint against the appellant under Section 142 of the Negotiable Instruments Act, 1881 for offence punishable under Section 138 thereof. According to respondent, the appellant-accused had entrusted it with some construction work and had issued a post dated cheque for Rs.25 lakhs in his favour towards the outstanding amount due to him for the work done by him. It was claimed that when the cheque was presented by the respondent with his bankers, the same was dishonoured due to insufficiency of funds in the account of the appellant. It was further claimed that though the respondent intimated about the dishonour of the cheque by a lawyer's notice served on the appellant, she came forward with a reply taking the stand that no amount was due and that the respondent stealthily removed two cheques from the custody of the appellant of which the present one was forged and presented for clearance.

The trial Court held that the appellant was able to rebut the presumption and that there was no circumstance warranting the execution of the cheque issued in favour of the respondent and so holding, found the appellant not guilty of the offence under Section 138 of the Act and acquitted her under Section 255(1) of CrPC. In appeal, the High Court while reversing the judgment of the trial Court found the appellant guilty of the offence and sentenced her to pay a fine of Rs.30 lakhs and in default to pay the fine amount directed her to

undergo simple imprisonment for 1 ½ years. It was further directed that on realization of the fine amount, the same should be paid to the complainant-respondent under Section 357(1) CrPC.

In the instant appeal, the appellant raised various contentions, viz. 1) that she had discharged her burden by rebutting the initial presumption contemplated under Section 118 read along with Section 139 of the Act and having regard to the overwhelming preponderance of probabilities existing in her favour, the trial Court rightly concluded that she was entitled for acquittal; 2) that the overwhelming evidence available on record as considered by the trial Court, though referred to by the High Court in the impugned judgment was completely omitted to be considered by it while reversing the order of acquittal of the trial Court and 3) that the specific expression "holder" and "holder in due course" having been used in Sections 8, 9, 138, 139 and 142 of the Act, the respondent cannot be said to have fulfilled the requirement of the said provisions in order to avail the benefits under the provisions of the Act.

Allowing the appeal, the Court

HELD: 1.1. While the trial Court made every effort to examine the claim of the respondent as regards the issuance of the cheque by the appellant in his favour and the stand of the appellant by referring to the respective documentary evidence as well as the version of P.W.1 before reaching the conclusion about the guilt of the appellant, the High Court completely failed to consider and appreciate the documents marked on the side of the appellant. The High Court failed to discharge its onerous responsibility of considering the material evidence available on record brought to its notice and for the reasons best known, the High Court blatantly declined to

examine those materials by simply stating that the same was not warranted. [Para 8] [538-C-E-H; 539-A-B]

1.2. The impugned judgment discloses that the attention of the High Court was drawn to specific Exhibits relied upon by the appellant and referred to by the trial Judge to reach a conclusion about the guilt or otherwise of the appellant, however, after referring to those Exhibits, in the very next sentence the High Court proceeded to state that the appellant failed to produce any material which was in her possession to show that no amount was due from the appellant to the respondent. Such an approach of the High Court displayed the total perversity in its approach while reversing the order of the trial Judge. [Para 11] [543-D-F]

2. Elaborate consideration was made by the trial Court for acquitting the appellant. The conclusions of the trial Judge were drawn by adducing cogent and convincing reasoning and no fault is found in the said conclusions drawn by the trial Judge. Taking into account various reasons *inter alia* including a) that the final payment was to be settled only after completion of the work and that the respondent did not complete the work; b) that there was no evidence to conclude that any measurement of the work was done and the accounts were settled; c) that the fact that the cheque was not in the handwriting of the appellant strengthens the defence version that it was not executed in favour of the respondent; d) that there was no reliable documentary evidence adduced by the respondent to hold that a sum of Rs.25 lakhs was due to him warranting execution of the cheque and e) that there was no amount legally due to the respondent to hold that the cheque was as a matter of fact issued by the appellant in favour of the respondent in order to hold that he was a holder of the cheque, the trial Court ultimately concluded that no

offence was made out as against the appellant under Section 138 of the Act in order to convict her under Section 142 of the Act. In the circumstance, the principles set out in the decision in *M.S. Narayana Menon alias Mani* as regards the presumption to be drawn and the preponderance of probabilities to be inferred are fully satisfied. In the said case, it was clearly opined that it is not necessary for the defendant to disprove the existence of consideration by way of direct evidence. The standard of proof evidently is preponderance of probabilities. Inference of preponderance of probabilities can be drawn not only from the materials on record but also by reference to the circumstances upon which he relies. Presumption drawn under a statute has only an evidentiary value. The judgment of the trial Court in having drawn the conclusions to the effect that the appellant sufficiently rebutted the initial presumption as regards the issuance of the cheque under Sections 138 and 139 of the Act, was perfectly justified. The preponderance of probabilities also fully support the stand of the appellant as held by the trial Judge. The judgment of the High Court in having interfered with the order of acquittal by the trial Judge without proper reasoning is, therefore, liable to be set aside. Consequently, the conviction and sentence imposed in the judgment impugned is also set aside. [Paras 9, 10, 12 and 13] [542-G-H; 543-A-B; 544-D-F]

M.S. Narayana Menon alias Mani v. State of Kerala and another **(2006) 6 SCC 39 – held applicable.**

Case Law Reference:

(2006) 6 SCC 39	**held applicable**	**Para 6**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1594 of 2012.

From the Judgment & Order dated 17.3.2010 of the High Court of Kerala at Ernakulam in Crl. A.No. 1707 of 2007.

Basava Prabhu Patil, Romy Chacko, Varun Mudgal for the Appellant.

V. Giri, M.Sadique, Nishe Rajen Shonker for the Respondents.

The Judgment of the Court was delivered by

FAKKIR MOHAMED IBRAHIM KALIFULLA, J. 1. The appellant/accused is aggrieved by the judgment dated 17.03.2010 passed in Criminal Appeal No.1707/2007 of the High Court of Kerala at Ernakulam. The respondent herein preferred a complaint against the appellant under Section 142 of the Negotiable Instruments Act (hereinafter called 'the Act') for an offence punishable under Section 138 of the Act. According to the complainant, the appellant/accused entrusted the work of construction of an Old Age Home and a Chapel at Punnaveli, Pathanamthitta District based on an agreement between the appellant and the respondent. According to the respondent, the appellant issued a post dated cheque for Rs.25 lakhs in favour of the respondent towards the outstanding amount due to him for the work done by him. The cheque was dated 21.03.2005. It was claimed that when the cheque was presented by the respondent with his bankers, the same was dishonoured due to insufficiency of funds in the account of the appellant. It was further claimed that though the respondent intimated about the dishonour of the cheque by a lawyer's notice dated 30.03.2005 served on the appellant on 31.03.2005, she came forward with a reply taking the stand that no amount was due and that the respondent stealthily removed two cheques from the custody of the appellant of which the present one was forged and presented for clearance. Before the trial Court the appellant pleaded not guilty. On behalf of the respondent Exhibits P-1 to P-20 were marked and the respondent examined himself as P.W.1. On behalf of the

appellant Exhibits D-1 to D-4 series were marked, in the course of cross-examination of P.W.1. No oral evidence was adduced on behalf of the appellant. When the incriminating circumstances were put against the appellant under Section 313 of Cr.P.C. she denied the same and filed a written statement.

2. The trial Court on a detailed analysis of the evidence, placed before it, ultimately held that the appellant was able to rebut the presumption and that there was no circumstance warranting the execution of Exhibit P-1 cheque in favour of the respondent. So holding, the trial Court found the appellant not guilty of the offence under Section 138 of the Act and acquitted her under Section 255(1) of Cr.P.C. Aggrieved by the acquittal of the appellant, the respondent preferred an appeal before the High Court of Kerala at Ernakulam wherein the impugned judgment came to be rendered.

3. The High Court while reversing the judgment of the trial Court found the appellant guilty of the offence and sentenced her to pay a fine of Rs.30 lakhs and in default to pay the fine amount directed her to undergo simple imprisonment for 1 ½ years. It was further directed that on realization of the fine amount, the same should be paid to the complainant under Section 357(1) of Cr.P.C. Appellant was also directed to appear before the trial Court on 17.07.2010 to make the payment of the fine amount. It was further directed that in default of appearance before the trial Court, the trial Court would be free to proceed against the appellant for taking coercive steps for executing the sentence.

4. At the time when special leave petition was moved, based on the undertaking of the appellant, she was directed to deposit a sum of Rs.25 lakhs in the trial Court within two weeks. Subject to the said condition notice was issued and interim stay was also granted subject to fulfillment of the said condition. Subsequently, it was reported on 10.11.2010 that the amount directed to be deposited was also deposited.

5. We have heard Mr. Basava Prabhu Patil, Senior Counsel for the appellant and Shri V. Giri, Senior Counsel for the respondent. We have also perused the material papers placed before us, the judgment of the trial Court as well as that of the High Court.

6. Mr. Basava Prabhu Patil, Senior Counsel for the appellant in his submissions primarily contended that the appellant discharged her burden by rebutting the initial presumption contemplated under Section 118 read along with Section 139 of the Act and that having regard to the overwhelming preponderance of probabilities existing in favour of the appellant, the trial Court rightly concluded that the appellant was entitled for the acquittal. The learned Senior Counsel further contended that the overwhelming evidence available on record which was considered by the trial Court, though was referred to by the High Court in the impugned judgment has been completely omitted to be considered while reversing the order of acquittal of the trial Court. The learned Senior Counsel, therefore, contended that the impugned judgment of the High Court was liable to be set aside. Apart from the above submission, the learned Senior Counsel by referring to Sections 8, 9, 138, 139 and 142 of the Act sought to raise a contention based on the specific expression "Holder" and "Holder in due course" used in those provisions to contend that the respondent cannot be said to have fulfilled the requirement of the said provisions in order to avail the benefits under the provisions of the Act. Learned Senior Counsel relied upon the decision of this Court, *M.S. Narayana Menon alias Mani Vs. State of Kerala and another* reported in (2006) 6 SCC 39, in support of his submissions.

7. As against the above submissions Mr. V. Giri, Learned Senior Counsel for the respondent contended that the appellant was prevaricating in her stand as regards the issuance of the cheque, namely, the one in her reply to the lawyer's notice and the other before the Court, in her written statement. The learned

Senior Counsel by referring to Annexure R-3 and R-4 contended that the contents of the said documents proved appellant's liability to the respondent and that the appellant miserably failed to rebut the initial presumption relating to the issuance of the cheque in favour of the respondent. As regards the submission based on Sections 8, 9, 138, 139 and 142 of the Act, made by the learned counsel for the appellant it was contended that the said contention has been raised for the first time in this Court and that in any event the status of the respondent as payee/holder of the cheque was duly proved.

8. Having heard learned counsel for the respective parties and having bestowed our serious consideration to the contentions raised, at the very outset, we wish to state that while the trial Court made every effort to examine the claim of the respondent as regards the issuance of the cheque by the appellant in his favour and the stand of the appellant by referring to the respective documentary evidence as well as the version of P.W.1 before reaching the conclusion about the guilt of the appellant, we find that the High Court completely failed to consider and appreciate the documents marked on the side of the appellant. We find that though the High Court made a reference to those specific Exhibits, the attention to which was drawn by the learned counsel, namely, Exhibit D-3, Exhibits P-6 to P-8, Exhibits D-4(A) to D-4(F) series vouchers as well as Exhibit D-4(J) voucher unhesitatingly stated that he did not propose to enter into any finding on merit as the same was unwarranted in the case on hand considering the nature of allegations and claim contained in the case. It also went on to state that in spite of those materials, in its conclusion, the appellant failed to produce whatever records available in her possession to show that no amount was due from her to the respondent. When we made a comparative consideration of the analysis made by the trial Court while holding that no offence was made out as against the appellant, as against the above reasoning of the learned Judge, in the order impugned in this appeal, we are convinced that the High Court has failed to

discharge its onerous responsibility of considering the material evidence available on record which were brought to its notice and for the reasons best known, the High Court blatantly declined to examine those materials by simply stating that the same was not warranted.

9. In order to appreciate the correctness of the impugned judgment of the High Court, as well as, that of the trial Court, it will be worthwhile to refer to certain conclusions drawn by the learned trial Judge by making specific reference to the various documentary evidence placed before it vis-à-vis the oral version of the complainant himself. The significant admission of the respondent as P.W.1 was noted by the trial Court as under:

(a) The construction work entrusted with the respondent had to be completed for a total sum of Rs.78,70,678/- as stated in Exhibit D-3.

(b) Respondent admitted that he had not completed the work and that he would have got payment only after the measurement of the quantity of the work done.

(c) All the amounts received from the accused were noted in Exhibit P-9.

(d) It was admitted that a sum of Rs.12,60,100/- mentioned in Exhibit D-4 series voucher was not noted in Exhibit P-9.

(e) The amount received by him from the accused for conducting earth work was also not included in Exhibit P-9.

(f) The respondent received various amounts by cheques and cash. He, however, denied the suggestion that the accused gave two cheques to one Joychen Manthurthy by way of security on 23.10.2001 while borrowing Rs.5 lakhs from the

said person.

(g) It was admitted by the respondent that flooring of the building was done by the appellant herself and the expenses were not included in the bill.

(h) The respondent admitted that he had received Rs.77,31,500/- as per Exhibit P-9 statement while the total amount of work as per Exhibit D-3 agreement was Rs.78,70,678/-.

(i) The respondent, however, denied the suggestion that excess payments were made by the appellant to him.

(j) Respondent also admitted that he did not complete the work and the flooring was ultimately done by the appellant herself.

(k) It was not in dispute that the final payment was to be settled only after completion of the work and that the respondent did not complete the work.

(l) There was no evidence to conclude that any measurement of the work was done and the accounts were settled.

(m) As regards the variation in the stand of the appellant, namely, the one in the reply notice and the other in the written statement the same did not materially affect the stand of the appellant in the light of the overwhelming evidence in support of her stand.

(n) The fact that the cheque was not in the handwriting of the appellant strengthens the defence version that it was not executed in favour of the respondent.

(o) There was no reliable documentary evidence adduced by the complainant to hold that a sum of Rs.25 lakhs was due to him warranting execution

of Exhibit P-1 cheque.

(p) There was no amount legally due to the respondent to hold that Exhibit P-1 cheque was as a matter of fact issued by the appellant in favour of the respondent in order to hold that he was a holder of the cheque.

10. It was based on the above reasoning, the trial Court ultimately concluded that no offence was made out as against the appellant under Section 138 of the Act in order to convict her under Section 142 of the Act. While such an elaborate consideration was made by the trial Court for acquitting the appellant, it will be appropriate to refer to the nature of consideration made by the High Court which has been stated in paragraph 13 of the impugned judgment, which is to the following effect:

"13. Another point vehemently raised by the counsel for the respondent/accused is that no amount is due from the accused to the complainant so as to issue Ext.P1 cheque. In order to substantiate the above submission, the learned counsel has taken me through the documents namely, Ext.D3, Exts.P6 to P8 final bills and Ext.D4(A) to D4(F) series vouchers and also Ext.D4(J) voucher. Regarding this submission, I am not proposed to enter into any finding on merit as the same is unwarranted in the present case considering the nature of allegations and claim contained in this case. But from the materials and evidence on record, it is crystal clear that the accused miserably failed to produce whatever records which she was in possession to show that no amount is due from the accused to the complainant. On the other hand, the attempt was to interpret and explain the documents produced by the complainant. Admittedly, no payment was made to the complainant otherwise than through the vouchers and cheques. If that be so, by producing those documents, the defence plea can be established. But there was no

attempt in this regard. When the accused has admitted the transaction claimed by the complainant and the complainant has established his claim that there was outstanding amounts due from the accused to the complainant out of the contract work undertaken by him under Ext.D3 agreement, it is for the accused to establish that no amount is due to the complainant by producing cogent and concrete evidence if they are sticking on their stand.

(underlining is ours)

11. We can understand if the High Court had considered those Exhibits, the attention of which was drawn to it and stated as to how it was not in a position to agree with the conclusions drawn by the learned trial Judge. The above statement contained in paragraph 13 of the impugned judgment discloses that the attention of the High Court was drawn to the specific Exhibits which were relied upon by the appellant and referred to by the learned trial Judge to reach a conclusion about the guilt or otherwise of the appellant. After referring to those Exhibits, unfortunately, we find that in the very next sentence the High Court proceeded to state that the appellant failed to produce any material which was in her possession to show that no amount was due from the appellant to the respondent. Such an approach of the High Court, in our considered opinion, has displayed the total perversity in its approach while reversing the order of the trial Judge. Even, Mr. V. Giri, learned Senior Counsel for the respondent in spite of his best efforts was unable to convince us to support the above conclusion found in the judgment of the High Court.

12. That apart having considered the conclusions of the learned trial Judge, we find that those conclusions were drawn by adducing cogent and convincing reasoning and we do not find any fault in the said conclusions drawn by the learned trial Judge. In the circumstance, the principles set out in the decision relied upon by the learned counsel for the appellant in *M.S.*

Narayana Menon alias Mani (supra) as regards the presumption to be drawn and the preponderance of probabilities to be inferred, as set out in paragraphs 31 to 33, are fully satisfied. Those principles, set out in paragraphs 31 to 33, can be usefully referred to which are as under:

> "31. A Division Bench of this Court in *Bharat Barrel & Drum Mfg. Co. v. Amin Chand Payrelal* albeit in a civil case laid down the law in the following terms: (SCC pp. 50-51, para 12)
>
> "12. Upon consideration of various judgments as noted hereinabove, the position of law which emerges is that once execution of the promissory note is admitted, the presumption under Section 118(a) would arise that it is supported by a consideration. Such a presumption is rebuttable. The defendant can prove the non-existence of a consideration by raising a probable defence. If the defendant is proved to have discharged the initial onus of proof showing that the existence of consideration was improbable or doubtful or the same was illegal, the onus would shift to the plaintiff who will be obliged to prove it as a matter of fact and upon its failure to prove would disentitle him to the grant of relief on the basis of the negotiable instrument. The burden upon the defendant of proving the non-existence of the consideration can be either direct or by bringing on record the preponderance of probabilities by reference to the circumstances upon which he relies. In such an event, the plaintiff is entitled under law to rely upon all the evidence led in the case including that of the plaintiff as well. In case, where the defendant fails to discharge the initial onus of proof by showing the non-existence of the consideration, the plaintiff would invariably be held entitled to the benefit of presumption arising under Section 118(a) in his favour. The court may not insist upon the defendant to disprove the existence of consideration by leading direct evidence as

> the existence of negative evidence is neither possible nor contemplated and even if led, is to be seen with a doubt."
>
> This Court, therefore, clearly opined that it is not necessary for the defendant to disprove the existence of consideration by way of direct evidence.
>
> **32.** The standard of proof evidently is preponderance of probabilities. Inference of preponderance of probabilities can be drawn not only from the materials on record but also by reference to the circumstances upon which he relies.
>
> **33.** Presumption drawn under a statute has only an evidentiary value. Presumptions are raised in terms of the Evidence Act. Presumption drawn in respect of one fact may be an evidence even for the purpose of drawing presumption under another."

13. Applying the abovesaid principles to the case on hand, we find that the judgment of the trial Court in having drawn the conclusions to the effect that the appellant sufficiently rebutted the initial presumption as regards the issuance of the cheque under Sections 138 and 139 of the Act, was perfectly justified. We also find that the preponderance of probabilities also fully support the stand of the appellant as held by the learned trial Judge. The judgment of the High Court in having interfered with the order of acquittal by the learned trial Judge without proper reasoning is, therefore, liable to be set aside and is accordingly set aside. Consequently, the conviction and sentence imposed in the judgment impugned is also set aside.

14. Having regard to our above conclusions, the amount deposited by the appellant with the trial Court in a sum of Rs.25 lakhs with accrued interest, if any, shall be refunded to her forthwith on production of a copy of this judgment. The appeal stands allowed with the above directions.

B.B.B. Appeal allowed.

STATE OF U.P.
v.
MUNESH
(Criminal Appeal No. 180 of 2007)

OCTOBER 12, 2012

[P. SATHASIVAM AND RANJAN GOGOI, JJ.]

Penal Code, 1860 – ss. 302 and 376 – Rape and murder of minor girl – Conviction of respondent-accused by trial court – Set aside by High Court – Justification – Held: Not justified – Two independent witnesses - PWs 2 and 3 actually witnessed the occurrence – High Court committed error in rejecting their evidence – Statement of PW1- the father of the victim corroborated with the statements made by PW2 and PW3 – Delay in lodging FIR was properly explained by PW1 – Statement of PW4(doctor), who conducted post-mortem, fully supported the case of the prosecution that the deceased was raped before strangulation – Prosecution story fully corroborated with the medical evidence on record – Act of respondent repels moral conscience as he chose a 11 year girl to satisfy his lust and subsequently murdered her – Conviction restored – RI for life imposed.

Evidence – Witness – Statement before Investigating Officer and before the Court – Contradictions – Appreciation – Rape and murder of minor girl – Conviction of respondent-accused – Set aside by High Court on the ground that there were some contradictions between the statements made by PWs 2 and 3 before the Investigating Officer u/s.161 CrPC and that made by them before the court – Held: PWs 2 and 3 were independent eye-witnesses who actually witnessed the occurrence – High Court committed error in rejecting their evidence – The contradictions were minor and did not affect the prosecution case – The statement before the Investigating

Officer and that before the Court were made at different intervals of time and there was bound to be some variance in the statements – Penal Code, 1860 – ss.302 and 376.

FIR – Delay in lodging of FIR – Whether reasonable and explained – Rape and murder of minor girl – Victim found lying dead in a naked condition – Incident occurred at 4.30 p.m. – Complaint made at 11.05 p.m. on the same day – Distance of 2 Kms. between the place of incident and the police station – Held: PW-1, father of the victim is a villager and on hearing the incident through PWs 2 and 3, he rushed to the spot, made arrangements to cover the body of his daughter, searched for some time to trace the accused, and thereafter, reached the Police Station – Considering the entire incident as a whole, it cannot be said that there was any unreasonable and unexplained delay which went to the root of the prosecution case – The delay was properly explained by PW-1, even otherwise, the same could not be construed as abnormal as erroneously observed by the High Court – Code of Criminal Procedure, 1973 – s.161.

FIR – Nature of – Held: FIR is not an encyclopedia – It is just an intimation of the occurrence of an incident and it need not contain all the facts related to the incident in question.

Crimes against Women – Devastating increase in rape cases and cases relating to crime against women – Primary concern both at national and international level – Although the statutory provisions provide strict penal action against such offenders, it is for the Courts to ultimately decide whether such incident has occurred or not – The Courts should be more cautious in appreciating the evidence and the accused should not be left scot-free merely on flimsy grounds.

According to the prosecution, the 11 year old daughter of PW-1 was raped and murdered by the respondent when she had gone alone from her house to

prepare cow-dung cakes. It was alleged that PW-2 and PW-3, who were passing through their fields at a short distance, saw the respondent strangulating the victim with a *chunni ('dupatta')* and on seeing them, the respondent ran away. The victim was subsequently found lying dead in a naked condition. PW-2 and 3 informed PW-1 about the said incident whereafter PW-1 lodged FIR. The trial court convicted the respondent under Sections 302 and 376 IPC and sentenced him to death. In appeal, the High Court disbelieved the statements of PW-2 and PW-3 on the ground that there were some contradictions between the statements made under Section 161 CrPC and in their evidence before the court and further holding that there was delay in lodging of the FIR, it acquitted the respondent. Hence the present appeal by the State.

Allowing the appeal, the Court

HELD: 1.1. Both PWs 2 and 3 were not related to the deceased. On the other hand, they were independent eye-witnesses who actually witnessed the occurrence and their evidence was reliable. The High Court committed an error in rejecting their evidence. The statement before the I.O. and the statement before the Court were made after some interval and there was bound to be some variance in the statements. Nevertheless, the contradictions were not much and did not affect the prosecution story. Further, in the absence of any previous enmity with the accused, the question of falsely implicating the accused did not arise. [Paras 7, 10 and 14] [553-F-G; 555-F-G; 557-D-F]

1.2. It is true that PW-1 is not an eye-witness but his statement corroborates with the statements made by PW-2 and PW-3. There is no reason to disbelieve the version of PW-1 and the trial court rightly relied on him

along with the statements of eye-witnesses PWs 2 and 3. The High Court rejected his evidence also on flimsy grounds. [Para 11] [555-H; 556-E]

2.1. It is not in dispute that the incident occurred at 4.30 p.m. on 05.03.2002 and the complaint was made by PW-1 at 11.05 p.m. on the same day itself. It has also come in evidence that the distance between the place of incident and the police station is 2 kms. Though the High Court commented that there was delay in lodging the complaint, it must be noted that PW-1 - father of the victim is a villager and on hearing the incident through PWs 2 and 3, he rushed to the spot, made arrangements to cover the body of his daughter, searched for some time to trace the accused, and thereafter, reached the P.S. which is at a distance of 2 kms. at 11.05 p.m. If one considers the entire incident as narrated by PW-1, it cannot be construed that there was any unreasonable and unexplained delay which went to the root of the prosecution case. On the other hand, considering the materials placed, it is clear that the delay was properly explained by PW-1, even otherwise, the same cannot be construed as abnormal as erroneously observed by the High Court. [Para 12] [556-F-H; 557-A-B]

2.2. Though it is stated that all the details as spoken to by PWs 1, 2 and 3 were not mentioned in the FIR, as rightly observed by the trial Court, FIR is not an encyclopedia. It is just an intimation of the occurrence of an incident and it need not contain all the facts related to the said incident. [Para 13] [557-C]

3. PW-4 conducted the *post mortem* on the body of the deceased. In his opinion, the cause of the death of the deceased was due to asphyxia due to strangulation and also due to pre-mordial injuries. For a specific question, PW-4 stated that "prior to her death, the

deceased was raped and due to that reason only, her hymen has been found to be ruptured". The above conclusion of PW-4 fully supports the case of the prosecution that the deceased was raped before strangulation. He also stated that blood was seen in the vagina of the deceased and her hymen was found to have been ruptured. Notwithstanding the absence of Sperm Detection Test report, the case of the prosecution cannot be doubted about rape, particularly, in the light of categorical findings of the doctor that her hymen was found to have been ruptured. The other prosecution witnesses have also stated injury on her private part and oozing of blood. The medical evidence proved that the victim was raped before her death. The prosecution story is fully corroborated with the medical evidence on record and, the High Court failed to give importance to the said evidence. [Paras 15, 16] [558-F-G-H; 559-A-C]

4. It is true that the prosecution has not collected the *chunni (dupatta)* allegedly used for pressing the neck of the victim, but, in the light of the material objects, the evidence of prosecution witnesses, statement of the doctor who conducted the *post mortem*, his opinion etc. amply prove the prosecution case. [Para 18] [559-E-F]

5. The primary concern both at national and international level is about the devastating increase in rape cases and cases relating to crime against women in the world. India is no exception to it. Although the statutory provisions provide strict penal action against such offenders, it is for the Courts to ultimately decide whether such incident has occurred or not. The Courts should be more cautious in appreciating the evidence and the accused should not be left scot-free merely on flimsy grounds. In the instant case, the accused had committed rape, which repels against moral conscience as he chose a girl of 11 years to satisfy his lust and

subsequently murdered her. [Para 19] [559-G-H; 560-A-B]

6. In the light of the acceptable materials in the form of oral and documentary evidence led in by the prosecution, particularly, the eye-witnesses PWs 2 and 3 who are independent witnesses coupled with the evidence of the doctor (PW-4), this Court accepts the conclusion of the trial court and disagrees with the conclusion of the High Court. It is held that the accused-respondent first committed the offence of rape and then murdered the deceased. The prosecution has established both the charges under Sections 376 and 302 of IPC. Taking note of the fact that the incident occurred in the year 2002, rigorous imprisonment for life would meet the ends of justice. [Paras 20, 21 and 22] [560-B-E]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 180 of 2007.

From the Judgment & Order dated 16.10.2003 of the High Court of Judicature at Allahabad in Criminal Appeal No. 737 of 2003.

Ratnakar Dash, Abhisth Kumar, T.N. Singh for the Appellant.

G.S. Mani, S.K. Verma, P.K. Tripathy, K. Rama Koteswara Rao, M.M. Kashyap for the Respondent.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. This appeal is filed by the State of U.P. against the final judgment and order dated 16.10.2003 passed by the High Court of Judicature at Allahabad in Criminal Appeal No. 737 of 2003 whereby the High Court allowed the appeal filed by the respondent herein and acquitted him of the offences punishable under Sections 302 and 376 of the Indian Penal Code, 1860 (hereinafter referred to as "IPC") and set

aside the judgment and order dated 15.02.2003 passed by the Additional Sessions Judge/Special Judge (E.C. Act), Bulandshahar in Sessions Case No. 748 of 2002.

2. **Prosecution case in a nutshell is as follows:**

(a) On 05.03.2002, at about 04.30 p.m., Roshni (the deceased), aged about 11 years, had gone alone from her house in Kalander Garhi, PS Khurja Nagar, Bulandshahar, U.P. to prepare cow-dung cakes in the cremation ground of Jatavs' and while she was doing her work, the respondent-accused forcibly took her in the wheat field of one Jalil Khadar with bad intentions. She raised cries and on hearing the same, Madanlal (PW-2) and Suresh Chandra (PW-3), who were passing through at a short distance, came to the said field and saw that the respondent-accused was strangulating her with a Dupatta. On seeing them, the respondent-accused ran away and when they tried to chase him, he could not be caught. When they returned back, Roshni was seen lying dead at the site in naked condition. Both of them informed Kanchhi Lal (PW-1), the father of the deceased-the complainant about the said incident and at 11.05 p.m., PW-1 lodged an F.I.R. being Crime No. 66 of 2002 at Police outpost Khurja Junction, District Bulandshahar and a case under Sections 376, 302 and 511 of IPC was registered against the appellant.

(b) After investigation, Kshetrapal Singh, S.I. (PW-7) arrested the accused on 14.03.2002. After filing of the charge sheet, the case was committed to the Court of Sessions and numbered as Sessions Case No. 748 of 2002.

(c) The Additional Sessions Judge/Special Judge (E.C. Act) Bulandshahar, by judgment dated 15.02.2003, convicted the respondent-accused and sentenced him to death under Section 302 of IPC and to imprisonment for life under Section 376 of IPC.

(d) Aggrieved by the said judgment, the respondent-

accused preferred an appeal being Criminal Appeal No. 737 of 2003 before the High Court. For confirmation of death sentence of the accused, Capital Sentence Reference No.7 of 2003 was also filed which was heard along with the appeal filed by the accused. The High Court, by impugned judgment dated 16.10.2003, allowed the appeal filed by the respondent-accused and acquitted him of all the charges and also rejected the Capital Sentence Reference.

(e) Against the order of acquittal passed by the High Court, the State has filed this appeal by way of special leave.

3. Heard Mr. Ratnakar Dash, learned senior counsel for the appellant-State and Mr. G.S. Mani, learned counsel for the respondent-accused.

4. Mr. Ratnakar Dash, learned senior counsel appearing for the State of U.P. submitted as under:-

(a) the High Court has committed an error by disbelieving the statement of two independent eye-witnesses, namely, Madanlal (PW-2) and Suresh Chandra (PW-3) merely on the ground that there are some contradictions between the statements made under Section 161 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "the Code") and in their evidence before the court;

(b) the High Court has failed to appreciate the vital facts that these two statements i.e. statement before the I.O. and the statement before the Court were made after some interval and there is bound to be some variance in the statements. However, the omission in the statement is not fatal to the prosecution case;

(c) the High Court was not correct in holding that there is delay in lodging of the FIR. Even if there is delay, it has been properly explained by the complainant - PW-1, father of the deceased; and

(d) Since the prosecution story is fully corroborated with the medical evidence on record that the victim was raped before her death and she had died on 05.03.2002 at 4.30 p.m. due to injuries, all these aspects have not been properly considered and the High Court committed a grave error in acquitting the accused.

5. On the other hand, Mr. G.S. Mani, learned counsel for the respondent-accused submitted that in view of the contradictions in the evidence of prosecution witnesses, particularly, their statements before the I.O. under Section 161 of the Code and their evidence before the Court, the High Court was fully justified in disbelieving their version. He pointed out that non-recovery of chunni (dupatta) is fatal to the prosecution case. He also pointed out that the prosecution failed to prove the motive and it is highly impossible to commit rape and murder at the same time. According to the counsel, there was inordinate delay in lodging the complaint and inquest was not made on the same night. He further pointed out that all these aspects were correctly appreciated by the High Court and ordered acquittal. Finally, Mr. Mani submitted that inasmuch as the High Court, on appreciation of evidence ordered acquittal, the same cannot be lightly interfered by this Court exercising jurisdiction under Article 136 of the Constitution of India.

6. We have carefully considered the rival submissions and gone through the relevant materials as well as the reasoning of the trial Court and the High Court.

7. As to the evidentiary value of eye-witnesses - PWs 2 and 3, it is not in dispute that both of them are not related to the deceased. On the other hand, they are independent eye-witnesses who actually witnessed the occurrence. Madanlal (PW-2), in his evidence has stated that Kanchhi Lal – (PW-1) father of the deceased victim, belongs to his village and his daughter by name Roshni was just 11 years old when the said incident occurred. He also stated that the accused Munesh-respondent herein too belongs to his own village. He narrated

before the Court that on 05.03.2002, at 4.30 p.m. he was passing through their field leading towards his village Manna along with one more villager Suresh Chandra (PW-2) and, ultimately, when they reached near the tube well fitted in the field of Jalil Khadar in which standing wheat crop was grown, at that time, they heard shrieking sound. On hearing the same, they immediately rushed towards the said direction. On reaching the spot, they saw Roshni lying down there and, at that time, Munesh-the accused tied a noose around her neck and tightened its knot. On seeing his action, both of them asked him "what are you doing". He further stated that after strangulating her, he ran away in the direction of south and they too followed him, but the accused could not be caught. Thereafter, they returned back to the spot and found that Roshini was lying on the ground in a naked state and the noose was around her neck. Her salwar and underwear were lying nearby her body. Immediately, they informed the same to her father PW-1. PW-2 identified Munesh-accused in the Court and asserted that it was he who committed the said act.

8. Though, learned counsel for the accused brought to our notice that certain statements have not been stated by him before the I.O., on verification of his statement under Section 161 of the Code and his evidence before the Court as well as the statement of I.O. (PW-6), we are satisfied that the contradiction, if any, is not much and the same would not affect the credibility of his statement. It is not in dispute that he is not related to the deceased, on the other hand, he is an independent eye-witness belonging to the same village as that of PW-1 and the accused.

9. The next eye-witness relied on by the prosecution is Suresh Chandra - PW-3. In his evidence, he has stated that PW-1 belongs to his own village and at the time of the incident, his daughter was aged about 11 years. He also admitted that even the accused-Munesh belongs to their village. Like PW-2, PW-3 also mentioned that the occurrence took place on 05.03.2002, between 4.30 to 5.00 p.m. He further stated that

he along with PW-2 was passing through their field and when they reached near the tube-well of Jalil Khadar, they heard shrieking sound, due to which, they rushed towards the said direction. They saw Munesh-accused has already got down Roshni, due to which, they shouted at him. In the meanwhile, the accused put around her neck a noose of her chunni (dupatta) and tightened it by pulling. Thereafter, he ran away towards the south. Like PW-2, he also chased him but the accused could not be caught. When they returned back, they saw that she was lying naked on the ground. Her salwar and underwear were lying near her body. Her vaginal area had bleeding and her hands were full of cow-dung. Thereafter, they informed the same to Kanchhi Lal – PW-1, father of the deceased. Like PW-2, he also identified the accused in the Court. Even in the cross-examination, he asserted that when they saw her at the first instance itself, a noose was tied around her neck and the accused was holding both the ends of the said noose and was pulling it to tighten it around her neck. He denied the suggestion that in order to support the family of the deceased, he was making a false statement. Here again, the counsel pointed out certain discrepancies in the statement before the police officer and his evidence before the Court. We have carefully verified the same and we are satisfied that the alleged contradictions are trivial in nature and have not affected the case of the prosecution.

10. The High Court, taking note of minor discrepancies, particularly, their statements recorded by the I.O. and their evidence before the Court, disbelieved their version. We are satisfied that the High Court has committed an error in rejecting their evidence. We have already stated that they are independent witnesses and witnessed the occurrence at a short distance and there is no reason to disbelieve their version.

11. Now, let us see the evidence of PW-1, father of the victim. It is true that he is not an eye-witness but his statement corroborates with the statements made by PW-2 and PW-3. It

is his evidence that the deceased-Roshni was his daughter and she was aged about 11 years at the time of occurrence. He further deposed that on 05.03.2002, at about 4.30 p.m., she went alone to the place of cremation ground of Jatavs' for preparing cow-dung cakes. At that time, Munesh-the accused who also belongs to his village forcibly dragged her with bad intentions to the wheat field of Jalil Khadar. He also stated that on hearing the cries of her daughter, Madanlal (PW-2) and Suresh Chandra (PW-3), who were passing through nearby the field, shouted at him and tried to catch hold of him. He also explained how PWs 2 and 3 chased the accused and informed about the incident to him. Thereafter, according to him, he rushed to the spot along with the villagers and saw that his daughter was not only lying in naked condition but her chunni was also lying around her neck as a noose. After searching for the accused in his village and after finding that he was not traceable, he submitted the written complaint to the P.S. Khurja Junction which is Exh. A-1. He also identified the accused who was present in the dock. He denied the allegation that he falsely implicated the accused due to some election dispute. There is no reason to disbelieve the version of PW-1 and the trial court has rightly relied on him along with the statements of eye-witnesses PWs 2 and 3. Unfortunately, the High Court has rejected his evidence also on flimsy ground.

12. Coming to the next contention about the delay in lodging of the FIR, it is not in dispute that the incident occurred at 4.30 p.m. on 05.03.2002 and the complaint was made by PW-1 at 11.05 p.m. on the same day itself. It has also come in evidence that the distance between the place of incident and the police station is 2 kms. Though the High Court has commented that there was delay in lodging the complaint, it must be noted that PW-1 - father of the victim is a villager and on hearing the incident through PWs 2 and 3, he rushed to the spot, made arrangements to cover the body of his daughter, searched for some time to trace the accused, and thereafter, reached the P.S. which is at a distance of 2 kms. at 11.05 p.m.

If we consider the entire incident as narrated by PW-1, it cannot be construed that there was any unreasonable and unexplained delay which goes to the root of the prosecution case. On the other hand, considering the materials placed, we hold that the delay has been properly explained by PW-1, even otherwise, the same cannot be construed as abnormal as erroneously observed by the High Court.

13. Though it is stated that all the details as spoken to by PWs 1, 2 and 3 were not mentioned in the FIR, as rightly observed by the trial Court, FIR is not an encyclopedia. It is just an intimation of the occurrence of an incident and it need not contain all the facts related to the said incident.

14. Coming to the contention about variance in the statement recorded by I.O. under Section 161 of the Code and the evidence before the Court, we have already expressed that the contradictions are not much and the same have not affected the prosecution story. It is to be noted that the statement before the I.O. and the statement before the Court were made after some interval and there is bound to be some variance in the statements. After verification of both the statements, we are satisfied that the omission is not much and not fatal to the prosecution case and it should not prejudice prosecution evidence. Accordingly, we reject the stand taken by the counsel for the accused. We have already concluded that the evidence of both the eye-witnesses, viz., PWs 2 and 3 are not only reliable but they are independent witnesses. Further, in the absence of any previous enmity with the accused, the question of falsely implicating the accused does not arise.

15. Finally, let us consider the evidence of the doctor who conducted the post mortem on the body of the deceased. Dr. Awdesh Kumar (PW-4) attached to District Hospital, Bulandshahar, in his evidence has stated that on 06.03.2002 Constables Jagat Singh and Usman brought the dead body of Kum. Roshni, daughter of Kanchhi Lal along with the relevant papers, specimen seal impression etc., for conducting post

mortem examination of the dead body. Both of them also identified the said dead body before him. He compared the seal stamped on the dead body package and found it to be correct and packing too was found to be in tact. He further deposed that at 3.30 p.m. on 06.03.2002, he conducted the post mortem on the dead body. The age of the deceased Roshini was about 11 years and she was of average physical built-up by appearance. He noted the following ante-mortem injuries on the dead body of the victim-Roshni.

> "1. Ligature marks 20 cm x 2.5 cm all around neck and also on that part of lower neck below thyroid cartilage.
>
> 2. Multiple linear abrasions on the back of left leg wholly, in its back side of sizes varying in between 10 cm to 3 cm. The face was congested and on her private part, blood was visible.
>
> In her internal examination, it was found that brain and membranes of the brain, both long sacks, trachea, liver tissues, kidney were found to be congested. Hyoid of neck was found to have been fractured. Her hymen has been ruptured. Its smear slide was prepared. It was then sent for pathological examination."

In his opinion, the cause of the death of the deceased was due to asphyxia due to strangulation and also due to pre-mordial injuries. The post mortem report was marked as Exh. A-2. For a specific question, PW-4 has stated that "prior to her death, the deceased was raped and due to that reason only, her hymen has been found to be ruptured". The above conclusion of PW-4 fully supports the case of the prosecution that the deceased was raped before strangulation. He also stated that blood was seen in the vagina of the deceased and her hymen was found to have been ruptured.

16. Mr. Mani has pointed out that in the absence of the report of Sperm Detection Test, the conclusion regarding rape

cannot be accepted. It is true that PW-4 has stated that the slide containing sperms which had been sent for examination has not returned so far along with the examination report. In the absence of such a report, the case of the prosecution cannot be doubted about rape, particularly, in the light of categorical findings of the doctor that her hymen was found to have been ruptured. The other prosecution witnesses have also stated injury on her private part and oozing of blood. The medical evidence proved that the victim was raped before her death and she died on 05.03.2002. In other words, the prosecution story is fully corroborated with the medical evidence on record and, unfortunately, the High Court failed to give importance to the said evidence.

17. The I.Os PWs 6 and 7 prepared panchnama Exh. No. A-5 and related papers which are Exh. Nos. A-6 to A-9. Exh. No. A-10 contains the list of articles confiscated by the I.O. viz., Salwar, panty and Hawai slippers which are marked as material object Nos. 1 to 3. PW-6 has prepared a spot map which is Exh. A-11.

18. Finally, learned counsel for the respondent submitted that failure to recover chunni (dupatta) which was alleged to have been used for pressing the neck goes against the prosecution case. It is true that the prosecution has not collected the same but, in the light of the material objects, the evidence of prosecution witnesses, statement of the doctor who conducted the post mortem, his opinion etc. amply prove the prosecution case and we reject the claim of the counsel for the respondent.

19. The primary concern both at national and international level is about the devastating increase in rape cases and cases relating to crime against women in the world. India is no exception to it. Although the statutory provisions provide strict penal action against such offenders, it is for the Courts to ultimately decide whether such incident has occurred or not. The Courts should be more cautious in appreciating the

evidence and the accused should not be left scot-free merely on flimsy grounds. In the instant case, the accused had committed rape, which repels against moral conscience as he chose a girl of 11 years to satisfy his lust and subsequently murdered her.

20. In the light of the acceptable materials in the form of oral and documentary evidence led in by the prosecution, particularly, the eye-witnesses PWs 2 and 3 who are independent witnesses coupled with the evidence of the doctor (PW-4), we accept the conclusion of the trial court and disagree with the conclusion of the High Court. The analysis and the ultimate conclusion of the High Court is contrary to the acceptable and reliable material placed by the prosecution and we hold that the accused has first committed the offence of rape and then murdered the deceased. We are satisfied that the prosecution has established both the charges under Sections 376 and 302 of IPC.

21. In view of the same, the conclusion arrived by the High Court is set aside. Taking note of the fact that the incident occurred in the year 2002, we feel that rigorous imprisonment for life would meet the ends of justice.

22. In view of the same, the respondent-accused is directed to surrender before the concerned authority/Court within a period of two weeks failing which the trial Judge is directed to take necessary effective steps for sending him to prison. The appeal preferred by the State is allowed.

B.B.B. Appeal allowed.

PRATAPBHAI HAMIRBHAI SOLANKI
v.
STATE OF GUJARAT AND ANOTHER
(Criminal Appeal No. 1649 of 2012)

OCTOBER 12, 2012

[K. S. RADHAKRISHNAN AND DIPAK MISRA, JJ.]

CODE OF CRIMINAL PROCEDURE, 1973:

s.439 - Bail - An RTI activist who had exposed illegal activities of appellant and others, got killed through a contract killer - Charge-sheet filed - Court of Session and High Court declining bail to appellant - In the instant appeal, after the judgment had been reserved, order dated 25.9.2012 passed by High Court entrusting the matter to CBI for further investigation, brought to the notice of the Court - Held: On a perusal of the order dated 25.9.2012, it is demonstrable that the High Court has expressed its dissatisfaction with regard to the investigation conducted by the investigating agency - At this stage, as there is a direction for fresh investigation, it would be inapposite to enlarge the appellant on bail - Penal Code, 1860 - ss. 120-B and 302.

s.439 - Granting of bail - Parameters - Explained.

PENAL CODE, 1860:

s.120-A - Criminal conspiracy - Essence of - Explained.

An FIR was registered on 20.7.2010 against two persons alleging that they came on a motorcycle and shot dead an RTI activist. The investigation was entrusted to State CID (Crime). The appellant was arrested on 7.9.2010. A charge sheet for offences punishable u/ss 302, 201 and 120-B IPC and ss.25(1)(b) and 27 Arms Act was filed in court. The bail applications filed by appellant were

rejected by the Sessions Judge. The application for bail filed by the appellant before the High Court was resisted by the prosecution on the ground that the deceased was an RTI activist and had exposed illegal activities of the appellant accused no. 4 and, therefore, he hatched a conspiracy with accused no. 1 to eliminate the deceased, which ultimately resulted in hiring accused no. 2, a contract killer on payment of Rs. 11 lakhs; that there were various call details and contacts made by the accused with accused no. 2 who had absconded; that fake SIM cards were provided by the appellant to other accused to hide their identity. The High Court declined the bail.

In the instant appeal, after the judgment had been reserved, the counsel for the State filed a copy of the order dated 25.9.2012 passed by the High Court expressing its dissatisfaction with regard to the investigation conducted by the investigating agency, and entrusting the matter to CBI to expeditiously undertake further investigation.

Disposing of the appeal, the Court

HELD: 1.1 It is obligatory on the part of court to scan and scrutinize, though briefly, as regards the prima facie case, the seriousness and gravity of the crime and the potentiality of the accused to tamper with evidence apart from other aspects before the restriction on liberty is lifted on imposition of certain conditions. [para 19] [572-D]

State v. Capt. Jagjit Singh **(1962) 3 SCR 622 and** *Gurcharan Singh v. State (Delhi Admn.)* **1978 (2) SCR 358 = 1978 (1) SCC 118** *Jayendra Saraswathi Swamigal v. State of T.N.* **2005 (1) SCR 160 = 2005 (2) SCC 13;** *Prahlad Singh Bhati v. NCT, Delhi and Another* **2001 (2) SCR 684 = 2001 (4) SCC 280;** *State of U.P. through C.B.I. v. Amarmani Tripathi* **2005 (3) SCR 12 = 2005 (4) SCC 21;** *Ash Mohammad v. Shiv Raj Singh @ Lalla Babu & Anr.* **JT 2012**

(9) SC 155 - referred to.

1.2 The essence of criminal conspiracy is an agreement to do an illegal act and such an agreement can be proved either by direct evidence or by circumstantial evidence or by both, and it is a matter of common experience that direct evidence to prove conspiracy is rarely available. Therefore, the circumstances proved before, during and after the occurrence have to be considered to decide about the complicity of the accused. In the instant case, there is no denial of the fact that the deceased was an RTI activist and extremely keen in exposing certain matters which pertain to illegal mining and many other such arenas. It is not in dispute that the deceased was murdered at the stated time and place. The appellant is a dealer in mobile phones and there is some material on record that he had handed over mobile phones to his friend who is a police constable and owns mines; and that a call has been traced from the mobile phone of the contract killer to the appellant. [para 23-24] [574-E-H; 575-A-B]

Damodar v. State of Rajasthan **2003 (3) Suppl. SCR 904 = 2004 (12) SCC 336;** *Kehar Singh v. State (Delhi Admn.)* **1988 (2) Suppl. SCR 24 = 1988 (3) SCC 609;** *State of Maharashtra v. Somnath Thapa* **1996 (1) Suppl. SCR 189 = 1996 (4) SCC 659;** *Ram Narayan Popli v. Central Bureau of Investigation* **2003 (1) SCR 119 = 2003 (3) SCC 641 - referred to.**

1.3 On a perusal of the order dated 25.9.2012, it is demonstrable that the High Court has expressed its dissatisfaction with regard to the investigation conducted by the investigating agency. It has called it perfunctory. After ascribing reasons, it has directed the C.B.I. to expeditiously undertake further investigation. Legality of the said order is not the subject matter of challenge in the

instant case. It has only been brought to the notice of the Court that C.B.I. has been directed to conduct a comprehensive investigation. At this stage, suffice it to say, as there is a direction for fresh investigation, it should be inapposite to enlarge the appellant on bail. [para 26] [578-C-E]

1.4 It may be clarified that the Court has not expressed final opinion on entitlement of the appellant to be released on bail or not because of the subsequent development i.e. direction by the High Court for comprehensive investigation by the CBI. However, in case the order for reinvestigation is annulled by this court, it would be open for the appellant to file a fresh application for bail before the competent Court. If the order of the High Court withstands scrutiny, after the CBI submits its report, liberty is granted to the appellant to move the appropriate court for grant of bail. [para 26] [578-F-G]

Case Law Reference:

(1962) 3 SCR 622	referred to	para 15
1978 (2) SCR 358	referred to	para 15
2005 (1) SCR 160	referred to	para 15
2001 (2) SCR 684	referred to	para 16
2005 (3) SCR 12	referred to	para 17
JT 2012 (9) SC 155	referred to	para 18
2003 (3) Suppl. SCR 904	referred to	para 18
1988 (2) Suppl. SCR 24	referred to	para 21
1996 (1) Suppl. SCR 189	referred to	para 21
2003 (1) SCR 119	referred to	para 22

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1649 of 2012.

From the Judgment & Order dated 26.07.2011 of the High Court of Gujarat at Ahmedabad in Criminal Misc. Application No. 9576 of 2011.

Mukul Rohatgi, V.K. Bali, Sujay N. Kantawala, Saurabh Kirpal, Sanjay Agarwal, Karan Bharioke, Alpesh Kogje, Dr. G.K. Sarkar, Malabika Sarkar, Rakesh Dahiya, Hemantika Wahi, Jesal, Nandani Gupta, Kamini Jaiswal, Mohit D. Ram, Meenakshi Arora for the Appearing Parties.

The Judgment of the Court was delivered by

DIPAK MISRA, J. 1. Leave granted.

2. Grieved by the order of rejection of prayer for bail for offences punishable under Sections 302, 201 and 120-B of the Indian Penal Code, 1860 (for short 'the IPC') and under Sections 25(1)(b) and 27 of the Arms Act, 1959 in Criminal Misc. Application No. 9576 of 2011 dated 26.7.2011 by the High Court of Gujarat at Ahmedabad, the appellant, accused No. 4, has preferred the present appeal by special leave under Article 136 of the Constitution.

3. The appellant was arraigned as an accused in crime/ F.I.R. No. 163/2010 for the aforesaid offences and the investigation was conducted by the CID (Crime), Ahmedabad. The prosecution case, in brief, is that an FIR was registered against two persons on 20th of July, 2010 about 8.40 pm. They came on a Bajaj motorcycle having registration No. GJ-1-DQ-2482. At the corner of "Satyamev Complex-I", Opposite Gujarat High Court at S.G. Highway, they fired at one Amitbhai Bhikhabhai Jethwa from their country made revolver on the left part of his back and caused injuries to which he succumbed and they immediately disappeared from the scene of occurrence. After the criminal law was set in motion, the investigating agency commenced investigation and after

completion, placed the charge-sheet before the competent court.

4. During pendency of investigation, an application was filed before the learned Session Judge for grant of bail contending, inter alia, that the name of the appellant was not found in the FIR; that he had no nexus with the commission of crime; that the case of the prosecution that he had conspired for murder of the deceased who was an RTI activist was absolutely incredulous inasmuch as the allegations against the appellant were totally vague and, in fact, had been deliberately made to destroy his unblemished public image, for he had been in public life for so many years; that the material brought on record in no way implicated the appellant in the crime in question and, therefore, he was entitled to bail. The learned trial Judge, analysing the material on record, declined to enlarge the appellant on bail. Be it noted, after the charge-sheet was filed the doors of the learned trial Judge were again knocked at but the same did not meet with success.

5. As the factual narration would exposit, the accused-appellant filed Criminal Miscellaneous Application No. 2847 on 30th March, 2011 before the High Court for grant of bail, but the same was withdrawn. Thereafter, the appellant filed Criminal Misc. Application No. 7505 of 2011 seeking temporary bail on the ground that his wife had suffered from acute gynaec problem and she needed to undergo surgery for Fibroid in the Uterus and regard being had to the said assertion the High Court granted temporary bail for a period of 21 days.

6. As is manifest from the material brought on record, the informant, after completing his duty about 8.00 p.m., was returning to his house on a motorcycle. He went to "Satyamev Complex" with his friend, Bhupatisinh, for the purpose of having tea and then they heard a gun shot sound and they rushed to the place where the firing took place. They found that one Bajaj motorcycle No. GJ-1-DQ-2482, one country made pistol and a plastic bag were lying on the road. They also saw a white colour

Maruti Gypsy. The informant, who was a constable, informed his superior inspector on his mobile phone and gathered information from the public around. They were informed that two persons after firing drove towards Viswas City Road. The emergency ambulance was called for and the staff after examining the injured person declared him dead. The advocate present there identified the deceased to be Amitkumar Jethwa, an RTI activist. In course of investigation, the appellant was arrested on 7.9.2010.

7. Thereafter, as the factual matrix is uncurtained, the appellant preferred bail application under Section 439 of the Code of Criminal Procedure, 1973 forming the subject-matter of Crl. Application No. 9576 of 2011. It was urged before the High Court that the appellant, for no justifiable reasons, had remained in custody since 7.9.2010 and the charge-sheet had been filed under Sections 302, 201 and 120-B of the IPC solely on the basis of the statement of Abhesinh Kesarsinh Zala, a Peon serving in the office of the appellant. It was also canvassed that there was no iota of material to rope him in the crime and a maladroit effort had been made to demolish his political career and demolish his social image.

8. It was further urged that the first application for bail having been withdrawn, there was no bar to entertain and dispose of second bail application on merits in favour of the accused-appellant; that the appellant is a childhood friend of accused, Bahadursinh Vadher, a police constable, having business of mines and he is engaged in the business of mobile towers and had held the post of the ex-President of Kodinar Nagar Palika and Vice-President at the time of incident and had been roped in such a crime solely on the base that the accused-Bahadursinh had met him at his office in Kodinar where allegedly a conspiracy was hatched to eliminate the deceased, which was sans substance; that as far as theory of conspiracy is concerned, nothing had been remotely brought on record to justify the allegations; and that the charge-sheet had been filed; and, therefore, he was entitled to be enlarged on bail. It was propounded that a singular telephonic call from the mobile the voice of which was not recorded, could not form the fulcrum of the prosecution to book the appellant in the crime and further the case has been fabricated with the sole intention to systematically smother the liberty of a law abiding individual.

9. The application for bail was resisted by the learned counsel for the prosecution on the ground that the deceased was the President of Gir Nature Youth Club, an NGO and also Editor of a magazine "Around the Nature" and an active RTI activist. He had found the appellant to be involved in number of illegal activities and had exposed him in number of ways as a consequence of which he had hatched the conspiracy with the accused No. 1 which ultimately resulted in hiring of accused No. 2 as a contract killer on payment of Rs.11 lakhs to eliminate him. The learned counsel also contended that there were various call details and contacts made by the accused, particularly, with accused No. 2 who had absconded; that fake SIM cards were provided by the appellant to hide their identity; that the appellant had criminal antecedents; that no leniency should be shown despite the plea advanced as regards the social reputation; that the factum of conspiracy is quite complex and the prosecution had been able to gather the connecting materials which would go a long way to show involvement of the appellant and hence, it was not a fit case where discretion for grant of bail should be exercised.

10. The learned single Judge, considering the rival submissions advanced at the Bar came to hold that the conspiracy between the accused No. 4 and the accused No. 1 was obvious from the number of visits of accused No. 1 to the office of accused No. 4; that there was conversation between the accused No. 4, the appellant herein, and the sharp-shooter, a person who had absconded and that itself prima facie showed the involvement of the accused-appellant. The High Court taking note of all the aspects including the gravity of the offence declined to admit the appellant to bail.

11. We have heard Mr. Mukul Rohatgi, learned senior counsel for the appellant, Ms. Hemantika Wahi, learned counsel for the State of Gujarat and Ms. Kamini Jaiswal and Mr. Mohit D. Ram, learned counsel for respondent No. 2.

12. Mr. Rohatgi, learned senior counsel for the appellant, accused No. 4, has submitted that the reliance on the statement of the peon who had only mentioned that accused No. 1 Bahadursinh, was a frequent visitor to the office of the appellant, but he had not been able to hear any conversation because of glass doors, makes the impugned orders sensitively unsustainable as such kind of statement does not render any assistance to the prosecution case. He would further submit that the allegation that the appellant provided the finance in hiring the contract killer has no semblance of truth inasmuch as it is manifest from the statement of Amarsinh, the brother of Bahadursinh, that he had given rupees nine lakhs in cash to his brother for purchase of land in Kodinar area and thus, the appellant had no involvement with the alleged financing. It is his submission that the voice in the mobile phone was not recorded and only a singular call was made by the accused No. 2 and such a stray incident cannot even suggest in the remotest manner any kind of conspiracy and, therefore, regard being had to the period of incarceration, he should be enlarged on bail.

13. Ms. Hemantika Wahi, learned counsel for the State of Gujarat, resisting the application for grant of bail, submitted that the conspiracy is always hatched in secrecy and there are series of circumstances from which the involvement of the accused-appellant is evincible and, that apart, the material on record would reveal that the appellant was in constant connection with the accused No. 1, who was facing a lot of disadvantage because of the pro-active crusade undertaken against his illegal activities by the deceased, an RTI activist, by filing PILs. It is also urged by her that the deceased had been able to expose the involvement of the appellant in many an illegal operations and, therefore, the High Court has correctly declined to entertain the prayer for bail.

14. Ms. Kamini Jaiswal and Mr. Mohit D. Ram, learned counsel for the respondent No. 2, the father of the deceased, have supported the stand of the State.

15. At this juncture, we may refer with profit to certain authorities which lay down the considerations that should weigh with the Court in granting bail in non-bailable offences. This Court in *State v. Capt. Jagjit Singh*[1] and *Gurcharan Singh v. State (Delhi Admn.)*[2] has held that the nature and seriousness of the offence; the character of the evidence; circumstances which are peculiar to the accused; a reasonable possibility of the presence of the accused not being secured at the trial; reasonable apprehension of witnesses being tampered with; the larger interest of the public or the State and other similar factors which may be relevant in the facts and circumstances of the case are to be considered. The said principles have been reiterated in *Jayendra Saraswathi Swamigal v. State of T.N.*[3].

16. In *Prahlad Singh Bhati v. NCT, Delhi and Another*[4], this Court has culled out the principles to be kept in mind while granting or refusing bail. In that context, the two-Judge Bench has stated that while granting the bail, the court has to keep in mind the nature of accusations, the nature of evidence in support thereof, the severity of the punishment which conviction will entail, the character, behaviour, means and standing of the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial, reasonable apprehension of the witnesses being tampered with, the larger interests of the public or State and similar other considerations. It has also to be kept in mind that for the purposes of granting the bail the legislature has used the words "reasonable grounds for believing" instead of "the

1. (1962) 3 SCR 622.
2. (1978) 1 SCC 118.
3. (2005) 2 SCC 13.
4. (2001) 4 SCC 280.

evidence" which means the court dealing with the grant of bail can only satisfy it as to whether there is a genuine case against the accused and that the prosecution will be able to produce prima facie evidence in support of the charge. It is not expected, at this stage, to have the evidence establishing the guilt of the accused beyond reasonable doubt.

17. In *State of U.P. through C.B.I. v. Amarmani Tripathi*[5], while emphasizing on the relevant factors which are to be taken into consideration, this Court has expressed thus: -

> "While a vague allegation that the accused may tamper with the evidence or witnesses may not be a ground to refuse bail, if the accused is of such character that his mere presence at large would intimidate the witnesses or if there is material to show that he will use his liberty to subvert justice or tamper with the evidence, then bail will be refused."

In the said case, the Bench has also observed as follows: -

> "Therefore, the general rule that this Court will not ordinarily interfere in matters relating to bail, is subject to exceptions where there are special circumstances and when the basic requirements for grant of bail are completely ignored by the High Court."

18. Recently, in *Ash Mohammad v. Shiv Raj Singh @ Lalla Babu & Anr.*[6], this Court while dealing with individual liberty and cry of the society for justice has opined as under: -

> "It is also to be kept in mind that individual liberty cannot be accentuated to such an extent or elevated to such a high pedestal which would bring in anarchy or disorder in the society. The prospect of greater justice requires that law and order should prevail in a civilized milieu. True it

5. (2005) 8 SCC 21.

6. JT 2012 (9) SC 155.

> is, there can be no arithmetical formula for fixing the parameters in precise exactitude but the adjudication should express not only application of mind but also exercise of jurisdiction on accepted and established norms. Law and order in a society protect the established precepts and see to it that contagious crimes do not become epidemic. In an organized society the concept of liberty basically requires citizens to be responsible and not to disturb the tranquility and safety which every well-meaning person desires."

19. We are absolutely conscious that liberty is a greatly cherished value in the life of an individual, and no one would like to barter it for all the tea in China, but it is obligatory on the part of court to scan and scrutinize, though briefly, as regards the prima facie case, the seriousness and gravity of the crime and the potentiality of the accused to tamper with the evidence apart from other aspects before the restriction on liberty is lifted on imposition of certain conditions.

20. The submission of Mr. Rohtagi is that there is total absence of material to connect the appellant with the crime in question but due to maladroit endeavour of the prosecution he has been falsely implicated. The learned senior counsel would emphatically urge that certain visits by a friend of accused No. 1, a singular telephone call and filing of a public interest litigation where the appellant is not involved cannot form the foundation of a prima facie case relating to conspiracy.

21. At this stage, it is useful to recapitulate the view this Court has expressed pertaining to criminal conspiracy. In *Damodar v. State of Rajasthan*[7], a two-Judge Bench after referring to the decision in *Kehar Singh v. State (Delhi Admn.)*[8], *State of Maharashtra v. Somnath Thapa*[9], has stated thus: -

7. (2004) 12 SCC 336.

8. (1988) 3 SCC 609.

9. (1996) 4 SCC 659.

"The most important ingredient of the offence being the agreement between two or more persons to do an illegal act. In a case where criminal conspiracy is alleged, the court must inquire whether the two persons are independently pursuing the same end or they have come together to pursue the unlawful object. The former does not render them conspirators but the latter does. For the offence of conspiracy some kind of physical manifestation of agreement is required to be established. The express agreement need not be proved. The evidence as to the transmission of thoughts sharing the unlawful act is not sufficient. A conspiracy is a continuing offence which continues to subsist till it is executed or rescinded or frustrated by choice of necessity. During its subsistence whenever any one of the conspirators does an act or series of acts, he would be held guilty under Section 120-B of the Indian Penal Code."

22. In *Ram Narayan Popli v. Central Bureau of Investigation*[10], while dealing with the conspiracy the majority opinion laid down that the elements of a criminal conspiracy have been stated to be: (a) an object to be accomplished, (b) a plan or scheme embodying means to accomplish that object, (c) an agreement or understanding between two or more of the accused persons whereby, they become definitely committed to cooperate for the accomplishment of the object by the means embodied in the agreement, or by any effectual means, and (d) in the jurisdiction where the statute required an overt act. It has been further opined that the essence of a criminal conspiracy is the unlawful combination and ordinarily the offence is complete when the combination is framed. No overt act need be done in furtherance of the conspiracy, and that the object of the combination need not be accomplished, in order to constitute an indictable offence. Law making conspiracy a crime is designed to curb immoderate power to do mischief which is gained by a combination of the means. The encouragement and

10. (2003) 3 SCC 641.

support which co-conspirators give to one another rendering enterprises possible which, if left to individual effort, would have been impossible, furnish the ground for visiting conspirators and abettors with condign punishment. The conspiracy is held to be continued and renewed as to all its members wherever and whenever any member of the conspiracy acts in furtherance of the common design. The two-Judge Bench proceeded to state that for an offence punishable under Section 120-B, the prosecution need not necessarily prove that the perpetrators expressly agree to do or cause to be done illegal act; the agreement may be proved by necessary implication. Offence of criminal conspiracy has its foundation in an agreement to commit an offence. A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act by unlawful means.

23. In the said case it has been highlighted that in the case of conspiracy there cannot be any direct evidence. The ingredients of offence are that there should be an agreement between persons who are alleged to conspire and the said agreement should be for doing an illegal act or for doing by illegal means an act which itself may not be illegal. Therefore, the essence of criminal conspiracy is an agreement to do an illegal act and such an agreement can be proved either by direct evidence or by circumstantial evidence or by both, and it is a matter of common experience that direct evidence to prove conspiracy is rarely available. Therefore, the circumstances proved before, during and after the occurrence have to be considered to decide about the complicity of the accused.

24. The present factual matrix is required to be tested on the aforesaid touchstone of law. There is no denial of the fact that the deceased was an RTI activist and extremely keen in exposing certain matters which pertain to illegal mining and many other such arenas. It is not in dispute that the deceased was murdered about 8.30 p.m. on the Public Road just opposite the High Court and near the corner of "Satyamev Complex-I"

where situates the office of Bar Council of Gujarat. The appellant is a dealer in mobile phones and there is some material on record that he had handed over mobile phones to his friend who is a police constable and owns mines; and that a call has been traced from the mobile of the contract killer to the appellant. Mr. Rohtagi would argue with vehemence that the aforesaid circumstances are sketchy and the prosecution has tried to rope the appellant in conspiracy basically on the ground that he had provided the finance but the said story does collapse like a pack of cards inasmuch as the accused No. 1 had taken a substantial sum from his brother towards his share in the profit from the family property. It is also borne out on record that the appellant is an influential man in the society and he claims to be a friend of a constable and has urged that as a friend he was visiting his office and nothing has been stated to have been heard by the office peon. It is argued with immense emphasis that the sketchy connection does not make out a prima facie case against the appellant and further there is no material to infer that he would tamper with evidence or would not make himself available for trial.

25. Ordinarily, we would have proceeded to express our opinion on the basis of analysis of the material available on record but, a pregnant one, after order was reserved, Ms. Arora, learned counsel appearing for respondent No. 2 filed an order dated 25.9.2002 passed by the Division Bench of the High Court of Gujarat in Special Criminal Application No. 1925 of 2010. On a perusal of the said order, it is luculent that the High Court after referring to its number of earlier orders and surveying the scenario in entirety has passed the following order:-

> "13. As discussed in detail in paragraphs 6, 7 and 9 herein, investigation into the murder of the petitioner's son does not appear to have been carried out in conformity with the legal provisions discussed in paragraph 11 and the control exercised by one police officer of a very high rank, all throughout and even after the orders for further investigation by this Court, provides sufficient ground to

> conclude that the investigation was controlled and the line of investigation was determined and supervised so as to put to naught the allegations made and the suspicion raised by the acquaintances and family members of the deceased. As discussed in detail earlier in paragraph 9, the investigation would hardly inspire confidence not only in the minds of the bereaved and aggrieved family members, but even general public on taking an objective view of the matter. On the other hand, the deceased having been an active RTI activist, so-many people whose vested interests may have been affected by his applications under the RTI Act, could have a motive to contribute into his killing. Therefore, a perfunctory investigation on the basis of statements of the accused persons themselves may not unearth the whole truth and meet the ends of justice. Therefore, it is imperative that proper and comprehensive investigation is undertaken by an agency which is not under the control of the State Government.
>
> 14. The Right to Information Act, 2005 declared in its Preamble that, whereas the Constitution of India has established democratic Republic and democracy requires an informed citizenry and transparency of information which are vital to its functioning and also to contain corruption and to hold Governments and their instrumentalities accountable to the governed; and to preserve the paramountcy of the democratic ideal, that it was enacted. The Constitutional powers conferred upon the highest judicial institution in the State to entertain public interest litigation and issue necessary direction was also a step forward in enforcing the fundamental rights of the citizens and ensuring the rule of law. These progressive steps cannot be allowed to be nullified and no one should face a threat to his life when he approaches a court of law to exercise his right of access to justice. In such milieu, murder of a petitioner in a PIL and an RTI activist, in front of the High Court, could be read as a clear message to the

concerned citizens that they may have to pay by their lives, if they insist upon using the tools placed in their hands by law and approach the Court for redressal of public grievance against some individuals. The commission of murder, in the facts of the present case, amounted to an affront to the judicial system and a challenge to implementation of an Act of Parliament, with national repercussions and has to be viewed seriously. Therefore, it is of utmost importance that the case on hand is thoroughly investigated and properly prosecuted by independent and competent officers, so as to inspire confidence and reaffirm faith of the people in rule of law.

15. In the facts and for the reasons discussed hereinabove, while concluding that the investigation into murder of the son of the petitioner was far from fair, independent, bona fide or prompt, this Court refrain from even remotely suggesting that the investigating agency should or should not have taken a particular line of investigation or apprehended any person, except in accordance with law. It is clarified that the observations made herein are only for the limited purpose of deciding whether further investigation was required to be handed over to CBI, and they shall not be construed as expression of an opinion on any particular aspect of the investigation carried out so far. However, in view of the peculiar facts and circumstances, following the ratio of several judgments of the Apex Court discussed hereinabove and in the interest of justice and to instill confidence in the investigation into a serious case having far reaching implications that we order that further investigation into I-C.R.No. 163 of 2010 shall be transferred to the Central Bureau of Investigation (CBI), with the direction that the CBI shall immediately undertake an independent further investigation, and all the officers and authorities under the State Government shall co-operate in such investigation so as to facilitate submission of report of investigation by the CBI as early as practicable and preferably within a period of six months. The police

authorities of the State are directed to hand over the records of the present case to the CBI authorities within ten days and thereafter the CBI shall take up comprehensive investigation in all matters related to the offence and report thereof shall be submitted to the Court of competent jurisdiction and, in the meantime, further proceeding pursuant to the charge-sheets submitted by respondent No. 5 shall remain stayed."

26. On a perusal of the aforesaid order, it is demonstrable that the High Court has expressed its dissatisfaction with regard to the investigation conducted by the investigating agency. It has called it perfunctory. After ascribing reasons, it has directed the C.B.I. to expeditiously undertake further investigation. We may hasten to add that the legal propriety of the said order is not the subject matter of challenge in the present appeal. It has only been brought to our notice that C.B.I. has been directed to conduct a comprehensive investigation. Needless to state, it is open to the appellant to challenge the legal substantiality of the said order. But for the present, suffice it to say, as there is a direction for fresh investigation, it should be inapposite to enlarge the appellant on bail. We may add that in case the order for reinvestigation is annulled by this Court, it would be open for the appellant to file a fresh application for bail before the competent Court. If the order of the High Court withstands scrutiny, after the C.B.I. submits its report, liberty is granted to the appellant to move the appropriate court for grant of bail. We may clarify that though we have narrated the facts, adverted to parameters for grant of bail under Section 439 of the Code, dwelled upon the view of this Court relating to criminal conspiracy and noted the submissions of the learned counsel for the parties, we have not expressed our final opinion on entitlement of the appellant to be released on bail or not because of the subsequent development i.e. direction by the High Court for comprehensive investigation by the C.B.I.

27. The appeal, is accordingly, disposed of.

R.P. Appeal disposed of.

PUBLIC UNION FOR CIVIL LIBERTIES
v.
STATE OF TAMIL NADU & ORS.
(Writ Petition (Civil) No. 3922 of 1985)

OCTOBER 15, 2012

[K.S. RADHAKRISHNAN AND DIPAK MISRA, JJ.]

BONDED LABOUR SYSTEM (ABOLITION) ACT, 1976:

ss. 10, 11 and 12 - Bonded labour - Abolition of - Rehabilitation of freed bonded labourers - Directions issued to States/Union Territories to conduct periodical surveys in accordance with provisions of the Act, to calculate firm requirement of funds for rehabilitation of freed bonded labourers and to take steps to enhance the rehabilitation package - States and UTs should continue to submit six monthly reports to NHRC and the latter would effectively supervise and take appropriate steps for carrying out the provisions of the Act and directions issued by the Court - Right of Children to Free and Compulsory Education Act, 2009 - Minimum Wages Act, 1948, Workmen's Compensation Act, 1923 - Inter State Migrant Workmen Act, 1979 - Child Labour (Prohibition and Regulation) Act, 1986 - Public interest litigation.

The instant writ petition was filed as public interest litigation in order to seek checking the practice of bonded labour and to rehabilitate the victims of such practice. The Court gave various directions including the setting up of Vigilance Committees, for the purpose of identifying and freeing the bonded labourers and to draw up a scheme or programme for a better and more meaningful rehabilitation of the freed bonded labourers and to ensure implementation of the Bonded Labour System (Abolition) Act, 1976. The Court, while dealing with the

instant case, by an interim order dated 13.5.1994[1], gave various directions.By order dated 11.05.1997, the National Human Rights Commission was entrusted with the responsibility of monitoring and over-seeing the implementation of the directions issued by the Court as well as provisions of the 1976 Act in all the States and Union Territories. The Expert Group constituted by the NHRC submitted its Action Taken Report on 6.6.2001 and the Court by order dated 5.5.2004 gave further directions. The NHRC in its report stated that even though the guidelines on the methodology of identification of bonded labourers formulated by the Chairman of the Expert Group constituted in the year 2001-02 had been circulated to all the States/UTs but there was no evidence of their being adopted and implemented. The Court by its order dated 9.7.2010, directed all the States/UTs to file their response to the NHRC's report, and by orders dated 16.12.2010, 25.4.2011, 26.8.2011 gave further directions. The NHRC submitted its revised report dated 3.9.2011. It is noticed that the response from the States concerned to the said report was not satisfactory.

Disposing of the petition, the Court

HELD: 1.1 It is unnecessary to dilate the matter further. Suffice it to say that on 30.6.2011, in all 2780 cases involving about 1 lakh bonded labourers have been registered in the Commission and as on date, 841 cases are under consideration of the Commission. The NHRC also brought to the knowledge of this Court, specific complaints, which are pending for compliance before the Government of Andhra Pradesh and the Governments of West Bengal, Jharkhand, Bihar and NCT of Delhi. The NHRC has sought proper directions from this Court so that the States concerned would take steps for reporting compliance to NHRC at the earliest. [para 14] [595-F-G]

4. *Public Union For Civil Liberties vs. State of T.N.* 1994 (5) SCC 116.

1.2 Taking note of the previous orders passed by this Court apart from the directions already issued, the Court gives the following directions:

(1) Fresh surveys be conducted periodically once in three years in all the States/UTs in accordance with the provisions of the Act and the revised report, the findings of the survey should be made a part of a computerized data base available on the websites of all concerned.

(2) The responsibility of conducting the surveys is on the District Level Vigilance Committees and Sub Divisional Vigilance Committees of the States/UTs and such Committees should submit their reports to the NHRC. This should be done in every three years and Committees also should be reconstituted in every three years.

(3) Bonded labour, it may be noticed, is rampant in brick kilns, stone quarries, crushing mines, beedi manufacturing, carpet weaving, construction industries, agriculture, in rural and urban unorganized and informal sector, power looms and cotton handlooms, fish processing etc. The Vigilance Committees are directed to give more attention to these areas and take prompt action in case violation is noticed.

(4) Large numbers of children are working as domestic help in the urban, town and rural areas with no chance to go to schools even though the education from standard I to VIII is compulsory under the Right of Children to Free and Compulsory Education Act, 2009.

Local *Panchayats* and local bodies should identify such children and ensure that they get proper education.

(5) Many of the States/UTs are reporting NIL status with respect to existence of Bonded labourers. This might be due to the faulty methodology adopted by them for conducting such surveys. Guidelines on the methodology of identification of bonded labourers formulated by SR Shankaran, Chairman of the Expert Group constituted by the NHRC be followed and implemented by all the States/ UTs with suitable modifications to suit local conditions.

(6) All the States/UTs should calculate firm requirements of fund for rehabilitation of freed bonded labourers and steps be taken to enhance the rehabilitation package from the present limit of Rs.20,000.

(7) The District Magistrates are directed to effectively implement ss. 10, 11 and 12 of the Act and they are expected to discharge their functions with due diligence, with empathy and sensitivity, taking note of the fact that the Act is a welfare legislation.

(8) The District Magistrate and the State Government/UTs would see that the Minimum Wages Act, the Workmen's Compensation Act, the Inter- State Migrant Workmen Act, Child Labour (Prohibition and Regulation) Act are also properly and effectively implemented.

(9) Directions are issued to all Gram *Panchayats*, local bodies to report, in case they come

across any case of bonded labour, to the District Magistrate who will take appropriate follow up action under the Act.

(10) The States of Andhra Pradesh, West Bengal, Jharkhand, Bihar and the NCT of Delhi are directed to ensure compliance with orders passed by the NHRC as highlighted in its revised report.

(11) The States and the Union Territories should continue to submit 6 monthly reports to NHRC.

(12) All the States/UTs to constitute Vigilance Committee, if not already constituted within six months. [para 16] [597-F-H; 598-A-H; 599-A-G]

1.3 This Court has already given various directions in its order dated 5.5.2004 passed in Public Union for Civil Liberties, authorizing the NHRC to monitor the implementation of the provisions of the 1976 Act which are re-iterated and NHRC is directed to effectively monitor and implement the provisions of the Act. The orders passed by this Court, time to time, in writ petitions are to be duly complied with the NHRC, Union of India, States and UTs. [para 17] [599-H; 560-A-B]

Public Union for Civil Liberties v. State of Tamil Nadu & Ors. **2004 (2) Suppl. SCR 64 = (2004) 12 SCC 381 - referred to.**

1.4 The NHRC would take appropriate steps and effectively supervise for carrying out the directions issued by this Court and the provision of BLS (A) Act. If the States/UTs are not implementing the directions given by this Court, NHRC is free to move this Court for further orders. [para 18] [560-C-D]

Bandhua Mukti Morcha v. Union of India **1984 (2) SCR 67 = 1984 (3) SCC 161 (1984) 3 SCC 161,** *Neerja Chaudhary v. State of M.P.* **(1984) 3 SCC 243;** *P. Sivaswamy v. State of Andhra Pradesh* **1988 (2) Suppl. SCR 346 = (1988) 4 SCC 466 - cited.**

Case Law Reference:

1984 (2) SCR 67	**cited**	**para 2**
(1984) 3 SCC 243	**cited**	**para 2**
1988 (2) Suppl. SCR 346	**cited**	**para 2**
2004 (2) Suppl. SCR 64	**referred to**	**para 17**

CIVIL ORIGINAL JURISDICTION : Writ Petition (Civil) No. 3922 of 1985.

Under Article 32 of the Constitution of India.

A.K. Ganguli (A.C.), T.S. Doabia, Dr. Manish Singhvi, Anil Grover, Manjit Singh, AAG's, A. Mariarputham, A.G. Gopal Jain (A.C.), Ugra Shankar Prasad, Sunit Sharma, S.S. Rawat, S.W.A. Qadri, Vikas Bansal, Rashmi Malhotra, Kiran Bhardwaj, Md. Khairati, Anil Katiyar, S.N. Terdal, D.S. Mahra, R.K. Panigrahi, Shobha, V.N. Raghupathy, Sunil Fernandes, Vernika Tomar, Shanshank Kumar Lal, Deepika Ghatowar, Navnit Kumar (for Corporate Law Group), Kirti R. Mishra, Apurna Upmanyu, Liz Mahtew, Sana Hashmi, Milind Kumar, Anjani Kumar Dubey, Gopal Prasad, Vikas Upadhyay, B.S. Banthia, Aruna Mathur, Yusuf Khan (For Arputham Aruna & Co.), Noopur Singhal, Ranjan Mukherjee, S. Bhowmick, S.C. Ghosh, V.G. Pragasam, S.J. Aristotle, Prabhu Ramasubramanian, Anil Shrivastav, Rituraj Biswas, Pragyan Sharma, Hoshu Kayina, Gautam Dhamija, Hemantika Wahi, Jesal, Nandini Gupta, Kamal Mohan Gupta, Atul Jha, Sandeep Jha, Dharmendra Kumar Sinha, Khwairakpam Nobin Singh, Sapam Biswajit Meitei, Naresh K. Sharma, Anis Suhrawardy, Anuvrat Sharma, T.V. George, Jatinder Kumar Bhatia, Kuldip Singh, P.V.

Dinesh, Rajesh Shrivastava, Asha Gopalan Nair, Gopal Singh, P.V. Yogeswaran, Suresh Chandra Tripathy for the Appearing Parties.

The Judgment of the Court was delivered by

K.S. RADHAKRISHNAN, J. 1. Through this Public Litigation, the petitioner has brought to the notice of this Court tell-tale miseries of bonded labourers in our country and their exploitation and the necessity of identifying and checking the practice of bonded labour in this country and to rehabilitate those who are victims of this practice.

2. This Court, while interpreting the provision of the Bonded Labour System (Abolition) Act, 1976, (for short 'the BLS (A) Act) in the light of the constitutional provision like Article 23, The Minimum Wages Act 1948, Contract Labour (Regulation and Abolition) Act 1970, Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act 1979, The Mines Act 1952 gave various directions including the setting up of Vigilance Committees, District Magistrates, etc. for the purpose of identifying and freeing bonded labourers and to draw up a scheme or programme for a better and more meaningful rehabilitation of the freed bonded labourers and to ensure implementation of the BLS (A), Act, 1976. In *Bandhua Mukti Morcha v. Union of India* (1984) 3 SCC 161, *Neerja Chaudhary v. State of M.P.* (1984) 3 SCC 243 this Court took the view that failure to rehabilitate freed bonded labourers would violate Articles 21 and 23 of the Constitution. In *P. Sivaswamy v. State of Andha Pradesh* (1988) 4 SCC 466 this Court held that the grant of financial assistance by the States of Rs.738/- per family of the released bonded labourers was inadequate for rehabilitation. Court held that the States, employers have a duty to rehabilitate the released bonded labourers.

3. This Court, dealing while dealing with this case, passed an interim order dated 13th May, 1994, (reported in (1994) 5

SCC 116) and gave various directions which are as under:

"(1) To identify the bonded labourers and update the existing list of such bonded labourers as well as to identify the villages where this practice is prevalent.

(2) To identify the employers exploiting the bonded labourers and to initiate appropriate criminal proceedings against such employers.

(3) To extinguish/discharge any existing debt and or bonded liability and to ensure them an alternative means of livelihood.

(4) To appoint an independent body such as a local non-political social action group to collect independent information and details of-

(a) the prevalence of the exploitative practice of bonded labour and

(b) employers or their agents perpetrating the wilful violation of the law by encouraging and abetting the practice of bonded labour.

(5) To provide employment to such bonded labourers as agricultural workers at the prescribed minimum wage rate and/or provide the landless bonded labourers with agricultural land, with a view to ensure an alternative means of livelihood.

(6) To provide adequate shelter, food, education to the children of the bonded labourers and medical facilities to the bonded labourers and their families as part of a rehabilitation package.

(7) To ensure-

(a) regular inspection by the Labour Commissioner concerned to keep the contractors who have in the

past employed bonded labourers under watch,

(b) setting up of Vigilance Committees in each district,

(c) the District Magistrates concerned to send quarterly reports to the Supreme Court Legal Aid Committee or to any Commissioner appointed by the court for this purpose,

(d) the setting up of rural credit facilities such as grameen banks, cooperatives etc. from which short-term interest free loans can be availed without security, since the root cause of bonded labour seems to be the lack of availability of funds (credit through an institutional network).

(8) To initiate criminal prosecution against the contractors/ employers or their agents who engage bonded labour and employ children below the age of 14 without adequate monetary compensation by paying wages below the minimum wage rate, as prescribed under the Minimum Wages Act.

(9) To initiate criminal prosecution against those employers, contractors or their agents who make part payment of wages by way of Khesri dal which is known to cause permanent disability - lathyrites.

2. With specific reference to the State of Madhya Pradesh, this Hon'ble Court gave the following additional directions:

(i) To provide data to this Hon'ble Court in respect of prosecutions launched against various employers already identified in proceedings before this Hon'ble Court as having employed bonded labourers in the context of Harwaha System.

(ii) To investigate and provide data to this Hon'ble Court

in respect of the fate of those bonded labourers identified and allegedly freed from the Harwaha System.

(iii) To report the present extent of cultivation of Khesri dal within Rewa and Satna districts as well as such other districts in which it may also be cultivated.

(iv) To report the steps taken by the State Government to prohibit the cultivation and consumption of Khesri dal.

(v) To report the fate of persons already identified as suffering from lathyrites and the steps taken by the State Government to provide free medical aid and facilities to such persons.

(vi) To provide the steps taken, if any, for the rehabilitation of bonded labourers freed from the Harwaha System and the rehabilitation of persons suffering from lathyrites within the State of Madhya Pradesh."

3. All the State Governments should issue directions forthwith to the Collector and District Magistrate of each district for making the necessary compliance. We also direct that all the State Governments would file a detailed report supported by an affidavit of a Senior Officer indicating the manner and the extent to which these directions have been complied with and also indicating therein the programme drawn up for full implementation of these directions. The report of the State Governments should also contain the detailed information required to be furnished in accordance with these directions. These reports be filed by each State Government by the end of August 1994. The matter be listed in the first week of September 1994.

4. The Registry to ensure that a copy of this order is made available to each State Government through their standing counsel, in addition to Mr Kapil Sibal, Senior Advocate and the other learned counsel appearing in these matters."

4. The National Human Rights Commission (for short the 'NHRC') has been entrusted with the responsibility of monitoring and over-seeing the implementation of its directions as well as provisions of the BLS (A) Act in all the States and Union Territories vide this Court's order dated 11.05.1997. The Expert Group constituted by the NHRC submitted its Action Taken Report (ATR) on 6.6.2001 and this Court vide order dated 5.5.2004 reported in *Public Union for Civil Liberties v. State of Tamil Nadu & Ors.* (2004) 12 SCC 381 gave the following directions:

"1. All States and Union Territories must submit their status report in the form prescribed by NHRC every six months.

2. All the State Governments and Union Territories shall constitute Vigilance Committees at the district and sub-divisional levels in accordance with Section 13 of the Act, within a period of six months from today.

3. All the State Governments and Union Territories shall make proper arrangements for rehabilitating released bonded labourers. Such rehabilitation could be on land-based basis or non-land basis or skilled/craft-based basis depending upon the choice of bonded labourer and his/her inclination and past experience. If the States are not in a position to make arrangements for such rehabilitation, then it shall identify two philanthropic organisations or NGOs with proven track record and good reputation, with basic facilities for rehabilitating released bonded labourers within a period of six months.

4. The State Governments and Union Territories shall chalk out a detailed plan for rehabilitating released bonded labourers either by itself or with the involvement of such organisations or NGOs within a period of six months.

5. The Union and State Governments shall submit a plan within a period of six months for sharing the money under

the modified Centrally Sponsored Scheme, in the case where the States wish to involve such organisations or NGOs.

6. The State Governments and Union Territories shall make arrangements to sensitise the District Magistrate and other statutory authorities/committees in respect of their duties under the Act."

5. The NHRC later submitted yet another report on 10.8.2009 high-lighting the remedial steps to be taken for eradication of bonded labour and child labour in the country. The NHRC in its report stated that its officials had been conducting detailed reviews on the status of the implementation of the Act in the various States/Union Territories (UTs). The report stated that these reviews were forwarded by the NHRC to the respective States/UTs for the necessary follow up action, and they were required to submit ATR to the NHRC. The NHRC has stated as follows:

"ATRs have been received from most of the State Governments but as they were incomplete they had to be returned for clarification and furnishing additional information before they could be accepted by the Commission. These States are being reminded and this will continue till follow up action is completed. Repeat visits to a few States (Orissa, M.P., Chattisgarh, Jharkhand, Punjab, Rajasthan, Karnataka and Bihar) have to be undertaken as the track record of compliance with the directions issued by the Commission is considered to be unsatisfactory by these States."

6. A review noticed that the States/UTs were supposed to receive assistance to the tune of Rs.2 Lakh per district once every 3 years for conducting surveys. However surveys had been conducted only a few States, that too in respect of only a few selected areas. Further, it was also noted that in many instances bonded labourers were found and reported, the

district administration had relented and dropped the cases. The NHRC in its report cited the instances of Tamil Nadu to the following effect:

> "….. to illustrate, in Tamil Nadu, 25000 cases out of 38,886 (cases of) bonded labourers identified were dropped leaving only 13,886 bonded labourers;
>
> ….. in Malkangiri district (which falls in the KBK region) a survey was conducted in 2001-02 with the help of NGO's (where) 707 bonded labourers were identified but (the) district administration dropped 688 cases leaving only 19 bonded labourers to be release."

7. The NHRC further states that Investigation/inquiry into specific complaints about bonded labourers were generally left by the States/UTs to be undertaken by the field officers of very low ranks who lack both professionalism as well as sensitivity to conduct such inquires and even existence of bonded labourers were detected in the States/UTs, States/UTs permitted compromise or settlement though the Act itself does not contemplate such a measure. The NHRC noted with concern that though one of the modes of identifying and detecting existence of bonded labour was conducting raids on households and workplaces, this however, had not been taken recourse to by most States, except the State of Maharashtra. The NHRC in its report stated that even though the guidelines on the methodology of identification of bonded labourers formulated by Shri S.R. Shankaran, Chairman of the Expert Group constituted in the year 2001-02 had been circulated to all the States/UTs but there was no evidence on the ground of them being adopted and implemented. The report further pointed out that according to the Ministry of Labour the following features came out clearly in the reports received from the States:

> "a) No fresh surveys are being conducted in the States. Wherever surveys have been conducted in the last few

> years, no bonded labourers could be found.
>
> b) Whereabouts of about 20,000 bonded labourers are reported to be untraced. Registers about bonded labourers identified, released and rehabilitated are not being maintained as required under Rule 7 of the BLS (A) rules.
>
> c) Budget provisions are not being made on the ground that there are no bonded labourers.
>
> d) All the Union Territories have been reporting that they have no Bonded labourers."

8. The NHRC accordingly requested this Court to give the following directions to the States/UTs:

> "a) Periodical conduct of survey in the affected areas is one of the measures which would source eradication of bonded labour system in compliance with the BLS (A) Act. Section 14(e) of the Act casts a statutory responsibility on the Vigilance Committees constituted in each district such surveys. It suggested that fresh survey be conducted by all States and repeated once in three years.
>
> b) The constitution of Vigilance Committees in all States at district and sub-divisional level was a necessary step in the process of property conducting surveys. Further these committees should be reconstituted once every 2 years.
>
> c) Since there was a need for a proper methodology for conducting such surveys it also suggests that the Guidelines issued by Shri S.R. Shanakaran, Chairman of the Expert Committee constituted by the NHRC be adopted with suitable modifications to suit local conditions.
>
> d) While disposing of cases under the BLS (A) Act the trying Magistrate should have recourse to the summary

procedure as laid down in Section 21(2) of the Act in all cases brought before him.

e) It was also suggested that to make the rehabilitation package under the Centrally Sponsored Scheme more meaningful, there was a need for it not to be confined to the limit of Rs.20,000, at which it stands at present."

9. This Court, vide its order dated 9.7.2010, directed all the States/UTs to file their response to the NHRC's report. The States/UTs were required to respond at least on the following aspects:

a) When was the last bi-annual report by the concerned State/UT submitted to the NHRC?

b) When was the last survey, as stipulated under the Act undertaken by the State/UT?

c) Whether the Vigilance Committee for the implementation of the Act has been constituted in all the districts in the States/UTs?

10. This Court vide its order dated 1.10.2010, following the note submitted by the amicus curiae on 27.9.2010, directed the Union of India to submit the data as to the amount which the Centre is releasing to the States/UTs and whether they were, in fact, using the amount for the purpose for which they were released.

11. In pursuance to that order, the Union of India filed its affidavit on 16.12.2010. It was noticed that only five states had, till then, furnished utilization certificates to the Union of India indicating utilization of central funds for survey. This Court, then, passed an order on 16.12.2010 directing the Union of India to call for the utilization certificates from all the States. Union of India later in its affidavit on 25.4.2011 stated that the Ministry of Labour and Employment has provided Rs.494 lakhs as Central Assistance for conducting surveys to the various State

Governments during the periods from 2001-2001 to 2009-2010. The Affidavit revealed that, in majority of the States, no surveys have been conducted after the year 2002-2003, namely, Punjab, Rajasthan, Karnataka, Orissa, Bihar, Jharkhand, Arunachal Pradesh, Chhattisgarh, Uttrakhand. It was stated that only a handful of States have conducted surveys in subsequent years, and that in many instances, the Survey Reports were still awaited.

12. This Court then passed an order dated 25.4.2011 directing the States of Haryana and Andhra Pradesh to explain what steps they have taken to implement the provisions of 1976 Act. Noticing that those States were not taking effective steps, this Court passed another order dated 26.8.2011 directing them to submit their Accounts to the Ministry of Labour, Government of India with regard to disbursement of amounts by Central Government for survey and rehabilitation of bonded labour. The responses from those States are far from satisfactory.

13. The NHRC submitted its revised report dated 3.9.2011 before this Court. We notice that the response from the States to the said report is also not satisfactory. The revised report of the NHRC reiterated that the analysis of the half yearly report sent by the States/UTs reveals the following aspects:

"(i) The reports appear to have been prepared in a very casual and stereotype manner.

(ii) They contain mostly nil information as far as conducting fresh surveys for identification of bonded labourers is concerned.

(iii) In some States like UP nearly 700 released bonded labourers have been awaiting rehabilitation for years due to no provision of funds in the budget needed for rehabilitation.

(iv) The outcome of legal and penal action against the offending employers or bonded labour keepers is nil.

(v) Not a single case has been reported so far which goes to show that an offending employer had been convicted by way of imprisonment.

(vi) It is almost confirmed beyond doubt that (a) efforts at identification of bonded labourers through fresh surveys are lackadaisical and the outcome of such surveys is nil (b) there is inordinate delay in securing rehabilitation of released labourers and (c) the penalties awarded are not proportional to the judicial severity of the crime."

14. The NHRC further stated that while examining about 400 cases, only in one case, the Commission found that the ground level situation confirmed to fulfillment of all requirements under the Minimum Wages Act, that the employer paid wages according to the law and has not detained anyone. Report states that workmen are usually recruited to brick kilns by middlemen on payment of an advance or other allurements, but at the close of the brick kilns operations, the advances paid at the time of recruitment are adjusted with wages due to the workmen in an arbitrary manner, to the disadvantage of the worker. It is unnecessary to dilate the matter further. Suffice it to say that on 30.6.2011, in all 2780 cases involving about 1 lakh bonded labourers have been registered in the Commission and presently 841 cases are under consideration of the Commission. The NHRC also specifically brought to the knowledge of this Court, two specific complaints, which are pending for compliance before the Government of Andhra Pradesh and with the Governments of West Bengal, Jharkhand, Bihar and NCT of Delhi. The NHRC has sought proper directions from this Court so that the concerned States would take steps for reporting compliance to NHRC at the earliest. It is useful to refer to the situations in the States of Andhra Pradesh, West Bengal, Jharkhand, Bihar and NCT of Delhi, which are as follows:

"RE: ANDHRA PRADESH

22. The first complaint is with respect to the State of Andhra Pradesh and pertains to the plight of labourers working in stone quarries on National Highway No. 9 at a distance of about 22 kms from Vijaywada. The issue was brought to light in 2005. However, despite repeated efforts when no results were forthcoming, the NHRC constituted a team to interact with the labourers and submit a detailed report. The team accordingly submitted its report "confirming the allegation that as many as 5000 quarry workers at the time of the visit [i.e.30.06.09 to 5.07.09] were living and working under conditions of debt bondage." Pursuant to the report "even though the Chief Secretary appeared in person before the Commission on 5.10.09 and gave an assurance about the implementation of labour laws and provision of basic facilities, till date that action on the part of the State Government and the District Administration, Krishna remains incomplete and the State Government is seeking time again and again.

RE: WEST BENGAL, JHARKHAND, BIHAR AND NCT OF DELHI

23. The second complaint of then NHRC pertains to the plight of bonded children from West Bangal, Jharkhand and Bihar working under bonded conditions in certain Zari Factories of Kotlamubarakpur Police Station area of Delhi had been released and rescured through raids "no steps have been taken by the administration of NCT of Delhi for issue of release certificates to the victims and for their rehabilitation. Instead of handing over the release certificates to the victims, these were sent to the Resident Commissioners of

the three originating States namely West Bengal, Jharkhand and Bihar." The NHRC has further pointed out that "in the process more than 2 years lapsed and the children who were supposed to have been rehabilitated by now could not be rehabilitated due to acts of negligence both of the part of Government of NCT of Delhi [as] also [the] Government[s] of Bihar, West Bengal and Jharkhand." Even though the complaint dates back to 2005 and proceedings were initiated by the NHRC in 2006, "till date there is no confirmation from the" States concerned "as to whether all the 129 working children who were rescued and released from work in the Zari making units of NCT of Delhi have been fully rehabilitated."

15. Shri A.K. Ganguly, learned senior counsel who assisted the Court as Amicus Curiae, submitted that in the light of the NHRC report dated 10.8.2009 and the affidavits filed by the States/UTs and the Union of India and subsequent revised report of NHRC dated 3.9.2011, it is imperative that certain directions are to be issued to the various States/UTs for proper implementation of the provisions of the 1976 Act.

16. After hearing the amicus curiae and other learned counsel appearing in these proceedings and also taking note of the previous orders passed by this Court, we are inclined to give the following directions, apart from the directions already issued:

(1) Fresh surveys be conducted periodically once in three years in all the States/UTs in accordance with the provisions of the Act and the revised report, the findings of the survey should be made a part of a computerized data base available on the websites of all concerned.

(2) The responsibility of conducting the surveys is on

the District Level Vigilance Committees and Sub Divisional Vigilance Committees of the States/UTs and such committees should submit their reports to the NHRC. This should be done in every three years and Committees also should be reconstituted in every three years.

(3) Bonded labour, it may be noticed, is rampant in brick kilns, stone quarries, crushing mines, beedi manufacturing, carpet weaving, construction industries, agriculture, in rural and urban unorganized and informal sector, power looms and cotton handlooms, fish processing etc. The Vigilance Committees are directed to give more attention to these areas and take prompt action in case violation is noticed.

(4) Large numbers of children are working as domestic help in the urban, town and rural areas with no chance to go to schools even though the education from standard I to VIII is compulsory under the Right of Children to Free and Compulsory Education Act, 2009. Local *Panchayats* and local bodies should identify such children and ensure that they get proper education. We are not unmindful of the fact that in some households they treat the domestic help just like their children and give food, clothing and education but they are exception.

(5) Many of the States/UTs reporting NIL status with respect to existence of Bonded labourers. This might be due to the faulty methodology adopted by them for conducting such surveys. Guidelines on the methodology of identification of bonded labourers formulated by Shri SR Shankaran, Chairman of the Expert Group constituted by the NHRC be followed and implemented by all the States/UTs with suitable modifications to suit local conditions.

(6) All the States/UTs should calculate firm requirements of fund for rehabilitation of freed bonded labourers and steps be taken to enhance the rehabilitation package from the present limit of Rs.20,000.

(7) The District Magistrates are directed to effectively implement Sections 10, 11 and 12 of the Act and we expect them to discharge their functions with due diligence, with empathy and sensitivity, taking note of the fact that the Act is a welfare legislation.

(8) The District Magistrate and the State Government / UTs would see that the Minimum Wages Act, the Workmen Compensation Act, the Inter- State Migrant Workmen Act, Child Labour (Prohibition and Regulation) Act are also properly and effectively implemented.

(9) Directions are issued to all Gram *Panchayats*, local bodies to report, in case they come across any case of bonded labour, to the District Magistrate who will take appropriate follow up action under the Act.

(10) The States of Andhra Pradesh, West Bengal, Jharkhand, Bihar and the NCT of Delhi are directed to ensure compliance with orders passed by the NHRC as highlighted in its revised report."

(11) The States and the Union Territories should continue to submit 6 monthly reports to NHRC.

(12) All the States / UTs to constitute Vigilance Committee, if not already constituted within six months."

17. This Court has already given various directions in its order dated 5.5.2004 passed in *Public Union for Civil*

Liberties v. State of Tamil Nadu and Others (2004) 12 SCC 381, authorizing the NHRC to monitor the implementation of the provisions of the 1976 Act which we re-iterate and direct NHRC to effectively monitor and implement the provisions of the Act. The orders passed by this Court, time to time, in writ petitions are to be duly complied with the NHRC, Union of India, States and UTs.

18. The Writ Petition is accordingly disposed of so as to enable the NHRC to take appropriate steps and effectively supervise for carrying out the directions issued by this Court and the provision of BLS (A) Act. If the States/UTs are not implementing the directions given by this Court, NHRC is free to move this Court for further orders. We record our deep appreciation to the efforts made by learned senior counsel - Shri A.K. Ganguli and for sparing his valuable time for a public cause. This Court is deeply indebted to him which we place on record.

R.P. Writ Petition disposed of.