

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment Reserved on: 2nd May, 2011
% Judgment Pronounced on: June 03, 2011

+ **LPA No. 470/2010**

UNION OF INDIA & ANR. Appellants

Through: Mr. Vivek K. Tankha, ASG with
Mr. Arjun Harkauli, Mr. Sumeer
Sodhi, Advs.

Versus

EDWARD KEVENTER Respondent

Through: Mr. Soli J. Sorabjee, Sr. Adv.
with Mr. Sanjeev Anand,
Mr. Shaunak, Mr. Bikash Mohanty,
Ms. Mandeep Kaur, Mr. Umesh
Agarwal, Advs.

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE SANJIV KHANNA

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| 1 | Whether reporters of the local papers be allowed to see the judgment? | Yes |
| 2 | To be referred to the Reporter or not? | Yes |
| 3 | Whether the judgment should be reported in the Digest? | Yes |

DIPAK MISRA, CJ

In this Letters Patent Appeal, the legal acceptability and pregnability of the order dated 6th May, 2010 passed by the learned Single Judge in WP(C) No.13872/2009 is called in question. Sans unnecessary details, the essential facts which are to be exposted are that the respondent-writ

petitioner (hereafter referred to as the respondent-petitioner), M/s Edward Keventer (Successors) Pvt. Ltd. (EKSPL), invoked the jurisdiction of this Court under Articles 226 and 227 of the Constitution of India for issue of a writ of certiorari for quashing the letter dated 3rd February, 1998 issued by the Land & Development Office (L&DO), Ministry of Urban Affairs & Employment, Government of India withdrawing the earlier letter dated 24th July, 1992 for the re-development of the property situate in Block No.48, Diplomatic Enclave, Sardar Patel Marg, New Delhi and the letter dated 25th August, 2009 issued by the L&DO disallowing the respondent's application for change of land use from Dairy Farm to Residential Group Housing in respect of the property in question.

2. It was averred in the writ petition that on 16th October, 1920, the Secretary of State for Indian Council executed a perpetual lease deed in favour of one Edward Keventer of Aligarh Dairy Farm in respect of the property in question admeasuring 22.95 acres. On 3rd August, 1942, the said Edward Keventer assigned the aforesaid land to the respondent-EKSPL. On 11th February, 1970, the respondent requested for permission to use the property in question for construction of ownership flats. It was pointed out that out of 22.95 acres, only 4 acres were used for the dairy

farm. By communication dated 24th July, 1992, the L&DO granted permission for conversion of land use and the respondent was called upon to pay the conversion charges amounting to Rs.8.5 Crores approximately. By letter dated 5/6 August, 1992, the respondent conveyed the acceptance and paid Rs.2.8 Crores towards the part payment of the conversion charges. On 23rd November, 1992, the respondent was informed by the L&DO that it would be given one month's extension to comply with the terms of conversion offered by the letter dated 24th July, 1992. Thereafter, certain correspondence went on between the parties regarding payment of the balance conversion charges. On 11th January, 1995, the Ministry of Urban Development, Lands Division, issued revised orders rationalizing and simplifying the conversion charges and other terms for group housing and/or commercial complexes. It is worth noting, on 30th January, 1995, the respondent applied for rationalization of conversion charges enclosing the calculations in terms of the said revised orders. A claim was put forth that it was entitled to refund of Rs.1,54,53,150.64 being the excess payment already made.

3. As certain cavil arose with regard to the conversion charges, by letter dated 3rd February, 1998, the present appellant withdrew the earlier

letter dated 24th July, 1992 allowing the conversion of the land use to residential. Being dissatisfied with the said communication, the respondent preferred WP(C) No.3509/2001 and sought a mandamus to the appellants to re-compute the conversion charges as per their policy. On 31st May, 2006, the said writ petition was disposed of permitting the respondent to make a representation to the appellants for grant of No Objection Certificate for re-development without prejudice to the rights and contentions of the parties in the writ petition. The said representation was rejected by the appellants on 19th July, 2006 on the ground that there was a title dispute pending in respect of the said property. The respondent filed CM No.6470/2007 in the said writ petition seeking a direction to the appellants herein to compute the conversion charges. On 28th March, 2008, the conversion charges were computed at Rs.67,57,74,806/-. Eventually, the writ petition was disposed of on 22nd August, 2008 referring to the affidavit dated 28th March, 2008 filed by the L&DO. We shall refer to the said order at a later stage.

4. In pursuance of the aforesaid order, the respondent deposited the conversion charges on 1st September, 2008 with L&DO along with an application for conversion. On 25th August, 2009, a communication was

made rejecting the change of user from dairy farm to residential on certain grounds and subsequently, the conversion charges amounting to Rs.67,57,74,806/- was refunded to the respondent. As is evident from record, the respondent filed CM No.6014/2009 in the pending WP(C) No.3509/2001 which was disposed of by requiring the respondent to challenge the said communication by an independent writ petition.

5. Before the learned Single Judge, it was contended that the order of rejection was absolutely unsustainable in law and the grounds stated therein are absolutely unfounded inasmuch as the property in question had never changed hands; that the lease continues to stand in the name of EKSPL although the management has changed; that there is no title dispute since the matter has been put to rest in WP(C) No.4521/2007 (*Nirmal S. Saigal v. Union of India*) which has been dismissed by the learned Single Judge with costs of Rs.1 lakh and further, the appeal preferred against the same order and the Special Leave Petition have also been dismissed. It was urged before the learned Single Judge that in the Master Plan for Delhi, 2021 (MPD), the area where the property in question is located is earmarked for residential purpose and, hence, there can be no impediment on the part of the L&DO to accede to the prayer for

conversion of the user of land from dairy farm to residential. It was also submitted that as and when any development plans are submitted to the department, the same can be processed in accordance with the prevailing norms consistent with the MPD and the policy of the Government.

6. On behalf of the present appellants, the respondents in the writ petition, it was put forth that no mandamus can be issued to them to grant permission for change or conversion of the land use from dairy farm to residential since the discretion is vested in the Government in entirety and the respondent-writ petitioner had no statutory right; that the proposal submitted by the respondent for re-development of the land cannot be considered in view of the policy of the Central Government regarding high intensity development in and around the Lutyens Bungalow Zone (LBZ); and that the area in question comes within the vicinity of LBZ President's Estate and involves security concerns.

7. The learned Single Judge first dealt with the maintainability of the writ petition and came to hold that it was maintainable since the action of the present appellants was amenable to judicial review as it cannot act in an arbitrary and capricious manner. The learned Single Judge placed

reliance on the decisions in *Bihar Eastern Gangetic Fishermen Coop. Society Ltd. v. Sipahi Singh*, (1977) 4 SCC 145 and *Union of India v. Muralidhara Menon*, (2009) 9 SCC 304 and eventually came to hold as follows on the issue of maintainability:

“In the instant case the Respondents do not deny that the area in which the property is located is earmarked for residential use under the MPD. Under the Delhi Development Act (DD Act) it is the duty of the Delhi Development Authority to ensure that the development of Delhi takes place in accordance with the MPD, which in terms of the DD Act is of a statutory character. Therefore in accepting the request of the petitioner for change of land use to residential, the Respondents would be performing a statutory duty consistent with the MPD norms. Therefore, it is not right to say that the Petitioner has no legal enforceable right to have the land use in relation to the property in question converted from dairy farm to residential. The objection as to the maintainability of the writ petition is accordingly rejected.”

8. After so holding, the learned Single Judge proceeded to address the issue on merits and came to hold that there was no transfer of the said property to anyone else as of date; that the question of payment of any unearned increase does not arise; that the ground mentioned with regard to the title was not correct and justified as the same had been put to rest by the decision of this Court as well as of the Apex Court; that the letter/

communication does not refer to any ground of security and, therefore, the same cannot be taken aid of in view of the decision in *Mohinder Singh Gill v. The Chief Election Commissioner, New Delhi, (1978) 1 SCC 405*; that the grant of permission to convert the land use to residential does not *ipso facto* imply approval of the proposal for re-development; that it has to be separately considered in the light of the MPD norms and prevailing policy; and that as the grounds were not germane to the rejection, the said letter/communication deserved to be axed and, accordingly, lanced the same. Thereafter, the learned Single Judge directed the writ petitioner to re-deposit the conversion charges within two weeks from the date of the order without any interest and commanded the present appellants to grant approval for conversion of land use in respect of the property in question with further stipulation that if thereafter the writ petitioner would submit a plan for re-development, it would be processed by the department in accordance with law.

9. Mr. Vivek K. Tankha, learned Additional Solicitor General, challenging the legal tenability of the order passed by the learned Single Judge, has submitted that the grounds mentioned in the order of rejection are totally absent and are not justified on facts and, therefore, the order

suffers from manifest errors. It is his further submission that the learned Single Judge has failed to appreciate that there is a difference between a quasi-judicial order and a purely administrative order and, hence, the decision rendered in the case of *Mohinder Singh Gill* (supra) is not applicable to the facts of the case. The learned Additional Solicitor General would further submit that the ground of security which was put forth in the counter affidavit should have weighed with the learned Single Judge but as the same has been totally brushed aside, the order suffers from substantial infirmity warranting interference in this intra-Court Appeal. It is canvassed by him that the appellant being the lessor and the respondent being the lessee, as per the terms of the lease deed, obtaining consent is the condition precedent and the appellant has the discretion to give the consent and, therefore, a writ of mandamus could not have been issued to grant permission for change of user on payment of conversion fees. The refusal of permission comes within the domain of policy decision and, therefore, the court should not have interfered in a decision of the present nature. To bolster the aforesaid submissions, he has commended us to the decisions rendered in *Ashoka Smokeless Coal India (P) Ltd. and others v. Union of India and others*, (2007) 2 SCC 640, *Pancham Chand and others*

v. State of Himachal Pradesh and others, (2008) 7 SCC 117 and Chairman, All India Railway Recruitment Board and another v. K. Shyam Kumar and others, (2010) 6 SCC 614.

10. Mr.Soli Sorabjee, learned senior counsel resisting the aforesaid submissions of learned counsel for the appellant has contended that the appellants cannot travel beyond the reasons stated in the order and hence the direction issued by the learned Single Judge does not suffer from any infirmity. Once a finding is recorded by the learned Single Judge that the grounds mentioned in the order are absolutely invalid and in fact do not really exist, the order deserves to be quashed and as a fall out, a writ of mandamus deserves to be issued and has been appositely issued. The submission that the lessor has paramount right to refuse consent is unacceptable inasmuch as the appellants, the Union of India and its functionaries, while dealing with a citizen cannot act in an arbitrary, whimsical and capricious manner. That apart, submits Mr.Soli Sorabjee, learned senior counsel that on earlier occasions before this Court the appellants have only raised the cavil with regard to the conversion charges and nothing else and hence, the question of consent has paled into insignificance. It is his further proponentment that the ground of security

had not been raised at any point of time and had it been raised, the respondent would have been in a position to satisfy that in the same locality residential buildings exist, subject to certain restrictions and in that event a different order would have resulted. But without affording the respondent an opportunity of being heard, the appellants have acted in a unilateral manner in the name of security. It is urged by him that the security concept has come into existence on the basis of due correspondence between an officer of the Union of India and a law officer, which were never brought on record and, therefore, there is no justification for interference in this intra-Court appeal. To buttress his submission, he has commended us to the decisions in *P. Bhooma Reddy v. State of Mysore and others*, AIR 1969 SC 655, *M/s. Krishna Cinema, a partnership firm, Rajkot & Others v. The State of Gujarat & Anr.*, AIR 1971 Gujarat 103, *A.K. Kraipak v. Union of India*, AIR 1970 SC 150, *The Kesava Mills Co. Ltd. & Anr. v. Union of India & Ors.*, AIR 1973 SC 389, *S.L. Kapoor v. Jagmohan & Ors.*, (1980) 4 SCC 379, *State of Karnataka & Anr. v. All India Manufacturers Organization & Ors.*, 2006 (4) Scale 398, *State of Gujarat & Anr. v. M/s. Krishna Cinema & Ors.*, AIR 1971 SC 1650, *Union of India & Ors. v. M/s Indo Afghan Agencies Ltd.*, (1968) 2 SCR 366,

Mohinder Singh Gill (supra), *Gujarat State Financial Corporation v. M/s. Lotur Hotels Pvt. Ltd.*, (1983) 3 SCC 379, *Ram Singh Vijay Pal Singh & Ors. v. State of U.P. & Ors.*, (2007) 6 SCC 44, *The Bihar Eastern Gangestic Fishermen Co-operative Society Ltd.* (supra), *Muralidhara Menon* (supra), *Commissioner of Police v. Gordhandas Bhanji*, AIR 1952 SC 16 and *ABL International Ltd. & Anr. v. Export Credit Guarantee Corporation of India Ltd. & Ors.*, (2004) 3 SCC 553.

11. At the very outset, it is appropriate to state that in course of hearing, we had called for the file to peruse the communications with regard to the ground of security and learned Additional Solicitor General has produced the file for our perusal.

12. First, we shall refer to the order of rejection. It reads as follows: -

“Sir/Madam,

I am to refer to your application dated 1st September, 2008 which has been filed for conversion/change of land use from Dairy Farming to Residential/Group Housing in respect of above mentioned property and to inform that your application for change of purpose from dairy farm to residential has been examined and it has been decided with approval of the Ministry that the said application is disallowed because

- (i) there is evidence that the property has changed hands in violation of lease provision;
- (ii) the issuer relating to unearned increase remain to be addressed; and
- (iii) there is a dispute about the title.

2. Sanction for refund of Rs.64,76,00,000/- (Rupees sixty four crores seventy six lakhs) the amount deposited with your application dated 1st September, 2008 is being issued separately.”

13. The learned Single Judge in paragraph 18 has opined thus –

“On merits, this Court finds that none of the grounds on which the Petitioner’s request for conversion of land use was refused is either factually or legally tenable. Admittedly the lease still stands in the name of EKSPL, the Petitioner herein. While the management of EKSPL may have changed, it continues to be the lessee in respect of the property in question. There is, therefore, no transfer of the said property to anyone else as of date. Consequently, the question of payment of any unearned increase does not arise. As regards the third ground, it is factually incorrect and Mr.Tankha did not contest the position. The dispute raised by Mr.Nirmal S. Saigal was dismissed both by the High Court and the Supreme Court. If Mr.Saigal has thereafter kept writing to the MoUD that will not amount to a ‘title dispute’ on the basis of which the request for conversion can be refused to the Petitioner.”

14. In view of the aforesaid finding returned, there cannot be a trace of doubt that the said reasons were not valid. It is not in dispute before us that the only ground that actually survives to be dwelled upon is the ground of security, which was put forth in the counter affidavit before the learned Single Judge. The learned Single Judge has disregarded the said ground on the basis that as the said reason was non-existent in the communication, it cannot be taken recourse to and, in any event, it may be germane when the petitioner would submit a plan for re-development hereafter.

15. Mr. Tankha, learned Additional Solicitor General has referred to the terms of lease deed to highlight that a mandamus cannot be issued for grant of permission. He has referred to clauses 6, 7 and 8 of the lease deed. The learned Single Judge has referred to the said conditions in the impugned order. He has also referred to the earlier orders passed in WP (C) No. 3509/2001 and CM No. 6470/2007. We think it appropriate to reproduce the order passed on 22nd August, 2008 in WP (C) No. 3509/2001 on the basis of an affidavit filed by the L&DO. The said order reads as follows: -

“5. As noted in the order dated 11.01.2008, the Petitioner is seeking change of land use from dairy farming to residential. At page 333 of the counter affidavit filed on behalf of the Union of India it has been stated that the Petitioner is entitled to develop the property in accordance with the master plan which shows the area as ‘residential’, on payment of the necessary conversion fee to the lessor to be determined/ calculated on the basis of the ‘crucial date’ which may be decided by the lessor. The writ petition had been filed because there was a dispute with regard to the ‘crucial date’ and the amount that was determined as payable by the Petitioner. Now, that the dispute no longer survives and the Petitioner is agreeable to pay the conversion charges as indicated in the said affidavit of Mr. G.H. Ratra which was filed on 28.03.2008, this writ petition is, therefore, disposed of with the direction that the Petitioner shall deposit, within two weeks, the conversion charges as demanded by the Respondents (after giving credit for the amount already deposited). The Respondent shall dispose of the application for conversion within eight weeks thereafter.”

Thereafter, the respondent deposited the conversion charges with the department. On the basis of the aforesaid order, the plea canvassed by the learned ASG that it was within the discretion of the appellant to grant consent or not as per the lease deed does not survive. What is contended by Mr. Tankha in the alternative is that the controversy was not finally put to rest on payment of conversion charges. The permission for user could be granted but if there are other grounds, the same can be refused. While

pyramiding the said submission, learned ASG would submit that it can use its discretion.

16. At this juncture, we may refer to certain decisions with regard to exercise of discretion by the executive, for the simple reason, the grant of permission for refusal in a case of present nature has to be adjudged on the parameter the way the authorities of the State are expected to deal with a citizen.

17. In *Ramana Dayaram Shetty v. International Airport Authority of India*; (1979) 3 SCC 489, it has been held thus -

“12.....This proposition would hold good in all cases of dealing by the Government with the public, where the interest sought to be protected is a privilege. 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."

(Emphasis supplied)

18. In *Common Cause (Petrol pumps matter) v. Union of India: (1996) 6*

SCC 530, it has been held thus -

"22. The Government today - in a welfare State - provides large number of benefits to the citizens. It distributes wealth in the form of allotment of plots, houses, petrol pumps, gas agencies, mineral leases, contracts, quotas and licences, etc. Government distributes largesse in various forms. A Minister who is the executive head of the department concerned distributes these benefits and largesse. He is elected by the people and is elevated to a position where he holds a trust on behalf of the people. He has to deal with the people's property in a fair and just manner. He cannot commit breach of the trust reposed in him by the people.

24. 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. ”

19. In *Shrilekha Vidyarthi v. State of U.P.* (1991) 1 SCC 212, it is held thus -

“21. 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.

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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 J&K* (1980) 4 SCC 1). In *Col. A.S. Sangwan v. Union of India* : 1980 Supp. SCC 559: 1981 SCC (L&S) 378: AIR1981SC1545, 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 touch stone, 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."

20. In *LIC v. Consumer Education & Research Centre*; (1995) 5 SCC 482, the Court negated the argument that exercise of executive power of the State was immune from judicial review and observed thus:

“23. Every action of the public authority or the person acting in public interest or any act that gives rise to public element, should be guided by public interest. It is the exercise of the public power or action hedged with public element (sic that) becomes open to challenge. If it is shown that the exercise of the power is arbitrary, unjust and unfair it should be no answer for the State, its instrumentality, public authority or person whose acts have the insignia of public element to say that their actions are in the field of private law and they are free to prescribe any conditions or limitations in their actions as private citizens, simplicitor, do in the field of private law. Its actions must be based on some rational and relevant principles. It must not be guided by irrational or irrelevant considerations.

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26. This Court has rejected the contention of an instrumentality or the State that its action is in the private law field and would be immuned from satisfying the tests laid under Article 14. The dichotomy between public law and private law rights and remedies, though may not be obliterated by any strait jacket formula, it would depend upon the factual matrix. The adjudication of the dispute arising out of a contract would, therefore, depend upon facts and circumstances in a given case. The distinction between public law remedy and private law field cannot be demarcated with precision. Each case will be examined on its facts and circumstances to find out the nature of the activity, scope and nature of the controversy. The distinction between public law and private law remedy has now become too thin and practicably obliterated.

27. In the sphere of contractual relations the State, its instrumentality, public authorities or those whose acts bear insignia of public element, action to public duty or obligation are enjoined to act in a manner i.e. fair, just

and equitable, after taking objectively all the relevant options into consideration and in a manner that is reasonable, relevant and germane to effectuate the purpose for public good and in general public interest and it must not take any irrelevant or irrational factors into consideration or appear arbitrary in its decision. Duty to act fairly is part of fair procedure envisaged under Articles 14 and 21. Every activity of the public authority or those under public duty or obligation must be informed by reason and guided by the public interest.”

21. In *M/s. Dwarkadas Marfatia and Sons v. Board of Trustees of the Port of Bombay*, AIR 1989 SC 1642, their Lordships have held thus –

“20. It was urged that the respondent did not enjoy any special privileges/powers or benefits vis-a-vis such activities by virtue of its being a local body or governmental character. In the premises, it was contended that such a body stands on the same footing as any other citizen and will, in respect of such activity, not be subjected to public law duty.

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23. The contractual privileges are made immune from the protection of the Rent Act for the respondent because of the public position occupied by the respondent authority. Hence, its actions are amenable to judicial review only to the extent that the State must act validly for a discernible reason not whimsically for any ulterior purpose. Where any special right or privilege is granted to any public or statutory body on the presumption that it must act in certain manner, such bodies must make good such presumption while acting

by virtue of such privileges. Judicial review to oversee if such bodies are so acting is permissible.

24. The field of letting and eviction of tenants is normally governed by the Rent Act. The Port Trust is statutorily exempted from the operation of the Rent Act on the basis of its public/governmental character. The legislative assumption or expectation as noted in the observations of Chagla C.J. in Rampratap Jaidayal's case (AIR 1953 Bom 170) (*supra*) cannot make such conduct a matter of contract pure and simple. These corporations must act in accordance with certain constitutional conscience and whether they have so acted, must be discernible from the conduct of such corporations. In this connection, reference may be made on the observations of this Court in *S.P. Rekhi v. Union of India*, (1981) 2 SCR 111 : (AIR 1981 SC 212), reiterated in *M.C. Mehta v. Union of India*, (1987) 1 SCC 395 : (AIR 1987 SC 1086), wherein at p. 148 (of SCR) : (at p.230 of AIR), this Court observed: -

“It is dangerous to exonerate corporations from the need to have constitutional conscience; and so, that interpretation, language permitting, which makes governmental agencies, whatever their mien amenable to constitutional limitations must be adopted by the court as against the alternative of permitting them to flourish as an imperium in imperio.”

Thereafter, their Lordships have stated thus -

“.... Every action of the Executive authority must be subject to rule of law and must be informed by reason. So, whatever be the activity of the public authority, it should meet the test of Article 14. The observations in

paras 101 & 102 of the Escorts' case (supra) read properly do not detract from the aforesaid principles.”

22. We have referred to the aforesaid decisions to highlight that the action of the State has to be tested on the touchstone of Article 14 of the Constitution of India. It cannot smack of arbitrariness. A decision cannot be taken in a capricious or cavalier manner. It has to have a rational base.

23. Presently, we shall advert to the submission urged by Mr. Tankha that there is a distinction between a purely administrative order and a quasi-judicial order.

24. In *Pancham Chand* (supra), a two-Judge Bench of the Apex Court was dealing with the issue whether the Chief Minister of a State has any role to play in a matter of grant of stage carriage permit in terms of the provisions of the Motor Vehicles Act, 1988. In the said case, the fourth respondent had approached the Chief Minister directly by a letter which was received in the official residence of the Chief Minister. The office of the Chief Minister had communicated the Commissioner, Transport that permit be sanctioned in favour of the appellant. Being grieved by the same, a writ petition was filed by some persons and eventually, the High

Court dismissed the writ petition. It was contended before the Apex Court that the grant of permit in favour of the fourth respondent therein was on the basis of wrong principle since an application could not have been submitted to the Chief Minister other than the statutory authority referred to in the Act. Their Lordships scanned the anatomy of the Motor Vehicles Act, 1988 and opined thus –

“Factual matrix, as indicated hereinbefore, clearly goes to show that the fourth respondent filed the application before the Chief Minister straightaway. Office of the Chief Minister communicated the order of the Chief Minister, not once but twice. Respondent 2 acted thereupon. It advised the Regional Transport Authority to proceed, after obtaining a proper application from Respondent 4 in that behalf. This itself goes to show that prior thereto no proper application was filed before the Regional Transport Authority. Such an interference on the part of any authority upon whom the Act does not confer any jurisdiction, is wholly unwarranted in law. It violates the constitutional scheme. It interferes with the independent functioning of a quasi-judicial authority. A permit, if granted, confers a valuable right. An applicant must earn the same.”

In the said case, their Lordships referred to the decisions in *D. Nataraja Mudaliar v. State Transport Authority*, AIR 1979 SC 114 and *Gordhandas Bhanji* (supra). In that context, their Lordships referred to *Mohinder Singh Gill* (supra) and reproduced the following paragraph -

“24. Yet again in *Mohinder Singh Gill v. Chief Election Commissioner*, (1978) 1 SCC 405 (SCC p. 417, para 8)

“8. The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose, J. in *Gordhandas Bhanji*:

‘9. ... public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself.’

Orders are not like old wine becoming better as they grow older.”

After reproducing the aforesaid paragraph, their Lordships proceeded to state as follows: -

“25. It is not a case where the statutory authority was hearing a grievance from the public that buses are not plying on a particular route as a result whereof the villagers were suffering.

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28. We also fail to understand as to how an independent quasi-judicial body, like respondent 3, could affirm an affidavit together with the State. Its duty before the High Court, in response to the rule issued by it, was to place the facts as borne out from the records. It was not supposed to take any stand one way or the other. It had no business to defend the State or the Chief Minister.”

25. The learned Additional Solicitor General has put immense emphasis on para 25 but in our considered opinion, the said decision is not for the proposition what is being canvassed by Mr.Tankha. What is submitted by Mr.Soli Sorabjee, learned senior counsel, is that unless a ground is incorporated in the order that is communicated to the petitioner, the same cannot be validated by adding another ground. That apart, it is also canvassed by him that the order has to stand the test of Article 14 of the Constitution of India which ostracizes all kinds of arbitrariness or capricious exercise of power. In view of the aforesaid, we are of the considered opinion that the said decision is distinguishable on facts.

26. In *M/s. Krishna Cinema* (supra) it has been held thus:

“It is within the powers of the High Court to issue a writ of mandamus where it finds that the Government or the Government Officers in whom the discretion is vested has not exercised that discretion in accordance with the requirement of law, or has taken any extraneous matters into consideration. In matters where the High Court has jurisdiction to issue writs of certiorari on the same principle the High Court has jurisdiction to issue a writ of mandamus against the State or its Officers.”

27. In *A.K. Kraipak* (supra), the Apex Court has held thus:

“The dividing line between an administrative power and a quasi-judicial power is quite thin and is being gradually obliterated. For determining whether a power is an administrative power or a quasi-judicial power one has to look to the nature of the power conferred, the person or persons on whom it is conferred, the framework of the law conferring that power, the consequences ensuing from the exercise of that power and the manner in which that power is expected to be exercised. In a welfare State like ours it is inevitable that the organ of the State under our Constitution is regulated and controlled by the rule of law. In a welfare State like ours it is inevitable that the jurisdiction of the administrative bodies is increasing at a rapid rate. The concept of rule of law would lose its validity if the instrumentalities of the State are not charged with the duty of discharging their functions in a fair and just manner.”

28. In *The Kesava Mills Co. Ltd.* (supra), their Lordships have held thus:

“...The only essential point that has to be kept in mind in all cases is that the person concerned should have a reasonable opportunity of presenting his case and that the administrative authority concerned should act fairly, impartially and reasonably. Where administrative officers are concerned, the duty is not so much to act judicially as to act fairly. See, for instance, the observations of Lord Parker in *In re H. K. (an infant)* [1967] 2 QB 617. It only means that such measure of natural justice should be applied as was described by Lord Reid in 1964 AC 40 as "in susceptible of exact definition but what a reasonable man would regard as a fair procedure in particular circumstances". However, even the application of the concept of fair play requires real flexibility. Everything will depend on the actual facts and circumstances of a case. As Tucker L. J. observed in *Russell v. Duke of Norfolk* (1949) 1 All. E.R. 109.

“The requirements of natural justice must depend on the circumstances of the case, the nature of the enquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with and so forth.””

29. From the aforesaid, it is clear as crystal that the fine distinction drawn by the learned ASG has lost its significance and the order passed by the government or the instrumentalities of the State cannot run counter to the constitutional mandates. Thus, analysed, both on the factual analysis regard being had to the previous orders passed in this case and the principle of law, we are of the considered opinion that there cannot be a

refusal of consent in an arbitrary manner but in a manner which is rational, cogent, germane and tenable in law.

30. Presently, we shall advert to the issue whether a ground of security could have been taken as a ground in the counter affidavit. Submission of Mr.Tankha is that though the same has not been incorporated in the order, yet regard being had to the area in question, the security ground cannot be totally brush aside. Per contra, Mr.Soli Sorabjee, learned senior counsel would contend that at no stage the ground of security was ever urged in previous litigations and the same does not find mention also in the communication/order but wisdom had dawned only in the counter affidavit. Learned senior counsel further contend that the only ground of security is that the change of use cannot be allowed as it relates to residential purposes but there are many residences in the area. It is urged by him that it can be controlled or restricted. The learned senior counsel submits that had there been a grant of opportunity to put forth his case in that regard, in all possibility the respondent would have been in a position to convince the authorities. In this context, we may refer to a passage from *Mohinder Singh Gill* (supra) –

“55. Law cannot be divorced from life and so it is that the life of the law is not logic but experience. If, by the experiential test, importing the right to be heard will paralyse the process, law will exclude it. It has been said that no army can be commanded by a debating society, but it is also true that the House of Commons did debate, during the days of debacle and disaster, agony and crisis of the Second World War, the life-and-death aspects of the supreme command by the then British Prime Minister 'to the distress of all our friends and to the delight of all our foes' - too historic to be lost on jurisprudence. Law lives not in a world of abstractions but in a cosmos of concreteness and to give up something good must be limited to extreme cases. If to condemn unheard is wrong, it is wrong except where it is overborne by dire social necessity. Such is the sensible perspective we should adopt if ad hoc or haphazard solutions should be eschewed.”

31. In *S.L. Kapoor* (supra), it has been held as follows:

“The old distinction between a judicial act and an administrative act has withered away and now even an administrative order, if involves civil consequences, must comply with the rules of natural justice. In its comprehensive connotation, everything that affects a citizen in his civil life inflicts a civil consequence.”

Thereafter, their Lordships held as follows:

“7. The old distinction between a judicial act and an administrative act has withered away and we have been liberated from the psittacine incantation of “administrative action”. Now, from the time of the decision of this Court in *State of Orissa v. Dr. (Miss) Binapani Devi*, AIR 1967 SC 1269, “even an

administrative order which involves civil consequences...must be made consistently with the rules of natural justice". What are civil consequences? The question was posed and answered by this Court in *Mohinder Singh Gill v. Chief Election Commissioner, New Delhi*, (1978) 1 SCC 405, 440, 441 Krishna Iyer J., speaking for the Constitution Bench said (at p. 308-309) : (SCC p.440, para 66)

But what is a civil consequence, let us ask ourselves, by passing verbal booby-traps? "Civil consequences" undoubtedly cover infraction of not merely property or personal rights but of civil liberties, material deprivations and non-pecuniary damages. In its comprehensive connotation, everything that affects a citizen in his civil life inflicts a civil consequence.

The learned Judge then proceeded to quote from Black's Legal Dictionary and to consider the interest of a candidate at a Parliamentary election. He finally said: (SCC p.441, para 66)

The appellant has a right to have the election conducted not according to humour or hubris but according to law and justice. And so natural justice cannot be stumped out on this score. In the region of public law locus standi and person aggrieved, right and interest have a broader import."

32. In *K. Shyam Kumar* (supra), their Lordships held as follows:

"22. Judicial review conventionally is concerned with the question of jurisdiction and natural justice and the court is not much concerned with the merits of the decision but how the decision was reached. In *Council of Civil Service Unions v. Minister for Civil Service*, 1985 AC 374e (GCHQ Case), the House of Lords rationalized the grounds of judicial review and ruled that the basis of

judicial review could be highlighted under three principal heads, namely, illegality, procedural impropriety and irrationality. Illegality as a ground of judicial review means that the decision-maker must understand correctly the law that regulates his decision-making powers and must give effect to it. Grounds such as acting ultra vires, errors of law and/or fact, onerous conditions, improper purpose, relevant and irrelevant factors, acting in bad faith, fettering discretion, unauthorized delegation, failure to act, etc., fall under the heading "illegality". Procedural impropriety may be due to the failure to comply with the mandatory procedures such as breach of natural justice, such as audi alteram partem, absence of bias, the duty to act fairly, legitimate expectations, failure to give reasons, etc."

33. Keeping in view the aforesaid enunciation of law, it is to be borne in mind that in a case of the present nature, the balance is required to be struck. True it is, the appellants have put forth a ground of security but it is not disputed that there are residential premises in the said area and the Master Plan of Delhi permits thus. It is the duty of the Court to do justice by promotion of honesty and good faith. That is the sacrosanctity of justice. The Court is under obligation to exercise the said power that lies within its domain. Therefore, we are disposed to think that the cause of justice would be best subserved if the order passed by the learned Single Judge directing deposition of conversion charges and grant of approval is

set aside with a direction that the appellant shall afford an opportunity of hearing with regard to the purpose of user, which relates to security measure and take a final decision within a period of twelve weeks from the date of receipt of the order passed today. We may hasten to clarify that we have thought it appropriate to afford an opportunity of hearing to the respondent as we have been apprised that the Master Plan permits the user for residential areas and there are many other residential premises in the area. Possibly there may be certain restrictions or constrictions. In this regard, we are not in a position to express our opinion but leave it to the authorities to deal with it with total objectivity by following the doctrine of *audi alteram partem*. Consequently, the appeal is allowed to the extent indicated hereinabove. There shall be no order as to costs.

CHIEF JUSTICE

JUNE 03, 2011
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SANJIV KHANNA, J.