

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH.

DATE OF DECISION : 2.6.2016

1. C.W.P. No.17958 of 2005 (O&M)
M/s Faridabad Gurgaon Minerals v. State of Haryana and others
2. C.W.P. No.14306 of 2005 (O&M)
M/s Ganpati Enterprises v. The State of Haryana and others.
3. C.W.P. No.14468 of 2005 (O&M)
Jitender Kumar v. State of Haryana and others.

CORAM : HON'BLE Mr.JUSTICE MAHESH GROVER
HON'BLE JUSTICE Mrs.LISA GILL

1. Whether reporters of Local Newspapers may be allowed to see the judgment ?
2. To be referred to the Reporters or not ?
3. Whether the judgment should be reported in the Digest ?

Present:- Shri Yashraj Singh Deora with Shri Alok Mittal, Advocates for the petitioners (in CWP Nos.17958 and 14468 of 2005)

Shri Shailender Jain, Senior Advocate with Ms.Mannu Chaudhary, Advocate for the petitioner (in CWP No.14306 of 2005).

Shri Amar Vivek, Additional A.G. Haryana.

MAHESH GROVER, J.

This order will dispose of C.W.P. Nos.17958,14306 and 14468 of 2005.

For the sake of convenience, brief facts have been taken from C.W.P.

No.17958 of 2005.

The petitioner who is the sole proprietary firm, was granted the rights to mine minor minerals on the strength of a lease executed by the State of Haryana after a successful bid by him in an open auction. He is aggrieved of Annexure P-6, a notification dated 3.6.2005 issued by the Mines and Geology Department, Haryana amending the Schedule to the Mines and Minerals (Regulation & Development) Act, 1957 (hereinafter referred to as the Central Act) to enhance the rate of royalty from Rs.24/- per tonne to Rs.36/- per tonne. Similarly, the grievance of the petitioners in CWP Nos.14306 and 14468 of 2005 is directed against the rate of dead rent which has been enhanced to Rs.2000/- per hectare per annum as an amendment to the Second Schedule.

There is in force a Central Act enacted by the Parliament to regulate the operation and development of mines in the country. Section 15 of the Central Act enables the State Government to frame their own rules and for the purpose of the present controversy, the relevant would be the Punjab Minor Mineral Concession Rules, 1964, as adopted by the State of Haryana. After the reorganisation such rules have been amended from time to time and the prevailing Rule 10 limited the grant of mining lease for minor minerals to an auction process alone instead of upon an application on *First Come First Serve* basis which was the prevailing practice prior to the amendments.

Pursuant to Rule 10, an auction notice was published on 12.10.2001 inviting applications from desirous persons to participate in the process of grant of mining lease for minor minerals which the petitioner bid successfully for two areas the specifications of which may be extracted here below :-

.....

Sr. No.	Name of the area	Khasra Nos.	Area in Hectares	Name of Minor Minerals	Reserve price (in Rs.)
.....					

8.	Sirohi	5M,6m,7m, 12m,13m,14m 15m,16m,17m, 18m,19m,28m, 29m,30m,31m,32m, 33m,34m,35m.	86.8	Road Metal & Masonary stone.	50 lacs
9.	Kohri	1m,2m,3m,4m, 6m,7,8,9,10m, 11m,12,13,14m, 23,24,25m,27m, 28,29,42m.	131.05	-do-	50 lacs

.....

The period of mining lease was to be 7 years from the date of execution of the lease deed or grant of permission to start mining operation and after communication of acceptance of the highest bid, which ever was earlier.

Clause 3 to this effect is extracted here below :-

“3. The period of mining lease shall be seven years from the date of execution of the lease deed or grant of permission to start mining operation after communication of acceptance of highest bid whichever is earlier.”

The highest bid offered in the auction was fixed to be dead rent per annum to be enhanced by 50% after the expiry of every 3 years of the period of lease. Clauses 5 and 6 stating as such are also extracted here below :-

“The highest bid offered in the auction shall be fixed as dead rent per annum. The highest bidder shall be liable to deposit 25% of his annual highest bid as security for the fulfillment of terms and conditions of the lease deed to be executed on the acceptance of his bid along with 1/12th of the highest bid i.e. one month dead rent in advance with the Presiding Officer of the Auction Committee on the fall of hammer falling which

the earnest money deposited by the successful bidder for participation of auction shall be forfeited. The highest bid received in the auction shall be subject to the approval of the State Government.

6. The annual dead rent shall be enhanced by 50% after the expiry of every three years period of the lease.”

The auction notice further stipulated at Clause-13 that provisions of Rules, 10,21 and 61 of the Punjab Minor Mineral Concession Rules, 1964 shall also apply. Clause 13 is extracted here below :-

“13. Other conditions as applicable to grant of mining lease for minor minerals as contained in Rules 10,21 and 61 of the Punjab Minor Mineral Concession Rules, 1964, shall also apply.”

The controversy as it shall unfold in the subsequent paragraphs, largely centres around the applicability of aforesaid clause 13 to existing leases.

The form of lease to be executed between the State and the successful bidder is contained in Form “F” and it was so done in the case of the petitioner. It is the case of the petitioner that since the lease deed executed as per Form “F” did not contain a stipulation of the applicability of any other rule, envisaging fluctuating rates of royalty the State limited itself to the terms of the lease between the parties and thus, any enhancement made subsequent to the execution of the lease deed would not affect the rights of the petitioner flowing from the lease. Consequently, Annexure P-6, the notification impugned in this petition enhancing the rates of royalty from Rs.24/- to Rs.36/- per tonne would be inapplicable to him. For the said purpose, the petitioner refers to and relies upon

the following extracted portion of the lease :-

“The Lessee/Lesseees here covenant(s) with the Government as follows :-

1. Rate of royalty :- (a) The lessee/lessees shall pay royalty on the quantity of the said minor mineral dispatched from the leased area at the following rate of:

Stone	Rs.24/- per tonne.
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(b) Mode of determination of sale price at the pit's mouth. The sale price of the minor mineral at the pit's mouth shall be the current market price for the mineral of the same grade less :-
 1. transport charges from the mine head to the nearest rail head.
 2. railway freight from the rail head to the market and
 3. estimated handing charges and other incidental expenditure not exceeding 5 percent of the market price.
(c) For calculating the royalty, the lessee/lessees shall submit half yearly returns for the period ending 30th September and 31st March in form “G” to the Director and the Mining Officer Faridabad.
2. Surface Rent :- The lessee/lessees shall pay for the surface area occupied by him/them, surface rent at the rate of Rs.Nil per acre per annum.
3. Dead Rent :- The lessee/lessees shall also pay

for every year and rent at the rate specified in Schedule II of Rules per acre per annum, and if, the lease permits the working of more than one minor mineral in the same area, the Government may charge separate dead rent in respect of each minor mineral :

Provided that the mining of one minor mineral does not involve the working of another minor mineral.

Provided further that the lessee/lessees shall be liable to pay the dead rent or royalty in respect of each mineral, whichever be higher but not both.

Provided further that the lessee shall pay in advance 50 percent of the annual dead rent at the time of execution of the agreement and also in the subsequent years on dates fixed in the lease for payment of the dead rent/ royalty.

Provided further that where the mining lease is granted by public auction, the lessee shall pay either royalty on mineral/minerals extracted or dead rent as determined in the auction, whichever is higher. He shall pay dead rent for a period of one month at the rate determined in the auction in advance by 7th of that month.”

... ..

Now, therefore, this deed witnesses and the parties hereto hereby agree as follows :-

Demised.

1. (a) In consideration of the rents and royalties covenants and agreements hereinafter contained and on the part of the lessee to be paid, observed and performed the Government hereby grants and demises upto the lessees all those mines/beds/veins/seems of road metal and masonry stone (hereinafter referred to as the said minor minerals) stipulated lying and being in or under the lands which are referred to in clause (b) together with the liberties, powers and privileges to be executed or enjoyed in connection herewith which are hereinafter mentioned in Part-I subject to the restrictions and condition as to exercise and enjoyment of such liberties, powers and privileges which are hereinafter mentioned in Part-II and subject to other provisions of this lease.

(b) The area of the said lands is as follows :-

Khasra

No.5m,6m,7m,12m,13m,14m,15m,16m,17m,18
m,19m,28m,29m,30m,31m,32m,33m,34m,35m

of Village Sirohi containing as area of 86.8
hectares or there abouts delineated on the plan
hereto annexed and (hereinafter referred to as
the 'said lands' or the 'leased area').

- (c) The lessees shall hold the premises hereby
granted and demised from the day of 6th

February, 2002 for the term of seven years
hence next ensuing.”

From this assertion of the denial of liability, flows the argument that the State having executed a statutory contract on a form appended to the statute itself, with there being no provision of enhancement, the State would have no authority to vary such a contract by relying on the enforceability of a statutory provision envisaging enhancement to an existing lease as well.

The second argument raised is regarding the absence of any empirical data or a rational input to conclude about the increase of royalty. Lastly, the decision has been challenged on the ground of violation of rules of business.

Learned counsel for the petitioner has stated that the unamended rule 10 envisaged grant of license to an applicant on *First Come First Serve* basis, but by virtue of the amendment, the process of auction was introduced and an auction notice published to which it responded successfully on 30.10.2001 and vide communication dated 6.11.2001 his bid was accepted.

A perusal of this document clearly indicates that the period of grant of lease was **7 years from the date of execution of the lease deed** for grant of permission to start mining operations after acceptance of the highest bid, whichever is earlier. It further went on to say that the agreement was to be executed by the petitioner within three months from the date of communication of acceptance of bid in terms of Rule 19 of the Punjab Minor Mineral Concession Rules, 1964, failing which the order accepting the bid was deemed to have been revoked and the amount of security and advance rent money, to be forfeited by the Government by operation of law.

It is the argument of the learned counsel for the petitioner that its rights were to commence from the date of execution of the lease deed and thus, it

would be the document of lease which would govern the rights of the parties. He specifically refers to the liabilities to be incurred by him in the event of failure to execute the lease deed within three months from the date of communication of acceptance of bid.

In sum and substance, the argument of the petitioner is that the rights would flow from the lease and the mere stipulation in the auction notice or even in the acceptance deed regarding applicability of Rules, 10,21 and 61, would be inconsequential in the face of the terms of the lease deed on statutory Form "F" which clearly excluded any such stipulation.

It is for this purpose that a reference has been made to the Rules of 2012 which have come into existence after the repeal of earlier rules providing a statutory form envisaging payment of fluctuating rate during the subsistence of lease.

Learned counsel for the petitioner also contended that the statute also provides for grant of mining rights under a contract for a fixed period of terms. He has tried to draw a distinction between the two contingencies of execution of contract and a lease deed. He has placed reliance on decisions of the Hon'ble Supreme Court in **Indian Aluminium Company v. Kerala State Electricity Board** (1975) 2 S.C.C.414 and **U.P.Hotels and others v. U.P.State Electricity Board** (1989) 1 S.C.C. 359.

He has further argued that he does not question the power of the State to enhance the royalty, but is aggrieved by the procedure which smacks of arbitrariness, as neither there are any basis for enhancement, nor any rationality to it.

He further contends that rules of business were clearly violated.

The State opposes the prayer of the petitioner to justify the enhancement of royalty on the ground that auction notice and the acceptance bid

clearly put the petitioner on notice regarding applicability of Sections 10,21 and 61 and this would naturally form an inherent component of the lease which was subsequently executed and even if such a stipulation is missing from the lease deed, the statutory obligation of which the petitioner was made aware, would still bind him to the decision of enhancement. It is the specific argument of the learned counsel for the respondents that the auction notice, the acceptance letter and the lease would form one part of composite contract with each to be read into the other.

Besides, rebutting the argument of the petitioner on the first issue as above, it has been contended that the rules of procedure have not been violated and the decision taken to enhance the royalty is in the interest of the revenue flowing from the right vested in them in the statute itself which enables a periodic increase. He has stated that rates of neighbouring States were considered while taking a decision on enhancement.

These are broadly the contours of the controversy and the gist of arguments adopted by the parties before us.

We would thus, now commence to answer the questions raised before us.

The first question raised by the petitioner revolves around the rights of the parties flowing from the lease deed. The petitioner has asserted before us that there can be no deviation from the terms of the lease deed and even if the auction notice and the acceptance bid did stipulate applicability of Rules 10,21 and 61, the relevant clause not forming a part of the statutory contract, would obviously not bind them.

We have noticed that the lease deed is as per the statutory Form "F" of the Punjab Minor Mineral Concession Rules, 1964 read with Rule 19. The rate of royalty is prescribed therein and we may extract it for reference :-

“PART-III

Covenants of the Lessee

The lessee/lessees hereby covenant(s) with the Government as follows :-

1. **Rate of Royalty** :- (a) The lessee/lessees shall pay royalty on the quantity of the said minor mineral dispatched from the leased area at the following rate of :

(b) Mode of determination of sale price at, the pit's mouth. The sale price of the minor mineral at the pits mouth shall be the current market price for the mineral of the same grade less :-

- (i) Transport charges from the mine head to the nearest rail head ;
- (ii) railway freight from the rail head to the market ; and
- (iii) estimated handling charges and other incidental expenditure not exceeding 5 percent of the market price.

(c) For calculating the royalty, the lessee/lessees shall submit half yearly returns for the period ending 30th September and 31st March in form “G” to the Director and the Mining Officer _____.”

In the lease executed, the rate prescribed was Rs.24/- per tonne with no mention of applicability of Rule 21 which obligates the lessee to pay royalty at such rates which may be notified from time to time. Rule 21 is extracted here below :-

“21.(1) **Conditions of mining Lease** :- Every mining lease shall be subject to the following conditions :

- (i) (a) The lessee shall pay royalty on minor minerals dispatched from the leased area at the rates specified in the first schedule :

Provided that the lessee shall pay royalty at such revised rates as may be notified from time to time.

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- (b) For calculating the royalty the lessee shall submit half yearly return for period ending 30th September and 31st March in Form "G".
- (ii) The lessee shall pay for the surface area occupied by him at such rates not exceeding land revenue, water charges and cesses, assessable on the land as may be fixed by the Govt. and specified in the lease deed.
- (iii) The lessee shall also pay for every year, such yearly **dead rent within the limits specified** in second schedule as may be fixed by the Government and if the lease permits the working of more than one minor mineral in the same area the Government may charge separate dead rent in respect of each minor mineral :

Provided that the mining of one minor mineral does not involve the mining of another minor mineral.

Provided further that the lessee shall be liable to pay the dead rent or royalty in respect of each minor mineral whichever is higher in amount but not both."

We may note here that the petitioner at no stage of the proceedings has questioned the legislative competence of the State to enhance the royalty. Its only assertion is that if it is a statutory contract executed on a Form prescribed by the Act itself and in the absence of any stipulation in the final draft of the lease making the petitioner liable for any enhancement or fluctuating rate of royalty, then the State would clearly not be within its rights to impose such a condition even if the statute (Rule 21) permits it to do so.

It is the admitted case of the parties that the lease deed does not provide for applicability of Rule 21 specifically.

The principle of law would dictate that the rights of the parties would flow from the document which compresses the terms between the contracting parties. It can be varied of course, with the consent of the parties, but something which has not been envisaged when the parties append their consent to a document, cannot be imported into it.

The plea of the respondent/State that the auction notice and acceptance bid would form an inherent part of the lease deed, does not find acceptance with us. It is quite possible that the terms of the auction notice and the acceptance deed may still be varied by the contracting parties at the time of finalizing the agreement.

It has also to be noticed at the cost of repetition that the lease is executed on a statutory form and nothing stops the State from incorporating such terms as it wishes to impose upon the lessee and obviously, it is for this reason that after the coming into force of the Rules of 2012, amendments in this regard have been made.

The document of contract has to be read as it is and this aspect would be clarified by the able language of Sections 91 and 92 of the Indian Evidence Act, 1872 which may be extracted here below :-

“91. Evidence of terms of contracts, grants and other dispositions of property reduced to form of documents.-

When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which second evidence is admissible under the provisions hereinbefore contained.

Exception 1.- When a public officer is required by law to be appointed in writing, and when it is shown that any particular person has acted as such officer, the writing by which he is appointed need not be proved.

Exception 2.- Wills (admitted to probate in (India) may be proved by the probate.

Explanation 1.- This section applies equally to cases in which the contracts, grants or dispositions of property referred to are contained in one document, and to cases in which they are contained in more documents than one.

Explanation 2.- Where there are more originals than one, one original only need be proved.

Explanation 3.- The statement, in any document whatever, of a fact other than the facts referred to in this section, shall not preclude the admission of oral evidence as to the same fact.

92. **Exclusion of evidence of oral agreement.-** When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms :

Proviso (1).- Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto ; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, (want or failure) of consideration, or mistake in fact or law :

Proviso (2).- The exercise of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved. In considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document.

Proviso 3.- The existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved :

Proviso (4).- The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property, may be proved, exception cases in

which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents.

Proviso (5).- Any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description, may be proved :

Provided that the annexing of such incident would not be repugnant to, or inconsistent with, the express terms of the contract.

Proviso (6).- Any fact may be proved which shows in what manner the language of a document is related to existing facts.”

The auction notice and the acceptance letter would not *ipso facto* confer any enforceable terms which would strictly be governed by the terms of the lease. Even the acceptance letter carried a reminder to the petitioner that the period of lease **shall be 7 years from the date of execution of the lease deed or grant of permission to start mining operations after communication of acceptance of the highest bid whichever is earlier.** This acceptance is dated 6.11.2001 and the lease deed was executed on 30.6.2002 defining the date of commencement of the terms and therefore, to say that the auction notice and the acceptance bid would form a composite portion of the contract, would be a fallacy. The notice and the acceptance bid are merely a part of the process leading to finalization of the contract.

It is a lapse of the State and even though the statute (Rule 21) mandates the lessee to pay the royalty on minor minerals at rates specified in the

First Schedule with the proviso mandating that the same shall be paid at such rates as may be notified from time to time, but absence of this stipulation from the lease deed would protect the petitioner.

In **Indian Aluminum Company v. Kerala State Electricity Board** (1975) 2 S.C.C.414 (supra), the Hon'ble Supreme Court observed as under :-

“10. Having analyzed the provisions of Section 49, we may now turn to consider the argument advanced on behalf of the Board that a stipulation binding the Board not to charge anything more than a specific rate would be void as it would have the effect of divesting the Board of the power to fix and re-fix charges entrusted to it under Section 49, or hindering or fettering its future exercise. Now, if there is one principle more well settled than any other, it is that when a public authority is entrusted by statute with a discretionary power to be exercised for the public good, it cannot, when making a private contract in general terms, fetter itself in the use of that power or in the exercise of such discretion. There are a number of decisions which would establish this principle beyond doubt. We may refer to a few of them in order to appreciate the true scope and ambit of this principle – what is its area of operation and what are its limitations.

11. The first case where this principle was enunciated is *Ayr Harbour Trustees v. Oswald (supra)*. In this case the Harbour Trustee, whose statutory power and duty were to acquire land, to be used as need might arise for the construction of works on the coastline of the harbour, sought

to save money in respect of severance on the compulsory acquisition of a particular owner's land by offering him a perpetual covenant not to construct their works on the land acquired, so as to cut off from access to the waters of the harbour, or otherwise to affect him injuriously in respect of the land not taken but from which the acquired land was severed. It was held that such a covenant was ultra vires. Lord Black-burn stated the principle in these terms :

I think that where the Legislature confers powers on anybody to take lands compulsorily for a particular purpose, it is on the ground that the using of that land for that purpose will be for the public good. Whether that body be one which is seeking to make a profit for shareholders, or as in the present case, a body of trustees acting solely for the public good, I think in either case the powers conferred on the body empowered to take the land compulsorily are entrusted to them, and their successors, to be used for the furtherance of that object which the Legislature has thought sufficiently for the public good to justify it in entrusting them with such powers ; and, consequently, that a contract purporting to bind them and their successors not to use those powers is void.

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14. The principle laid down in these cases is unexceptionable and cannot be doubted. But the question is :does it apply in the present case. We do not think so.

The principle is attracted when an attempt is made to fetter in advance the future exercise of statutory powers otherwise than by the valid exercise of a statutory power. The covenant in *Ayr Harbour's case (supra)* tied the hands of the Harbour Trustees and prevented them from constructing works on the land acquired, however necessary they might become for the proper management of the undertaking and thus fettered the Harbour Trustees in the exercise of the statutory power entrusted to them by the Legislature for the purpose of the undertaking. But this covenant was entered into by the Harbour Trustees as a 'private contract' with the owner of the land acquired in order to save money in respect of severance and not in exercise of a statutory power and hence the principle was invoked to invalidate the covenant. So far as York Corporation case (*supra*) is concerned, it came to be severely criticized by Sargant, L.J. in *Southport Corporation v. Birkdale District Electric Supply Co.* and the learned Lord Justice pointed out that the decision in York Corporation's case could hardly stand with the judgment of the Court in Southport Corporation's case (*supra*). This criticism of the decision in York Corporation's case was adopted by Earl of Berkenhead when the Southport Corporation case was taken in appeal to the House of Lords. Lord Sumner also observed in that case that he did not think that there was a true analogy between *Ayr Harbour's case* and *York Corporation's case*. The House of Lords as well as the

Court of Appeal in the *Southport Corporation's case* seemed to be of the view that the *Yord Corporation's case* was *wrongly decided*. Of course, they did not doubt the validity of the principle enunciated by Russell, J., but questioned its applicability to the facts of the *York Corporation's case*. They appeared to think that the discharge of their statutory duties by the Harbour trustees would be facilitated rather than fettered by a reasonable altitude of discretion in fixing tolls and both Ouse and Fose agreements must, therefore, be regarded as having been entered into by the Harbour Trustees in exercise of the statutory power of fixing tolls and hence they would be valid. But they pointed out that there were certain peculiar features in the *York Corporation's case* on which the actual decision of Russell, J., holding Ouse and Fose agreements to be void, could be sustained. **The discussion of these two cases shows that the principle that a public authority cannot by contract fetter the exercise of the statutory power, which is conferred upon it for the public good, is limited its application to those cases where the attempt to do so is otherwise than by the valid exercise of a statutory power.**

15. The position is different where a statutory power is exercised to enter into a stipulation with a third party which fetters the future exercise of other statutory powers – where such stipulation is made not as part of 'private contract in general terms' as Devin, L.J. calls it in *Commissioner of Crown Lands v. Page* but in exercise of a statutory power. In

such a case, it is difficult to see how the exercise of the statutory power could be held to be invalid as a fetter on the future exercise of other statutory powers. If it were so held, it would render the statutory power meaningless and futile. It would nullify the existence of the statutory power and that would be contrary to all canons of construction. If the statutory power is to have any meaning and content, the stipulation made in exercise of the statutory power must be valid and binding and it would, as pointed out by *Pennycuik, V.C. in Dowty Boulton v. Wolverhampton; Corporation*, “exclude the exercise of other statutory powers in respect of the same subject matter”. **To put it differently, where a stipulation in a contract is entered into by a public authority in exercise of a statutory power, then, even though such stipulation fetters subsequent exercise of the same statutory power or future exercise of another statutory power, it would be valid and the exercise of such statutory power would pro tanto stand restricted. That would follow on the principle of harmonious construction. The public authority would not, in such a case, be free to denounce the stipulation as a nullity and claim to exercise its statutory power in disregard of it. If that were permissible, it would mean that the stipulation has no binding force and the public authority has no statutory power to enter into such stipulation. But that would be plainly contradictory of the premise on which the argument is based.**

16. The distinction must always, be borne in mind whether the stipulation by which the public authority is alleged to have fettered in advance the further exercise of the statutory power, is one which is entered into as part of 'private contract in general terms', or in exercise of a statutory power. If it is the former, the stipulation would be bad on the principle that a public authority cannot by contract fetter the exercise of a statutory power which is conferred upon it for the public good. But if it is the latter, the stipulation being in exercise of a statutory power would be valid and it would not be open to the public authority to disregard the stipulation and exercise the statutory power inhibited or fettered by it. This last statement, must, however, be qualified by making it clear that a case may conceivably arise where there may be an over-riding statutory provision which expressly or by necessary implication authorizes the public authority to set at naught, in certain given circumstances, a stipulation though made in exercise of a statutory power. Where there is such a statutory provision, the stipulation would certainly be binding, but when the specified circumstances arise, the public authority would have the power to override the stipulation and act in derogation of it. But that again would be a matter of construction."

We have no doubt in our mind that the contract was a statutory contract. It was obligatory on the State to incorporate the statutory terms with

which it intended to bind the contracting party, but having forsaken such a course it cannot jump the statutory gun on the contracting party to enforce the terms which were not visualized in the document of contract. Indeed, it is a case where the State itself fettered its own powers either through neglect or convenience.

The respondents have placed reliance on judgments of the Hon'ble Supreme Court in **State of Haryana v. Jage Ram** 1980(3) S.C.C. 599 and **Har Shankar v. Deputy Excise & Taxation Commissioner** 1975(1) S.C.C. 737. Reliance was also placed on a decision in **D.K.Trivedi & sons and others v. State of Gujarat and others** 1986(Supp.) S.C.C.20. We find that this judgment is distinguishable on facts. While commenting that the State would be within its authority to charge the prevailing royalty from a lessee during the subsistence of the terms of a lease deed, it noted terms of the lease deed itself which was executed in the Form prescribed under the statute itself which contain a clear stipulation that we may extract here below :-

“PART V

Rent and Royalties Reserved by this lease

xxx	xxx	xxx
xxx	xxx	xxx

3. *Rate and mode of payment of royalty.*- Subject to the provisions of Clause I of this Part, the lessee/lessees shall, during the subsistence of this lease, pay to the Government at such times and in such manner as the government may prescribe royalty in respect of any minor minerals removed by him/them from the leased area at the rates for the time being in force under Schedule I to the Gujarat Mineral Rules, 1966.”

By a subsequent notification, clause-10 was inserted in para-9 of the

Schedule to Form D which makes it abundantly clear that lease executed in the statutory form by the parties in the said case contained a clear stipulation binding the lessee to the rules as amended from time to time and payment of royalty as per the prevailing rates.

Evidently, conscious of this lapse, the Mining Rules of 2012 now clearly provide for applicability of revised rates of royalty that the Government may prescribe from time to time. We may extract the relevant portion of the rules for ready reference :-

“9. Grant of a Mining Leae through competitive bidding.

xxx	xxx	xxx
xxx	xxx	xxx

(5) The lessee shall pay royalty in respect of each of the minor minerals extracted or removed or consumed by him or by his agent, manager, employee etc. The royalty shall be payable at the rates prescribed in the First Schedule appended to these rules.”

The Form on which the lease is executed as per 2012 Rules, also provides similarly.

We thus, conclude the aforesaid first question that the State was absolutely within its rights to have increased the royalty which in any case has not been challenged, but in the absence of any stipulation in the lease deed which define the contract, the State has fettered its own rights flowing from the statute, and thus cannot bind the petitioner to any other term not contemplated in the lease deed. The next question that has been posed before us is regarding the arbitrariness in concluding the increase.

Once the State has the legislative competence to increase the rates, it

obviously cannot be questioned on the ground of competence, but under Article 226 of the Constitution of India, the Court is empowered to look into the reasons which go into such a decision to conclude about its validity. The power of judicial review is well defined. Every executive action can be nullified on scrutiny by the Court, if the elements of arbitrariness and non-application of mind manifest themselves.

In Indian Railway Construction Co.Ltd. v. Ajay Kumar (2003)

4 S.C.C. 579 the Hon'ble Supreme Court observed as under :-

“13. One of the points that falls for determination is the scope for judicial interference in matters of administrative decisions. Administration action is stated to be referable to the broad area of government activities in which the repositories of power may exercise every class of statutory function of executive, quasi-legislative and quasi-judicial nature. It is trite law that exercise of power, whether legislative or administrative, will be set aside if there is manifest error in the exercise of such power or the exercise of the power is manifestly arbitrate. (See State of U.P. v. Renusagar Power Co.). At one time, the traditional view in England was that the executive was not answerable where its action was attributable to the exercise of prerogative power. Professor de Smith in his classical work *Judicial Review of Administrative Action*, 4th Edn., at pp.285-87 states the legal position in his own terse language that the relevant principles formulated by the courts may be broadly summarized as follows. The authority in which a discretion is vested can be compelled to exercise that discretion, but not to exercise it in

any particular manner. In general, a discretion must be exercised only by the authority to which it is committed. That authority must genuinely address itself to the matter before it ; it must not act under the dictates of another body or disable itself from exercising a discretion in each individual case. In the purported exercise of its discretion, it must not do what it has been forbidden to do, nor must it do what it has not been authorized to do. It must act in good faith, must have regard to all relevant considerations and must not be influenced by irrelevant considerations, must not seek to promote purposes alien to the letter on to the spirit of the legislation that gives it power to act, and must not act arbitrarily or capriciously. These several principles can conveniently be grouped in two main categories : (i) failure to exercise a discretion, and (ii) excess or abuse of discretionary power. The two classes are not, however, mutually exclusive. Thus, discretion may be improperly fettered because irrelevant considerations have been taken into account, and where an authority hands over its discretion to another body it acts ultra vires.

14. The present trend of judicial opinion is to restrict the doctrine of immunity from judicial review to those class of cases which relate to deployment of troops, entering into international treaties etc. The distinct features of some of these recent cases signify the willingness of the courts to assess their power to scrutinize the factual basis upon which discretionary powers have been exercised. One can conveniently classify under three heads the grounds on which

administrative action is subject to control by judicial review. The first ground is “illegality”, the second “irrationality”, and the third “procedural impropriety”. These principles were highlighted by Lord Diplock in *Council of Civil Service Unions v. Minister for the Civil Service* (commonly known as CCSU Case). If the power has been exercised on a non-consideration or non-application of mind to relevant factors, the exercise of power will be regarded as manifestly erroneous. If a power (whether legislative or administrative) is exercised on the basis of facts which do not exist and which are patently erroneous, such exercise of power will stand vitiated. (See *CIT V. Mahindra and Mahindra Ltd.*). The effect of several decisions on the question of jurisdiction has been summed up by Grahame Aldous and John Alder in their book *Applications for Judicial Review, Law and Practice* thus :

“There is a general presumption against ousting the jurisdiction of the courts so that statutory provisions which purport to exclude judicial review are construed restrictively. There are, however, certain areas of governmental activity, national security being the paradigm, which the courts regard themselves as incompetent to investigate, beyond an initial decision as to whether the Government's claim is bona fide. In this kind of non-justiciable area judicial review is not entirely excluded, but very limited. It has also been said that powers conferred by the Royal Prerogative are

inherently unreviewable but since the speeches of the *House of Lords in Council of Civil Service Unions v. Minister for the Civil Service* this is doubtful. Lords Diplock, Scarman and Roskill appeared to agree that there is no general distinction between powers, based upon whether their source is statutory or prerogative but that judicial review can be limited by the subject-matter of a particular power, in that case national security. Many prerogative powers are in fact concerned with sensitive, non-justiciable areas, for example, foreign affairs, but some are reviewable in principle, including the prerogatives relating to the civil service where national security is not involved. Another non-justiciable power is the Attorney-General's prerogative to decide whether to institute legal proceedings on behalf of the public interest.”

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17. Before summarizing the substance of the principles laid down therein we shall refer to the passage from the judgment of Lord Greene in *Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn.* (KB at p.229 : All ER pp.682 H-683 A). It reads as follows :

“It is true that discretion must be exercised reasonably. Now what does that mean ? Lawyers familiar with the phraseology used in relation to exercise of statutory discretion often use the

word 'unreasonable' in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably'. Similarly, there may be something so absurd that no sensible person could even dream that it lay within the power of the authority. ... In other, it is taking into consideration extraneous matters. It is unreasonable that it might almost be described as being done in bad faith ; and in fact, all these things run into one another. Lord Greene also observed :(KB p.230 : All ER p.683 F-G).

“ ... it must be proved to be unreasonable in the sense that the court considers it to be a decision that no reasonable body can come to. *It is not what the court considers unreasonable.* ... The effect of the legislation is not to set up the court as an arbiter of the correctness of one view over another.”

18. Therefore, to arrive at a decision on “reasonableness” the court has to find out if the administrator has left out relevant factors or taken into account irrelevant factors. the decision of the administrator must have been within the four corners of the law, and not one which no sensible person could have reasonably arrived at, having regard to the above principles, and must have been a bona fide one. The decision could be one of many choices open to the authority but it was for that authority to decide upon the choice and not for the court to substitute its view.”

In Rayalaseema Paper Mills Ltd. and another v. Government of A.P. and others (2003) 1 S.C.C. 341, the Hon'ble Supreme Court observed as under :-

“14. Before we enter the discussion, it is made clear that the determination of rates of royalty for supply of forest produce to paper mills is not governed by any statute or a statutory order. The Government while entering into the agreement with the paper mills had undertaken to supply a certain specified quantity of wood each year for a period of 20 years. The Government had not assured the mills that it will supply bamboo and other forest produce required by them at a particular rate. Nor was there an agreement between them with respect to the manner in which the rates of royalty would be determined. There was no assurance that the mills would be consulted or associated while fixing the rates of royalty.

Even where the matter is governed by a statute or a statutory order, the scope of judicial enquiry is limited. This Court in *Union o India v. Cynamide India Ltd.* examined the scope of judicial interference in the matters of price fixation and observed : (SCC pp.734-35, paras 4-6)

“4. We start with the observation, 'Price fixation is neither the function nor the forte of the court'. We concern ourselves neither with the policy nor with the rates. But we do not totally deny ourselves the jurisdiction to enquire into the question, in appropriate proceedings, whether relevant considerations have gone in and irrelevant considerations kept out of the determination of the price. For example, if the legislature has decreed the pricing policy and prescribed the factors which should guide the determination of the price, we will, if necessary, enquire into the question whether the policy and the factors are present to the mind of the authorities specifying the price. But our examination will stop there. We will go no further. We will not deluge ourselves with more facts and figures. The assembling of the raw materials and the mechanics of price fixation are the concern of the executive and we leave it to them. And, we will not re-evaluate the considerations even if the prices are demonstrably injurious to some manufacturers or producers. The court will, of course, examine if there is any hostile discrimination. That is a

different 'cup of tea' altogether.

5. The second observation we wish to make is, legislative action, plenary or subordinate, is not subject to rules of natural justice. In the case of parliamentary legislation, the proposition is self-evident. In the case of subordinate legislation, it may happen that Parliament may itself provide for a notice and for a hearing – there are several instances of the legislature requiring the subordinate legislating authority to give public notice and a public hearing before say, for example, levying a municipal rate – in which case the substantial non-observance of the statutorily prescribed mode of observing natural justice may have the effect of invalidating the subordinate legislation. The right here given to rate payers or others is in the nature of a concession which is not to detract from the character of the activity as legislative and not quasi-judicial. But, where the legislature has not chosen to provide for any notice or hearing, no one can insist upon it and it will not be permissible to read natural justice into such legislative activity.

6. Occasionally, the legislature directs the subordinate legislating body to make 'such enquiry as it thinks fit' before making the subordinate legislation. In such a situation, while such enquiry by the subordinate legislating body as it deems fit is a condition precedent to the subordinate legislation, the nature and the extent

of the enquiry is in the discretion of the subordinate legislating body and the subordinate legislation is not open to question on the ground that the enquiry was not as full as it might have been. The provision for 'such enquiry as it thinks fit' is generally an enabling provision, intended to facilitate the subordinate legislating body to obtain relevant information from all and whatever source and not intended to vest any right in anyone other than the subordinate legislating body. It is the sort of enquiry which the legislature itself may cause to be made before legislating, an enquiry which will not confer any right on anyone."

15. **This Court was examining the scope of judicial enquiry in the matters of price fixation where it was governed by statutory provisions. The scope of judicial scrutiny would be far less where the price fixation is not governed by the statute or a statutory order. Where the legislature has prescribed the factors which should be taken into consideration and which should guide the determination of price, the courts would examine whether the considerations for fixing the price mentioned in the statute or the statutory order have been kept in mind while fixing the price and whether these factors have guided the determination. The courts would not go beyond that point. In the present appeals, there is no law, or any statutory provision laying down the criteria or the principles which must be followed, or which must guide**

the determination of rates of royalty. No doubt, any arbitrary action taken would be subject to scrutiny by the courts because arbitrariness is the very antithesis of rule of law. But this does not mean that this Court would act as an Appellate Authority over the determination of rates or royalty by the Government. The Government is the owner of the products. While it had agreed to supply a particular quantity every year for specified period, it had never agreed to supply at a particular rate ; nor did it stipulate with the mill-owners the basis upon which it would determine the rates of royalty. It is open to the Government to fix such price as it thinks appropriate having regard to public interest, which inter alia, may include interest of revenue, environmental, ecology, the need of mills and the requirements of other consumers. The price is not to be fixed keeping in mind the requirements of the mills alone.”

We are at pains to state here that in **Royalaseema Paper Mills Ltd. and another v. Government of A.P. and others (supra)**, a Committee had been constituted which went into the detailed aspects before fixing the rates of royalty and the observations of the Hon'ble Supreme Court on a perusal of the report of the Committee would be relevant and are extracted here below :-

“18. We have gone through the report of the Committee in fixation of the rates of royalty. The Committee took into consideration the status of the paper industry in the country and in the State of Andhra Pradesh. Thereafter the Committee proceeded to examine the various alternative

methods for fixing the rates of royalty. It was noted that the Committee did not come across any norms evolved so far anywhere in the country for determining the rates of royalty when captive forest resources are offered by the State to the industry. They referred to a study by the Central Board of Forestry (1973) in which the Central Board of Forestry recommended the guiding principle as follows :-

“The incentive of the produce be kept alive and a proper price be paid for the raw material which will enable the Forestry sector to carry out the needed maintenance and improvement of natural forests as well as grow plantations which are economically viable from the point of Forestry sector.”

19. After examining the various methods including the past rates, rates prevalent in the neighbouring States, administrative cost/expenses on silvicultural needs, market price, cost of production of paper, replacement cost for man-made forest material, market price as royalty etc., it adopted the method of replacement cost be the guiding principle for fixing the rates of royalty. The relevant factors which prevailed with the Committee for adopting the regeneration/replacement cost method were detailed in the report which has been referred to and reproduced by us in this judgment. It would be noted that the Committee came to the conclusion that forests are no longer naturally renewable resource but have been rendered wasted assets due to over exploitation without

corresponding regeneration, resulting in serious environmental and ecological imbalance. To reduce the pressure on reserved forests, increasing to almost alarming proportions, replacement or regeneration coupled with improved management, should be at least as fast as the pace of exploitation.”

In M.P.Oil Extractions and another v. State of M.P. and others

(1997) 7S.C.C. 592, the Hon'ble Supreme Court observed as under :-

“46. So far as the contention that royalty for the sal seed to be supplied to the respondents has been fixed unreasonably in order to ensure naked favouritism to the said respondents is concerned, the appellants have failed to demonstrate such naked favouritism. The fixation of rate of royalty on the basis of weighted average formula has a rational basis and is also a known method and modality for determining market price. It also appears to us that the price per MT of sal seeds has different components of which collection charges is the principal factor. It may also be noted here that the revisions of royalty by the State Government at Rs.750, Rs.1030 and Rs.1030 per MT respectively for 1983-85, 1985-87 and 1987-89 blocks and had been challenged and such revisions were struck down by the High Court of M.P. and High Court directed redetermination of the rates of royalty as per the established weighted average formula. Arbitration was held for determining the appropriate royalty and the royalty thereafter was refixed at Rs.300 per MT in place of Rs.750,

Rs.300 per MT in place of Rs.1030 and Rs.294 per MT in place of Rs.1030 for the said three blocks. **In the aforesaid facts, it cannot be held that the fixation of royalty in the impugned agreements is without any basis and wholly arbitrary and designed only to ensure favouritism, as alleged. If there is an objective and rational foundation for the fixation of royalty, the Court will not interfere with the exercise of governmental decision by itself undertaking an exercise to find out as to whether better fixation was possible or not.** It needs to be noted that in matters of economic rights and policy decision, the scope of judicial review is limited and circumscribed. It may also be indicated here that within the ambit of protective measure of assured supply of sal seeds, such supply of concessional price is also a relevant consideration. The State Government may not be dictated by the only consideration of more revenue.”

There is thus, no element of doubt that there has to be an impact assessment and an empirical study of inputs from relevant sources before such an increase ought to be effected to earn justification.

Some of the factors to be considered have been noticed in **Quarry Owners' Association v. State of Bihar and others (2000) 8 S.C.C. 655** and it was observed as under :-

“59. Next, coming to the quantum of imposition, on the facts of this case, the imposition of royalty/dead rent could be said to be arbitrary or excessive by the State Government. We do

not find any material placed by the appellants in the writ petition to come to such a conclusion. Though by proviso to sub-section (3) of Section 15 it is open for the State Government to revise the royalty every three years but the history shows it has not done so. Since 1975 the State Government has increased royalty only four times and there is no increase since 28.9.1994 despite lapse of six years, in other words, raising royalty only four times during 25 years. Even in the case of **D.K.Trivedi** as we have recorded above a large percentage of increase in royalty has been made yet it was not struck down on that account.”

Ironically, this judgment has been relied by the respondents also to state that the enhancement of royalty was upheld, but that was in the peculiar set of circumstances where the enhancement was justified particularly when the legislative competence was not challenged (as in the instant case also) but largely for the reason that the parties to the dispute in the said case had not placed any material to persuade the Court to come to such a conclusion.

In the instant case, however, the petitioner has placed on record by way of a Miscellaneous Application ample information which has not been disputed by the respondents to expose the decision of enhancement of royalty to a sustainable allegation of arbitrariness and irrationality.

In the noting dated 20.3.2003, a proposal was made to enhance the royalty on minor minerals by 50% over and above the present rates and dead rent from Rs.1000/- to Rs.2000/- per hectare. For the purpose of reference, the relevant portion of the noting is extracted here below:-

“.... According to the terms and conditions of the lease deed,

such lessees shall be liable to pay royalty can the mineral (minor) extracted the rates prescribed in the first schedule to the Punjab Minor Mineral Concession Rules, 1964 or the minimum dead rent fixed on the basis of bid offered whichever is more. It will be all the more important to revise these rates as the lessee is required to pay royalty per tonne of the mineral dispatched.

... ..

In the State of Haryana about 90% of the royalty is been accrued mainly from two minor mineral i.e. Road Metal and Masonary Stone and ordinary sand, that too mainly comes from the districts of Faridabad and Gurgaon. Mining in these two districts is lying closed in view of interim orders of Hon'ble Supreme Court of India since May 2002 and December 2002 respectively.

However, in view of the fact that the period of 3 years has already expired may put up the case to the State Govt. for the enhancement of royalty/dead rent for minor minerals. **It is submitted that a sub committee constituted of DETC and MO of he districts of Faridabad, Gurgaon, Bhiwani and Narnaul may be constituted to give its suggestions with regard to enhancement in royalty, so that a proposal for final decision can be put to State Govt. for enhancement in royalty/dead rent.**

Submitted please.

**MINING ENGINEER
29.5.03.**

... ..

In the year 1999, proposal for the revision of royalty was sent to the State Govt. vide this office Memo dated 29.6.99 (Flat - "X") along with a draft notification on 19.8.1999 (Flag-'V') the State Government requested this office to reconsider the matter and submit to the Government urgently. Accordingly, to the State Government vide this memo dated 7.9.1999 (Flat-'Z') again submitted the proposal for revision of royalty. The orders of C.M. might have been obtained on the file of the State Government.

... ..

It is requested that the royalty rates of Delhi, Uttar Pradesh, Rajasthan, etc. may also be compared.

... ..

May seek information regarding rates of royalty and dead rent of Minor Minerals from States of Rajasthan, U.P., Uttaranchal, Punjab, H.P. and Delhi as per fair drafts placed below for approval and signs please.

... ..

State Geologist, Himachal Pradesh has sent the copies of the existing rates of royalty and dead rent as prevailing in their State. PUC II & III.

... ..

The rates of royalty of U.P. as well as Punjab added please. The comparative rats of minor minerals mainly available in the State with adjoining States is placed below for perusal please.

...

...

...

Rate of royalty of minor minerals from the State of Himachal Pradesh, Punjab, Rajasthan and Uttar Pradesh have been procured and comparative chart have been prepared and is placed at flag 'A'. The perusal of comparative figures indicates that rate of royalty for minor minerals, particularly for stone and Ordinary sand, which contributes about 90% of the revenue collected from royalty on minor minerals from the mining lease hold areas granted for the various minerals, is on higher side. State of Haryana revised royalty/dead rent rates on 16.9.1999. As per provisions of sub section 3 of section 15 of Mines and Minerals (R&D) Act, 1957, State Government shall not enhance the rate of royalty and dead rent before period of 3 years. Since period of three years has already expired. State can revised royalty/dead rent for minor mineral.

In view of above, submitted for orders on "X" at page 6/N.

Submitted please.

MINING ENGINEER

28.7.03

...

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...

The Sub-Committee to be constituted of DETC and MOs will be headed by which Officer has not been decided. Moreover, the copy of the orders to constitute a Sub-Committee may be sent to the State Government for issuing the Office Order.

...

...

...

The proposal was submitted to State Govt. for the formation

of Sub Committee constituted of DETC & MO to give suggestions with regards to enhancement of royalty so that proposals be put up for enhancement (page 6/N).

The then Commissioner and Secretary to Government Haryana Mines and Geology Department desired that a comparative royalty adjoining State Delhi, U.P., Rajasthan be put up (page 8/N). As per the orders of comparative statement chart of the rate of royalty by put (flag 'B') and the State Govt. was again requested for the approval of the proposal put up by this office at on page 6/N. The State Govt. approved the proposal (page 12/N).

... ..

If approved State Govt. may now be requested to issue orders for constituting the Sub-Committee and also name the officer to head the Sub-Committee as per draft.

... ..

A proposal for revision of rates of royalty and dead rent was earlier submitted to the State Govt. The substantial amount of royalty is being accrued from two minor minerals i.e. ordinary sand and Road Metal and Masonary Stone (stone) mainly from the districts of Faridabad and Gurgaon. But the mining in these districts is lying closed in compliance with the interim orders of Hon'ble Supreme Court of India since May and December, 2002 respectively. The matter relating to mining in these districts is pending adjudication before Hon'ble Supreme Court of India and is fixed for 29.3.2005.

In view of the orders of the the Director Mines and

Geology on page 15/N, draft notification was submitted for approval. But the case could not be discussed as in between the model code of conduct came into force.

In view of the position explained above, it is proposed that rates of royalty on minor minerals be enhanced by 50% over and above the present rates of royalty and dead rent may also be enhanced from Rs.1000/- per hectare to Rs.2000/- per hectare. Increase of rates of royalty for ordinary sand and stone shall boost the State revenue substantially as these two minerals are the major productions in the State. Draft notification enhancing the rates of royalty on different minor minerals and also dead rent is placed below at flag "C" for kind perusal and approval please."

Finally, a decision was taken on 23.3.2005 and it may be extracted here below :-

"The rates of royalty as prescribed in the first schedule of the state rules, the rate of dead rent for minor minerals 2nd schedule, and rate of royalty (lumpsum) being charged from B.K.O's was last revised on 16.9.1999. Hence period of more than three years has passed and rates can be revised enhanced.

The rates of Royalty on the minerals is paid in case of mining leases, whereas in the case of mining contracts fixed contract money as decided in the public auction is paid. At present mining in the district of Gurgaon and Faridabad (except 2 mines of stones lease) are lying closed, where mining leases exists. The enhancement of royalty at present

will increase revenue from the two mining leases of Fbd. and six mining leases of district Bhiwani. Though the comparative royalty on the main minerals stone and ordinary sand (minor minerals) in the adjoining states is on lower side, but the period of 3 years has already lapsed, royalty rates, may be enhanced to increase the State revenue. In the year 1999, the increase was of 100%, however now keeping in view of comparative royalty in adjoining states we may increase it by 50% only.”

The aforesaid found approval.

The plea of the petitioner is that such an enhancement was completely arbitrary as the aforesaid notings of the Government would show that the increase being enforced without any valid inputs.

The respondents justify this by referring to the fact that on a prior occasion i.e. the last enhancement was 100% and since there was a mining ban enforced by the Hon'ble Supreme Court in the area in question with the petitioner virtually enjoying monopoly on the two mines, the enhancement was justified particularly when the object of the Government was to have increased revenue which in itself is a valid ground to enhance the royalty more particularly when the State's legislative competence in this regard is unquestioned.

Unquestioned it may be, but not unbridled. The aforesaid notings would clearly indicate that the State did endeavour to seek rates from the neighbouring States and also suggest formation of a Committee, but for some strange reasons, neither the Committee was constituted, nor any inputs obtained and neither impact assessment conducted, nor any rational provided to decision of enhancement. In **Quarry Owners' Association v. State of Bihar and others**

(supra), the Hon'ble Supreme Court upheld the enhancement only because of lack of material to support the allegation of arbitrariness. In the instant case, we find that the notings provided an insight to the Government's alertness to the fact that a decision needs to be taken by evaluating the inputs by an Expert Committee, but no reasons have been given either for abandonment of such a process, or for prescribing 50% increase in royalty.

The increase in revenue would be a logical corollary, to an increased royalty but this itself can only offer a justification for the necessity to increase, but cannot be a substitute as a reason to prescribe quantum rate which is dependent on various factors.

We are, thus, of the opinion that there was no material before the decision making authority to have concluded the rate of enhancement at 50%. An attempt has also been made by the petitioner to argue that even the reasoning of increase in revenue is falsified by the action of the State itself when it resorted to giving the mines in the same area on contract basis through an auction notice dated 3.5.2005 merely few months before the enhancement. From this, it has been argued that either it is a case of the left not knowing what the right is doing, or it is a dishonest exercise intended to give contracts to the favoured before announcement of the enhancement to which these beneficiaries would not be bound since it is a contract and not subject to any variables as the lessees would be such as the petitioner.

This argument seems attractive but we leave it that at that for we have no insight into such a decision.

From the above, we would conclude that the decision is based on no visible rationale and can be termed to be arbitrary.

The last limb of the arguments is that the rules of business formulated by the Government under Article 166 of the Constitution of India as

applicable to the State of Haryana have been totally deviated from, to result in violation rendering the decision unsustainable in view of the mandatory nature of the said rules. It has been argued that the State Government is the repository and trustee of the natural sources existing within the State and it acts as a delegatee of the Central Government, who has enacted the Principal Act. The State in this regard acts as a delegatee of the Parliament to frame rules under Section 15 of the Minor Mines and Minerals Development Act, 1957 (Central Legislation). The matters provided under this section relate to the executive power of the State and not the legislative ones and hence to be governed by the rules of business framed pursuant to Article 166 of the Constitution of India.

With regard to sub-clause (3) of the aforesaid provision, learned counsel for the petitioner contends that they are mandatory and relies upon the decision reported as **MRF Limited v. Manohar Parrikar and others** (2010) 11 S.C.C. 374 wherein it was observed as follows :-

“90. Before the High Court as also before us it was contended by the appellants herein, that, the Rules framed under Article 166(3) are only directory in character and failure to comply with them does not vitiate the decision taken by the State Government. The High Court after considering the various judgments cited before it has repelled the said contention to hold that the said Rules are mandatory and non-compliance thereof would be disastrous. The reasoning adopted by the High Court to arrive at such a conclusion is sound and in accordance with the constitutional mandate. The decisions of the State Government have to be in conformity with the mandate of Articles 154 and 166 of the Constitution as also the Rules framed thereunder as otherwise such

decision would not have the form of a government decision and will be a nullity.

91. The Rules of Business framed under Article 166(3) of the Constitution are for convenient transaction of the business of the Government and the said business has to be transacted in a just and fit manner in keeping with the said Business Rules and as per the requirement of Article 154 of the Constitution. Therefore, if the Council of Ministers or the Chief Minister has not been a party to a decision taken by an individual Minister, that decision cannot be the decision of the State Government and it would be non est and void ab initio. The conclusion draws support from the judgment of this Court in *Haridwar Singh v. Bagun Sambrui*. This Court in the said case was dealing with the Business Rules of the State of Bihar framed under Article 166(3) of the Constitution of India and the observations of this Court on the issue apply to the case on hand in all force. This Court observed : (SCC pp.895-96, paras 14-16)

“14. Where a prescription relates to performance of a public duty and to invalidate acts done in neglect of them would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty, such prescription is generally understood as mere instruction for the guidance of those upon whom the duty is imposed ...

15. Where however, a power or authority is conferred with a direction that certain regulation or

formality shall be complied with, it seems neither unjust nor incorrect to exact a rigorous observance of it as essential to the acquisition of the right or authority ...

16. Further, Rule10(2) makes it clear that where prior consultation with the Finance Department is required for a proposal, and the Department on consultation, does not agree to the proposal, the Department originating the proposal can take no further action on the proposal. The Cabinet alone would be competent to take a decision. When we see that the disagreement of the Finance Department with a proposal on consultation, deprives the Department originating the proposal of the power to take further action on it, the only conclusion possible is that prior consultation is an essential prerequisite to the exercise of the power.”

An oblique reference has also been made to para-71 of the judgment to emphasize that the High Court whose decision was under question, had held that the decision taken in violation of the rules if upheld, would result in disastrous consequence. But in a democratic set up, the decision of the State Government must reflect collective wisdom of the Council of Ministers or atleast that of the Chief Minister who heads the Council. It was in this context that the mandatory nature of the rules was commented upon.

Some of the Rules of Business of the Government of Haryana have been framed under sub-clauses 2 and 3 of Article 166 of the Constitution. It would be important to segregate them. For the sake of reference, Rules 5,11,12, read

with entries 10 and 11 of the Schedule need to be extracted here below :-

“.... In exercise of the powers conferred by clauses (2) and (3) of Article 166 of the Constitution of India and all other powers enabling me in this behalf Jaisukhlal Hathi, Governor of Haryana, hereby make the following rules in supersession of the existing rules :-

... ..

4. The Council shall be collectively responsible for all executive orders issued in the name of the Governor in accordance with these rules whether such orders are authorized by an individual Minister on a matter pertaining to his portfolio or as a result of discussion at a meeting of the Council or howsoever otherwise.

5. Subject to the orders of the Chief Minister under rule 11, all cases referred to the Schedule shall be brought before the Council in accordance with provisions contained in Part II.

... ..

7. (1) No Department shall without previous consultation with the Finance Department, authorize any orders (other than orders pursuant to any general delegation made by the Finance Department) which :-

(a) either immediately or by their repercussion will affect the finances of the State or which, in particular -

(i) involve any grant of land or assignment of revenue or concession, grant lease or licence of mineral or forest rights or a right to water power

or any easement or privilege in respect of such
concession ; or

(ii) in any way involve any relinquishment of
revenue ; or

(b) relate to the number or grading or cadre of posts or the
emoluments or other conditions of service or posts.

... ...

11. All cases referred to in the Schedule be submitted to
the Chief Minister after consideration by the Minister-in-
Charge with a view to obtaining his orders for circulation of
the case under rule 12 or for bringing it up for consideration
at a meeting of the Council.

12. (1) The Chief Minister may direct that any case referred
to in the Schedule may instead of being brought up for
discussion at a meeting of the Council be circulated to the
Ministers for opinion, and if all the Ministers are unanimous
and the Chief Minister thinks that a discussion at a meeting of
the Council is unnecessary, the case shall be decided without
such discussion. If the Ministers are not unanimous or if the
Chief Minister thinks that a discussion at a meeting is
necessary, the case shall be discussed at a meeting of the
Council.

(2) If it is decided to circulate any case to the Ministers,
copies of all papers relating to such cases which are
circulated among the Ministers shall simultaneously be sent
to the Governor. Where such a case is circulated in original
to the Ministers it should be circulated to the Governor also

after all the Ministers have seen.

The order of circulation shall be as flows :-

- (a) the Minister-in-charge ;
- (b) the Finance Minister (if the case involves financial issues) ;
- (c) other Ministers in the order of juniority ;
- (d) the Finance Minister (if the case involves financial issues) ;
- (e) the Minister-in-charge ;
- (f) the Chief Minister ; and
- (g) the Governor.”

With reference to the aforesaid rules and upon going through the minutes brought on record by the petitioner and not disputed by the respondents, we find that the proposal to initiate the decision to enhance royalty was by the Mining Engineer on 29.5.2003 and it continued at various levels and finally was granted acceptance by the Chief Minister after approval by the Principal Secretary. It is established from the minutes appended as Annexure A-10. As noticed above, these documents on record have not been controverted. But the learned counsel for the respondents sought to refute these arguments both on the issue of arbitrariness and on the issue of Rules of Business to contend by way of rebuttal to the contents of the Miscellaneous Application filed, that there were sufficient reasons before the State to enhance the royalty. To understand, we may extract the relevant portion of the reply :-

“10. That the petitioner under the present application has raised two issues relating to procedure for increase in the rate of royalty of the minor minerals opted while

issuing notification dated 3.6.2005. The petitioner has claimed that the department initially in its internal process for increase in royalty rates decided to have a report from a sub committee, however, subsequently, no report was sought before issuing the notification dated 3.6.2005. Selected parts of the notings of the relates files have been annexed to create bias against the respondents. In this behalf it is being projected as if some procedure which were being followed in the past were decided not to be followed at the time of revision of rate of royalty of minor mineral in the June, 2005. In this behalf to bring the factual position before this Hon'ble Court following may kindly be considered:

10.1 That as per provisions of Section 15(3) of the Central Act, 1957 the holder of a mining lease or other mineral concession granted under any rule made by State Governments in exercise of the powers vesting under Section 15(1) shall pay royalty or dead rent whichever is more in respect of minor minerals removed or consumed by him at the rate prescribed for time being in such rules. The State Government can increase the rate of royalty or dead rent in respect of any minor minerals but not more than once during any period of three years.

10.2 That the rates of royalty of minor minerals before issuance of notification dated 3.6.2005 was revised/notified on 16.9.1999. It may be pointed out

here that as per provision of Section 15(3) the increase could have been made after 15.9.2002 i.e. on expiry of period of three years which was actually made on 3.6.2005.

10.3 That the case for increase in rate of royalty on minor mineral was initiated by the office of respondent No.2, on **20.3.2003/29.5.2003**. The office proposed increase in the royalty rates by 50%. The Mining Engineer (ME) in the office of respondent No.2, on 29.5.2003 while forwarding the file to the Director, Mines and Geology Department suggested that a Sub Committee consisting of Deputy Excise and Taxation Commissioner and Mining Officers of the Districts of Faridabad, Gurgaon, Bhiwani and Narnaul may be constituted for suggestions with regard to enhancement of the rate of royalty of the minor minerals so that final proposal to the State Government could be submitted.

10.4 That the then Director, Mines and Geology forwarded the case to the then Commissioner, Mines and Geology, however, the proposal to constitute sub Committee could not find approval. The Commissioner, Mines and Geology, sought to submit the previous orders of the Chief Minister made in September, 1999 i.e. while ordering last increase of rate of royalty of minor minerals made in the year 1999 ;

10.5 That though the said file asked to be submitted pertained to the administrative department, the same

was collected and submitted for fresh orders by the office on 4.6.2003. The then Director, Mines and Geology in her remarks dated 6.6.2003 sought approval of the proposal relating to constitution of Sub Committee as stated under **para 10.3** above.

10.6 That the proposal to constitute to sub committee once again could not find approval as the then Commissioner, Mines and Geology sought to have comparative rates of royalty of minor minerals in the States of Delhi, U.P., Rajasthan etc. After collection the information, the office submitted the details on 22.7.2003. The office proposal was forwarded by Mining Engineer on **28.7.2003 for orders on constitution of Sub Committee** as was earlier suggested.

10.7 That the then Director, Mines and Geology on **29.7.2003** forwarded the file for approval of proposal earlier in the month of May, 2003, the same was approved by the then Commissioner, Mines and Geology and no approval of the Hon'ble Chief Minister/Minister Mines was obtained. However, it needs to be clarified here that despite above said approval of the then Commissioner, Mines and Geology the constitution of the Sub Committee could never materialized because no orders by the State Government were issued in this behalf. Even otherwise the earlier proposal had no clarity about the terms of

Committee and as to who will be the Chairman of the Committee. Accordingly, the file was resubmitted by the then Assistant Mining Engineer on 28.8.2003 for orders on the name of officers to head the Sub Committee along with draft orders.

10.8 That the then Director, Mines and Geology not forwarded the case for issuance of orders of any such sub committee and file remained under consideration in the directorate itself. In this way neither the orders for constitution of Sub Committee were obtained from the competent authority nor the case file was submitted to the State Government for enhancement of rate of royalty for the minor mineral as per normal practice being forwarded since long. At the cost of repetition, it is pointed out here that for enhancement of the rate royalty on the minor minerals in the past, there was no such practice of formation of inter-departmental-committee. At this stage if the same is examined critically suggestion of formation of the Sub Committee resulted only in delay on decision on enhancement of rate of royalty of the minor minerals.

10.9 That it is relevant to point out that the related file remained undecided for discussion between the then Assistant Mining Engineer and Director, Mines and Geology. The then Director, Mines and Geology sought to have information about the pendency of matter relating to mining in the Aravalli Hill areas in

the districts of Faridabad, Gurgaon and Mewat before Hon'ble Supreme Court. Though the pendency of matter relating to resumption of mining was not directly related with the issue relating to enhancement in the rates of royalty of minor minerals, however, in case the impact of said case was properly taken into consideration, the same would have shown that the petitioners were making wind fall gain because of litigation pending before Hon'ble Supreme Court. They virtually were enjoying monopoly since December, 2002.

Impact of pendency of mining matters before Hon'ble Supreme Court, on the petitioners

10.10 That before giving further details on the list of events qua decision on increase in the rates of royalty, it would be important in this case to explain as to what was the impact of the case on petitioners, pending before Hon'ble Supreme Court. The petitioner had been in extra ordinary advantage due to closure of mining in the areas because of pending litigation before Apex Court. The brief details of the same are as under :-

- (a) The mining leases of Villages Sirohi and Khorl Jamalpur were granted to the petitioner for extraction of stone, a minor mineral through open auction in the month of October, 2001 and the mining operations in the lease areas were commenced w.e.f. 6.2.2002.

- (b) At the time of grant of mining lease to the petitioner, mining operations in large number of mines in district Faridabad/Palwal, Gurgaon and Mewat was going on and stone was being excavated in all other mines. Accordingly, the level of production in these mining leases was normal ;
- (c) The Hon'ble Supreme Court in the case of M.C.Mehta versus Union of India – WP(C) No.4677 of 1985, vide its orders dated 6.5.2002, directed that no mining activities shall be carried out within 5 km of Delhi-Haryana boundary. the same resulted in closure of mining operations in number of stone mines in the districts of Faridabad and Gurgaon falling within 5 km. of Delhi-Haryana boundary.
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- (h) Accordingly, the petitioner after December, 2002 operated the area in complete monopoly for mining of stone in the district Faridabad, Gurgaon and Mewat. At the time of increase in the rate of royalty notified on 3.6.2005 the petitioner was enjoying monopoly.”

From the aforesaid, learned counsel for the respondents has contended that these were the reasons which persuaded the State to take a decision which can hardly be termed to be arbitrary or in violation of the Rules of Business.

We have to notice the said reasons only to reject them as none of these manifest themselves in the minutes recorded by the Officers leading to the decision. It is a sheer after-thought and reaction to the challenge that such issues have surfaced in the reply. Had these reasonings been evident from the minutes, the details of which we have already extracted above, it would have some justification to offer. Repeated emphasis has been made by the learned counsel for the State that the decision was in the interest of revenue and since no adverse result was possible to cause damage to the interest of the State, it was not necessary to adhere strictly to the rules of procedure.

We do not agree with the argument of the learned counsel for the respondents that only matters involving finance, possibly effecting the interest of the State adversely are to be routed through the Finance Department and other channels suggested by the Rules of Business. Rule 31 if perused, would allay all illusion to this effect. It lays down that the Finance Department shall be consulted before the issue of orders upon proposals which affect the finances of the State and in particular,

- (A) Proposal to add any post or abolish any post from the Public Service or to vary emoluments of any post.
- (B) Proposal to sanction allowance or special or personal pay for any post or class of posts or to any service of the Government of the State.
- (C) Proposal involving abandonment of revenue that involve expenditure for which no provision has been made in the Appropriation Act.

It has been argued by the learned counsel for the petitioner that addition of any post would involve financial expenditure while abolition of one would necessarily have consequences of reduction. Thus, both contingencies require the proposal to be routed through the Finance Department.

To this, learned counsel for the respondents stated that Dictionary

meaning of the word 'affect' would only talk of adverse consequences requiring the decision to be routed through the Finance Department and if it is beneficiary, it may not be necessary to follow the procedure warranting passage through the Finance Department.

We find the argument of the learned counsel for the respondents to be difficult to accept. The Judicial Dictionary would define the word 'affect' as follows :-

“**Affect.** The word 'affect means 'alter' or 'influence' or 'have an impact on'. The word 'affect' is a word of wide import and in the context in which it occurs, it must be construed to mean “touch” or “relate to” or “concern”. (*Daniraiji Vrajilaiji v. Maharaj Shri Chandraprabha*, (1975) 1 SCC 612 at 622 : AIR 1975 SC 784).

The word “affects” means as the respondents contend, alters, the appeal against the decree dismissing the appellant's petition would not lie as of right, because it is clear that the decree does not alter the appellant's statute. (*Daniraiji Vrajilaiji v. Maharaj Shri Chandraprabha*, (1975) 1 SCC 612 at 622 : AIR 1975 SC 784).

Apart from the above, the argument of the learned counsel for the respondents cannot be accepted for another reason, because any decision which ostensibly benefits State's revenue, may possibly be proved speculative upon implementation. It is appropriate that a decision is preceded by proper impact assessment.

If such procedures of business are given a go-bye in a democratic set-up, it may result in unilateral proposals being implemented without evaluation by the stake holders of the Government itself, thus striking at the very root of

collective responsibility of the Government. Thus, it would be a dangerous proposition to propound for if accepted, it would pave the way for pitfalls that emerge from unilateral actions. Rules of Business form a complete procedure of checks and balances within the Government itself so that no functionary has a free run with no accountability. Even otherwise, once the courts have ruled that such Rules of Business are mandatory, their non-compliance would certainly vitiate the procedure.

In our opinion, the Rules of Business were completely circumvented.

For the aforesaid reasons, we accept the writ petitions and set aside the notification Annexure P-6 and direct that the enhanced rate of royalty on minor minerals by 50% would not be applicable to the existing lease of the petitioners. We also hold that the said decision is totally arbitrary, arrived at without any impact of assessment or empirical data and a result of deviation/violation of the Rules of Business which have a mandatory character.

For the very same reasons for which we have held the decision to be arbitrary and violative of the procedures of Rules of Business, we also hold the imposition of dead rent which is the subject matter of challenge in C.W.P. Nos.14306 and 14468 of 2005, as unsustainable in law and the same is also accordingly quashed.

(MAHESH GROVER)
JUDGE

(LISA GILL)
JUDGE

June 2, 2016
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