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

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CO.APP. 54/2013 & CM No. 12904/2013

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Date of decision : 28th January, 2016

THE PRADESHIYA INDUSTRIAL & INVESTMENT
CORPORATION OF U.P. LTD. Appellant

Through: Mr. Joy Basu, Sr. Adv. with Mr.
Prashanto Sen, Ms. Ankita Saikia
and Mr. Abhinav, Advs.

versus

M/S PACQUIK INDUSTRIES LTD. & ORS. .. Respondents

Through: Mr. Preetpal Singh, Adv. for R-1.
Ms. Pooja Saigal, Adv. for R-2&3.

CORAM:

HON'BLE MS. JUSTICE GITA MITTAL

HON'BLE MR. JUSTICE P.S.TEJI

JUDGMENT

GITA MITTAL, J.

"Power vested by the State in a Public Authority should be viewed as a trust coupled with duty to be exercised in larger public and social interest. Power is to be exercised strictly adhering to the statutory provisions and fact-situation of a case. 'Public Authorities cannot play fast and loose with the powers vested in them'. A decision taken in arbitrary manner contradicts the principle of legitimate expectation. An Authority is under a legal obligation to exercise the power reasonably and in good faith to effectuate the purpose for which power stood conferred. In this context, "in good faith" means "for legitimate reasons". It must be exercised bona fide for the purpose and for none other."

(Ref.: Noida Entrepreneurs Association v. Noida & Ors. (2011) 6 SCC 508)

1. Having acted totally contrary to the above mandate, the Pradeshiya Industrial & Investment Corporation of U.P. Ltd. ('PICUP' hereafter) appellant herein assails the order dated 8th July, 2013 whereby the learned Company Judge has directed return of amounts deposited with the appellant by Mr. Darshan Khurana - the respondent no.3, on behalf of the debtor - Pacquik Industries Ltd. - respondent no.1 ('Pacquik' hereafter) herein.

2. We propose to decide the issues pressed before us in the following manner :

- I. **Factual narration** (paras 3 to 41)
- II. **PICUP treated tender by the respondent no.3 as valid deposit on behalf of Pacquik of the OTS amount** (paras 42 to 70)
- III. **Withdrawal/cancellation of OTS** (paras 71 to 88)
- IV. **Order dated 8th July, 2013 – finding that if OTS cancelled, PICUP had no right to retain amount paid by the respondent no.3** (paras 89 to 90)
- V. **Whether PICUP stood estopped from withdrawing or cancelling the OTS?** (paras 91 to 131)
- VI. **Whether Pacquik concealed material facts in its OTS proposal and committed fraud on PICUP?** (paras 132 to 163)
- VII. **Whether PICUP was entitled to forfeit the deposited amount?** (paras 164 to 166)
- VIII. **Whether challenge pending in Allahabad High Court precludes our scrutiny?** (paras 167 to 174)

- IX. Whether financial loss to PICUP by sanction of the OTS (paras 175 to 200)***
- X. Unnecessary Litigation by Government and Public Sector Enterprises (paras 201 to 207)***
- XI. Misfeasance in Public Office (paras 208 to 223)***
- XII. Conclusions (paras 224 to 243)***
- XIII. Result***

We now propose to discuss the above issues in seriatim :

I. Factual narration

3. Let us briefly examine the facts giving rise to the filing of the company petition before the learned Company Judge and the passing of the impugned order.

4. Pacquik, a company incorporated under the Indian Companies Act had approached PICUP for financial facilities. On 3rd December, 1996, a term loan of ₹185.00 lakhs stood sanctioned by PICUP to Pacquik for setting up its project at its Noida premises at B-54, Sector 57, NOIDA (U.P.). Against this loan, an amount of ₹165.50 lakhs stood disbursed while the balance of ₹19.50 lakhs was cancelled.

5. As per its agreement, PICUP was charging interest @21% per annum compounded quarterly from the company. However, Pacquik was given 2% discount on the interest rate. The company had created an equitable mortgage of the factory property at Noida in favour of PICUP by deposit of its title deeds.

6. The Pioneer Multifilms (respondent no.2 herein), was a sole proprietorship firm of Shri Darshan Khurana (respondent no.3 herein). It is also on record that between 15th July, 2005 to 30th December, 2005, cheques worth ₹49,25,000/- issued by Pacquik to its creditors, Shri Darshan Khurana and his family members were dishonoured, resulting in the filing of the several proceedings under Section 138 of the Negotiable Instruments Act ('N.I. Act') against Pacquik which also had liability towards the income tax, excise department.

7. In this background, a notice of demand under Section 431A of the Companies Act, 1956 dated 21st April, 2006 was also issued by Shri Khurana to Pacquik calling upon them to pay the amount of ₹62,53,375/- with interest @18% per annum within three weeks failing which respondent no.3 would initiate proceedings for winding up of the company besides other legal remedies.

8. The record of the case discloses that the Managing Director of Pacquik, namely, Shri Dinesh Sehgal was detected with liver cancer and shortly after the diagnosis, he unfortunately expired on 14th July, 2006. For this reason, the notice of the respondent no.3 could not be replied by the company.

9. C.P.No.194/2006 was filed on 1st August, 2006 by the respondent nos.2 and 3 under Section 433(e) read with Section 434(1)(a) of the Company's Act, 1956 seeking winding up of Pacquik Industries Ltd. The respondent no.3 complained that Pacquik owed a sum of ₹62,53,375/- with future interest @ 18% p.a. since April, 2006 to him; that the substratum of the company

was finished; that it was not in a position to pay its debts and liabilities; that it was making preferential payments to its near and dear ones and discriminating against the creditors at large and squandering away its assets to deprive creditors from recovering their liabilities; that despite service of a registered A.D. notice dated 22nd April, 2006, the company had failed to pay its debts and, that, for all these reasons, the company was liable to be wound up.

Notice was issued to Pacquik in this petition to show cause. The company filed a reply contesting the winding up.

10. On 17th September, 2009, the learned Company Judge directed that "*status quo shall be maintained with regard to the assets of the company and the same shall not be disposed of or alienated in any manner, whatsoever, till the next date*".

11. So far as the liability to PICUP is concerned, Pacquik had effected re-payments to the tune of ₹158.94 lakhs. This amount was adjusted by PICUP against interest liability calculated @19% per annum compounded quarterly.

12. On 8th March, 2010, Smt. Vandana Sehgal, Shri Ashish Sehgal (also co-respondents in the company petition), were present and informed the court that the "*factory premises of the company are situated at B-54, Sector-57, Noida and that all the machineries lying in the said factory premises are mortgaged to M/s PICUP, who is the secured creditor of the company*".

It was thus on the record of the company court that PICUP was a secured creditor of the company.

(i) Proposal for a One Time Settlement (OTS) by Pacquik and action thereon by PICUP

13. It appears that PICUP had floated One Time Settlement Schemes (OTS) at different times to enable its debtors to settle their debts. Pacquik's proposals for such settlement were accepted on three occasions by PICUP. A proposal by Pacquik was firstly accepted by PICUP in March, 2002 for settlement at a total of ₹234.48 lakhs, which Pacquik was unable to meet. A second such proposal was accepted on 24th September, 2005 based on the outstanding principal amount of ₹165.50 lakhs payable by 23rd March, 2007 in 12 monthly instalments commencing from 12th April, 2006 with 15% upfront payment. PICUP states that it waived the interest overdues of ₹210.75 lakhs outstanding as on 31st July, 2005. Against this second OTS, despite extensions, by 19th April, 2007 the company was able to pay only a sum of ₹31.34 lakhs in the OTS account.

14. As a result, on 16th July, 2010, PICUP issued a demand show cause notice as also a notice under Section 29 of the State Financial Corporation Act and after lapse of the notice period, a recovery certificate was issued on 10th September, 2010 against the guarantors. Thereafter, an advertisement was released by PICUP for sale of the assets of Pacquik and 18th October, 2010 was fixed as a date for the negotiations in terms thereof. No proposals were received. However, one M/s Zestha Infra Pvt. Ltd., Noida purported to make an offer for the purchase of the assets of

the company after the dispersal of the negotiation committee by a sealed letter which had to be returned as the auction sale of the assets of Pacquik stood cancelled.

15. The above manifests that two attempts by the respondent no.1 to settle the dues of the appellant as well as PICUP's effort to sell its assets were unsuccessful.

16. On 11th October, 2010, Pacquik submitted the third OTS proposal of ₹220 lakhs and deposited earnest money of ₹1,00,000/-, offering to pay this amount between 120 to 150 days and requested PICUP for withdrawal of the coercive recovery proceedings as well as stoppage of the recovery certificate.

17. Vide its letter dated 12th November, 2010, Pacquik reiterated to PICUP that it had additional liabilities to the tune of ₹1.32 crores towards excise, income tax, recovery dues, pendency of the winding up petition as well as proceedings under Section 138 of the Negotiable Instruments Act against it.

18. On 24th November, 2010, Pacquik made a request to PICUP seeking permission to sell its assets and pay the dues of PICUP as per para 8 of the OTS policy. This proposal was revised on 26th November, 2010 whereby the company deleted the request for permission to sell the assets.

19. Meanwhile, PICUP prepared a background note on 13th November, 2010 for the meeting of the OTS Committee which was placed before the third OTS Approval Committee (for its meeting on 16th November, 2010) setting out the complete factual background including the efforts to revive the company recover the

amounts, efforts to settle by Pacquik and inability to sell the assets of the company.

20. The proposal submitted by Pacquik is noted in para 5 of the background note. We also find that the company had disclosed the pending liabilities beyond the two legal proceedings which stand duly noted in the background note dated 13th November, 2010, the relevant extract whereof reads thus:

“3rd OTS APPROVAL COMMITTEE MEETING
ITEM NO. _____

M/S PACQUIK INDUSTRIES LTD. :
CONSIDERATION OF OTS PROPOSAL

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5. OTS Proposal of Company

5.1 The company submitted an OTS proposal of Rs.220.00 lakhs vide its letter dated 11.10.10 and deposited earnest money of Rs.1.00 lakh alongwith requisite details vide company's letter dated 12.10.10. The company has proposed to ***pay the OTS amount of Rs.220.00 lakhs within 120-150 days***. Further, the company vide its letter dated 10.11.10 addressed to IIDC and endorsed to CMD, PICUP has requested for ***withdrawal of Recovery Certificate and stopping coercive proceedings*** and also ***requested to adjust Rs.15.00 lakhs paid by the company*** as earnest money earlier in the OTS amount of Rs.220.00 lakhs proposed now.

5.2 The company vide its ***letter dated 12.11.10*** has also indicated the ***liabilities of the company to the tune of Rs.1.32 crore towards Excise, Income Tax, Recovery dues against winding up petition and u/s 138 of the NI Act.***”

(Emphasis supplied)

21. Our attention is drawn to the valuation of the assets and

realizable net-worth of guarantors in the note in paras 6, 6.1A and 6.1B. In para 6.1B of the recommendation, it was noted that the net-worth of the guarantors was zero.

22. PICUP had undertaken a careful evaluation of the accounts position of the company as on 31st October, 2010 and had mentioned what stood paid and due to PICUP as follows :

“8. Accounts Position of the Company (as on 31.10.2010)

		<u>Rs., lakhs</u>
Term Loan sanctioned	:	185.00
Term Loan cancelled	:	19.50
Term Loan disbursed	:	165.50
Term Loan Repaid	:	NIL
Term Loan outstanding	:	165.50
Interest overdues	:	941.16
Total outstanding dues	:	<u>1106.66</u>

9.Amount paid to PICUP : **Rs.158.94 lakhs**
Since Inception”

(Emphasis supplied)

23. The observations made by Sh. Ashok Mishra, Dy. Manager (Finance) and Sh. D.K. Sharma, Sr. Manager (Finance) in the note dated 13th November, 2010 on the working of the company are important and read as follows :

“10. Observations :

10.1 The base amount as per policy works out to Rs.175.89 lakh and realizable value of the security is Rs.323.71 lakh. As per the current OTS policy, if realizable value of security is more than 100% of base value, negotiation process shall not hover around the indicative amount which in this case is Rs.173.69 lakhs as shown above. It has been stipulated that dues

as per memoranda account shall be advised to the obligants and negotiation will start from such total/gross dues owed by the borrower. In view of this, Committee may negotiate with company for suitable enhancement of the OTS amount offered.

10.2 We have already issued RC on the guarantors. Hence the company will be required to pay 10% RC Collection Charges on the OTS amount as may be finalized. In addition, the company is liable to pay ARO dues till date of final payment and issuance of No Dues Certificate.

10.3 ***Company's request that liabilities amounting to Rs.1.32 cr. towards excise, income tax etc. are also to be borne by it cannot be considered in the OTS proposal, as there is no such provision in the OTS policy.***

10.4 With regard to company's request for adjustment of Rs.15 lakhs paid in the past, in current OTS proposal, the same cannot be considered, since amount has already been accounted for as per policy and its adjustment under new OTS policy is not possible."

(Emphasis by us)

24. As per the aforesaid note of 13th November, 2010, the accounts position of Pacquik as on 31st October, 2010 reflected total outstanding dues of ₹1106.66 lakhs which included a term loan outstanding to PICUP of ₹165.50 lakhs and interest overdues of ₹941.16 lakhs.

25. Also of relevance is the constitution of the Third OTS Approval Committee which considered this proposal on the 16th of November 2010 and consisted of the following :

"1.	Shri V.N. Garg	CMD	Chairman
2.	Shri Prof. Prakash Singh	IIM, LKO	Member

3.	Shri V.K. Seth	DGM(F)	Member
4.	Shri Rajeev Sonker	DGM(T)	Member
5.	Shri S.P. Singh	DLA	Member
6.	Shri D.K. Sharma	SM(Fin.)	Member
7.	Shri Ashok Agarwal	MT(T)	Member
AT ATTENDANCE:-			
1.	S/Shri Ashok Mishra	DM(F)	
2.	J.K. Nigam	DM(A)	Coordinator”

Thus experts from the Finance, Technical as well as the Legal and Administrative Departments of the PICUP considered the OTS proposal from every angle in the meeting which was presided over by its Chairman cum Managing Director. An expert, who was a Professor from the Indian Institute of Management, was also a member of the committee.

The record placed before us discloses that some of these persons in high offices have subsequently disowned knowledge of the facts they have endorsed on the 16th November, 2010!

26. The proposal of the Committee was taken up as item no. 2 when the following observations were made thereon :

“Thereafter the Committee held detailed deliberations on the final offer made by the company. It was noted that:-

a) **Company could not be placed in the category of wilful defaulter as it had paid an amount of Rs.158.94 lakhs to the Corporation which was over 95% of the principal term loan disbursed to the company.**

b) The **previous OTS was done at Rs.165.50 lakhs** against which the **company had paid Rs.31.34 lakhs** and entire amount has been adjusted against interest overdues.

c) The OTS outstanding of Rs.165.50 lakhs alongwith interest (opportunity cost, taken at 10%) from the last extended period, i.e. 30.9.2007 till date works out to app. Rs.225 lakhs, against which the current final OTS proposal of Rs.243.00 lakh is much more.

d) The final offer of OTS amount of Rs.243.00 lakh may be considered if it is around the average of principal outstanding and value of prime security i.e. $(165.5 + 321.24)/2 = 243.37$.

(Emphasis by us)

27. The Committee also noted that if the company's request for the one time settlement was acceded, it would "*permit a last chance to the borrowers to settle the accounts within the permissible framework of the new OTS policy, failing which the corporation would be free to adopt coercive measures as the policy provided for automatic cancellation in the event of default*".

28. So far as the approval of the settlement was concerned, the same was not unconditional and the committee had directed as follows :

"The Committee decided to settle the dues of the Corporation at aforesaid amount of Rs.243.00 lakhs with the following conditions:-

1. That the company will make the *payment* of entire OTS amount of Rs.243.00 lakhs *within 90 days from the issuance of the OTS sanction/offer letter.*

2. *No interest shall be charged during the period of 90 days.*

3. *5% of OTS amount shall be paid within 15 days and 10% of OTS amount shall be paid within 45 days from the date of OTS sanction/offer letter otherwise the OTS sanctioned will automatically be cancelled as per prevailing OTS policy of the Corporation.*

4. And ***balance 85% of OTS*** amount will be paid ***within 90 days*** from the date of OTS sanction/offer letter otherwise the OTS sanctioned will automatically be cancelled.

5. The company is also liable to pay ***ARO dues*** which are at present to the ***tune of Rs.0.80 lakh (App.)*** and further ***any amount due as ARO till the date of issue of No Dues Certificate.***

6. The ***RC issued against the promoter/guarantor*** issued ***on 10.9.2010 shall be kept in abeyance till the entire payment of OTS amount of Rs.243.00 lakhs alongwith ARO dues*** are received by the Corporation within 90 days from the date of OTS sanction/offer letter and ***after recovery of entire OTS amount and other dues Corporation shall make efforts for withdrawal of RC.*** However, the ***company shall directly be liable to pay RC Collection Charges if claimed by the concerned Distt. Authorities."***

(Emphasis supplied)

29. In Clause 10 of this letter, the effect of any false information being furnished by the borrower company was stated in the following terms :

“10. In the event it comes to the notice of PICUP that the ***company/guarantors*** have ***submitted any false information*** or have ***concealed any relevant information*** from PICUP, which could have a bearing on the OTS decision, then irrespective of the payments made in OTS, the OTS arrangement would be cancelled outright and all payments under OTS shall be adjusted against original loan dues and coercive action for recovery shall be taken.”

(Emphasis by us)

It would thus appear that in case the payment was made within 45 days of 26th November, 2010 (which was by 10th

January, 2011), the company became entitled to a discount of 5% on the OTS and would then be required to deposit a balance amount of ₹2,29,85,000/- only as against the full OTS amount of ₹243.00 lakhs.

(ii) Efforts by Pacquik to make OTS payment

30. By a letter dated 30th December, 2010, PICUP reminded the company that the last date for making the balance payment of the OTS amount of ₹229.85 lakhs was 10th of January 2011 and "*if the entire OTS amount is not received by the Corporation by the stipulated period, the OTS shall automatically be cancelled as per policy and as mentioned in the OTS sanction letter*".

31. On 20th September, 2010, the Board of Directors of Pacquik had passed a resolution authorizing its Director Mr. Ashish Sehgal to negotiate and give acceptance to the terms of a One Time Settlement with PICUP. From this resolution, no intention to sell the company's assets can be discerned. It is on record that after the OTS settlement, Pacquik had some difficulty in arranging the funds for making payment to PICUP and consequently it had entered into some arrangement for funds whereby it requested the respondent no.3 to advance funds so that it could make payment of the dues to PICUP.

32. It has been submitted by both the company as well as by the respondent no.3 that to secure the amount of respondent no.3, upon release of the title deeds by PICUP, Pacquik agreed to locate a buyer of the property to liquidate the liability to respondent no.3.

33. This is manifested by the resolution dated 10th December, 2010 whereby the company had resolved to sell-off the property to pay-off PICUP as well as Shri Darshan Khurana, Kapil Khurana and Sanjeev Khurana (who had also filed cases against the company under Sections 138 and 141 of the N.I. Act). In the absence of a suitable buyer, it was proposed that the assets "*be offered for sale to Shri Darshan Khurana and his relatives or any other person approved by them*". Yet another resolution dated 20th December, 2010 of the Board of Directors of Pacquik has been placed on record which notes the consent of the members of the company in their Extraordinary General Meeting held on 10th December, 2010 to offer the company's property at Noida for sale to Shri Darshan Khurana and his relatives or any other person approved by them for the above purpose. Shri Ashish Sehgal, Director of the company was authorised to procure the no objection certificate from PICUP.

(iii) Filing of joint applications – C.A.Nos.10/2011 and 11/2011

34. In view of the above proposed settlement between the company on the one hand and Shri Darshan Khurana (respondent no.3 herein) on the other, two applications being C.A.Nos.10/2011 and 11/2011 dated 4th January, 2011 were jointly filed on 4th January, 2011 before the learned Company Judge, after couriering advance copies to PICUP at their Lucknow address. The applications were duly served on 6th January, 2011 on PICUP.

35. CA No.10/2011 was filed under Order XXIII Rule 3 for

recording a settlement between the parties wherein it was noted that the company was unable to arrange the finances to make good the amounts payable to PICUP and that keeping in view the cases filed by him, the company was exploring the possibility of selling the property of the company to the petitioner. The copies of the resolutions dated 20th September, 10th and 20th December, 2010 were annexed with the applications.

We may set out in extenso the averments made by Shri Darshan Khurana and the company in C.A.No.10/2011 which are heavily relied upon by PICUP :

"4. The respondent discussed the matter and resolved in the meeting of its Board of Directors and ***decided to sell and dispose off its asset*** i.e. B-54, Sector 57, Noida, UP alongwith Plant and Machinery installed therein ***to clear of its debt against M/s PICUP, the petitioner and his other relatives***.

5. The respondent in pursuance to the decision made by its Board of Directors ***made efforts to sell*** its said asset ***but could not find a suitable buyer, who can offer reasonable price. In such a short period it is difficult for the Respondents to find any buyer, therefore, the Respondents approached the Petitioner*** to take over the Land building and the machinery, pay a sum of Rs.2,29,85,000/- to the PICUP and get the documents of title released from the PICUP in their favour. The possession of the property with Plant & Machinery shall be retained by the petitioner and the respondents shall be left with no right, title or claim thereupon. Then the Petitioner may sell the said factory with his own efforts and appropriate the entire sale consideration for the ***liquidation and recovery of its dues and the liability & debt of his other relatives including his son Kapil Khurana & brother Sanjeev Khurana, who have also***

filed cases u/s 138 & 141 of NI Act.

6. Now this settlement has been arrived with the following terms and conditions :

(A) That the *Petitioner shall pay a sum of Rs.2,29,85,000/- to the PICUP and get the mortgage redeemed and the PICUP will issue a No Objection Certificate showing therein that all their dues have been recovered and release the title deeds of the property in favour of the Petitioner herein.* The respondent shall have no objection *if the PICUP receives the payment of Rs.2,29,85,000/- from the Petitioner and hand over the documents of title of the property aforesaid to the petitioner.*

(B) That the Petitioner after making the payment of Rs.2,29,85,000/- shall become the owner of the entire land, building and the moveable assets lying therein which includes the plant and machinery.

(C) That the Petitioner shall pay a sum of Rs.21,542/-, demand *of the authority of water charges* up till 31 March 2011 and shall *pay another sum of Rs.1,47,300/- to NOIDA for the arrears of lease money and shall pay another sum of Rs.5,00,000/- to 6,00,000/-, arrears of trade tax and ROC dues which is claimed to be payable by respondents.* It is made clear that the excess amount on account of any government dues, if any shall be bear and borne by the respondents only. The respondents will obtain the necessary clearances from the Noida Authorities so that the property is made free to be transferred in favour of petitioner or any other individual or company or partnership firm approved by the Petitioner.

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(F) It has also been agreed that the Petitioner will not be concerned with any of the other liabilities of the Company. That the *parties shall move a joint application for impleading PICUP, the other main creditor as party to the petitioner and get the approval of the settlement between the parties in order to recover*

their liability from the Hon'ble High Court after the vacation of stay.

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(H) That after the Property bearing No.B-54, Sector 57 NOIDA (UP) is transferred in the name of the petitioner/is sold by the petitioner, the Petitioner and his family members shall also withdraw all the cases filed under Section 138 & 141 of the Negotiable Instruments Act or any other litigation initiated by petitioner or his family members against respondent company or its any directors.

(I) By virtue of present settlement & it being acted upon the *petitioner and his family members* shall be left with *no claim/Dues against the respondent company or its directors*.

(J) That the parties are left to bear their own cost.

It is, therefore, prayed that the *present settlement* be *taken on record* and undertaking given by the Directors by way of affidavits be accepted and appropriate directions in terms of the compromise aforesaid be passed so that the matter can be settled in terms of the compromise.”

(Emphasis by us)

36. CA No. 11/2011 was simultaneously filed by respondent no.1 seeking impleadment of PICUP for the purposes of adjudication of CA No. 10/2011 pointing out that the land and buildings stood mortgaged with PICUP and that its impleadment was necessary for completely and effectually settling out disputes between the parties. In para 3, it was clearly mentioned that "before any settlement is arrived in the matter" PICUP should be impleaded as a party so that the disputes could be resolved.

It is, therefore, apparent that any agreement between the company and Darshan Khurana whereby Darshan Khurana agreed

to pay this amount to PICUP or the agreement by the company to transfer its properties to Darshan Khurana, were conditional upon PICUP approving the same.

37. On 6th January, 2011, PICUP received by courier at its Lucknow address, the copies of C.A.Nos.10/2011 and 11/2011. PICUP did not contest the statements therein contained. It did not make any objection thereto either by a notice nor by way of a reply on court record at any point of time.

38. The applications were listed for the first time before the court on 7th January, 2011 when formal notice was also directed to be issued to PICUP giving directions to it to file reply/affidavit within three weeks. In the meantime, the court also directed that "*subject to further orders of this Court, let the one time settlement offered be complied with by the parties by depositing Rs.2,29,85,000/- with M/s PICUP (U.P.)*".

(iv) Payment of OTS amount

39. On the 7th of January 2011, Pacquik informed PICUP vide a facsimile communication addressed to the Chairman-cum-Managing Director of PICUP that the payment of ₹2,29,85,000/- was to be made on 10th January, 2011 on its behalf by Shri Darshan Khurana, an associate of Pacquik, and that title deeds of the property be released across the table to him as he "*intends to have title deeds in his own hands for securing his interest*".

40. Pacquik addressed yet another letter dated 10th January, 2011 to the Chairman-cum-Managing Director of PICUP informing

about the transfer of sum of ₹2,29,85,000/- online to PICUP's bank account; the discharge of the OTS by Darshan Khurana and that *"after necessary confirmation the title deed may directly be dispatched or handed over to him personally"*.

41. In order to meet the deadline and to avail 5% discount, the OTS amount was thereafter transmitted on behalf of Pacquik by Shri Darshan Khurana to PICUP through his bank account by an RTGS transfer on 10th January, 2011 so as to get the amount remitted to PICUP within the stipulated date.

II. PICUP treated tender by the respondent no.3 as valid deposit on behalf of Pacquik of the OTS amount

42. In the above circumstances, prior to making the payment by Shri Darshan Khurana, PICUP was put to sufficient notice by Pacquik on working days of the arrangement between the company and Mr. Darshan Khurana well before he transferred the amount.

43. We now come to the manner in which PICUP has treated this tender and proceeded with its affairs. We note that the original record of PICUP had not been placed at any time before the Company Judge and, therefore, has not been examined till such time that the same has been placed by PICUP before us.

44. We extract hereunder the noting recorded on **7th January, 2011 by PICUP** (after receipt of C.A.Nos.10/2011 and 11/2011 and the Fax, as contained in PICUP's records) :

"SM(F)/DGM(F)/CMD

Reg. M/s. Pacquik Industries Ltd.

In terms of the OTS approval letter dated 26.11.2010,

‘A’ the company *is required to pay the entire OTS amount of Rs.243.00 lakhs* (net amount payable after availing 5% discount = Rs.229.85 lakhs) by *10.1.2011*. The company by fax letter received today (PUC) has requested that since the company proposes to pay the OTS amount after availing 5% discount on 10.1.2011, the Corporation may release the title deeds on 10.1.2011 across the table as the funds have reportedly been arranged through one of their associates Shri Darshan Khurana, New Delhi who intends to have the title deeds in his possession for securing his interests.

It may be observed that *upon clearance of OTS account, the Corporation initiates the process of issuance of No Dues Certificate through its Internal Audit Cell, and the borrower is required to clear the ARO dues as reported by our Accounts Section and any other expenses as maybe reported by our Legal and other sections to the Internal Audit Cell.* In addition, the company, vide *Clause no. (5) of our OTS sanction letter dated 26.11.2010 (F/A), is required to undertake that it will be liable directly to pay the RC collection charges as may be levied by the district authorities. The company will have to furnish a suitable undertaking to enforce this condition* after OTS dues and ARO dues have been paid.

Having regard to the above, the *request of the company as per ‘A’ above is not feasible, and we are not in a position to accede to the same. However, we may await receipt of the OTS amount as committed by them and thereafter advise them of the factual position.”*

Submitted please.

*Sd/-
(Ashok Mishra)
DM(F)*

*Sd/-
(D.K. Sharma)
[Sr. Manager(F)]*

Sd/-
(V.K. Seth)
[Dy.General Manager (Finance)]

Sd/-
(V.K. Sharma)
Chairman & Managing Director,
PICUP”

(Emphasis by us)

The above noting by Mr. Ashok Mishra, Dy.Manager (Finance) has been approved by the entire hierarchy of authorities in PICUP including the Senior Manager(Finance), Mr. V.K. Seth, Dy.GM(Finance) as well as by the Chairman-cum-Managing Director of PICUP.

45. In para 6(f) of C.A.No.10/2011, it was stated that PICUP, as a party to the petition, was to get the approval of the settlement between the parties. PICUP admits receipt of the applications (C.A.Nos.10/2011 and 11/2011) on 6th January, 2011, four days before the transfer of money; the fax on the 7th of January, 2011 as well as the letter dated 10th January, 2011.

46. PICUP thus admittedly had full knowledge of the entire proposed settlement between Pacquik and Darshan Khurana as well as the resolution dated 10th December, 2011. It did not stop Pacquik from getting the amount transferred. It also did not return the amount nor informed Pacquik that the title deeds would not be returned to Darshan Khurana. On the contrary, PICUP clearly took a considered decision to first receive the “OTS amount” and

thereafter to apprise the borrowers of this "*factual position*" regarding only handing over off the title deeds. PICUP thus had no objection to either the settlement between Pacquik and Shri Darshan Khurana or the payment being made by respondent no.3.

47. The above also shows that PICUP documents the receipt of the fax message dated 7th January, 2011 in this noting and concludes that it was unable to accede to the request of Pacquik to hand over the title deeds to Shri Darshan Khurana for the sole reason that apart from the OTS liability, the borrower (Pacquik) had to clear the 'ARO dues' and undertake that it shall be liable to pay the RC charges.

48. C.A.Nos.10/2011 and 11/2011 were also first listed before the court on the next day i.e. 7th January, 2011. PICUP is represented by counsel in this court. PICUP did not inform the company or the court that it was not willing to accept the proposal of Shri Darshan Khurana and the company or that the proposal set out in the application was not acceptable to it or that the OTS amount should not be paid to it by Shri Darshan Khurana.

49. So far as the amount of ₹2,29,85,000/-, deposited on 10th January, 2011 with PICUP by Darshan Khurana is concerned, PICUP permitted the deposit and unconditionally appropriated the same. Even today, PICUP objects to return of the money which can only be because it treats the deposit as discharge of the liability of the company.

50. On 14th January, 2011, PICUP issued a no dues certificate stating as follows :

“Please *refer to our OTS letter* no.FUP/1/1485/4071 dated 26th November, 2010 by which the Corporation had agreed to settle your account on a total amount of Rs.243.00 lakhs on the terms and conditions indicated therein. Accordingly *we confirm that the company has repaid the entire OTS dues to the Corporation as per the terms and conditions of the OTS sanction letter and there are no dues outstanding against the same.* This No Dues Certificate is being issued subject to the condition that the guarantors of the company shall furnish an irrevocable Bank Guarantee for an amount of Rs.24.30 lakhs (being 10% of the amount of OTS as RC collection charges), valid at least for a period of 6 months, extendable as may be required by the Corporation. The *title deeds shall be released only after the Bank Guarantee as above has been furnished* to the satisfaction of the Corporation.”

(Emphasis supplied)

51. Not only was the arrangement between the company and Darshan Khurana clearly acceptable to PICUP, it unconditionally accepted the payment of the amount and unequivocally acknowledged that the “*company had repaid the entire OTS dues*” to it “*as per the terms and conditions of the OTS sanction letter*”.

52. In addition to the above, on 25th January, 2011, PICUP received a copy of the court order dated 7th January, 2011 as well as copies of C.A.Nos.10/2011 and 11/2011. Even if it could be held that PICUP was unaware of the arrangement of the company with Darshan Khurana, as on 25th January, 2011 it had received full details of the proposal.

It still did state that it had any objection thereto. PICUP made no effort at all to return the amount to Shri Darshan Khurana

who had made the payment.

53. In yet another action manifesting the appropriation of the amount of ₹2,29,85,000/- towards the OTS liability, Shri V.K. Sharma, Chairman and Managing Director of PICUP issued the communication dated 3rd February, 2011 to the Collector, Lucknow with the copy to the Delhi authorities informing them that “M/s Pacquik Industries Ltd. have since settled its outstanding dues under the One Time Settlement policy of the corporation and as such it is requested that the concerned District Authority at New Delhi may be requested for withdrawal of the RC issued as above, under intimation to us”. The reference to the ‘RC’ is to the recovery certificate.

54. The only conditions specified in the noting dated 7th January, 2011, thus also stood satisfied. The no objection certificate dated 14th January, 2011 and this letter dated 3rd February, 2011 withdrawing the RC were issued with full knowledge of the arrangement between Pacquik and Shri Darshan Khurana and stated that Pacquik had discharged its OTS liability.

(i) Proceedings in the winding up petition after receipt of the OTS amount

55. Thereafter armed with the receipt of its dues, on 1st March, 2011, before the learned Company Judge, PICUP through its counsel also consented to grant of the prayer in C.A.No.11/2011 whereby its impleadment was sought. PICUP thus also confirmed to the court on 1st of March, 2011 that the “*one time settlement*”

amount”, had been “*duly paid*” by the “*petitioner*”, namely, Darshan Khurana to PICUP and that only the matter of guarantors to furnish an irrevocable guarantee for ₹30 lakhs for a period of six months remained pending which was disputed by counsel for respondent no.3 as no such collection charges were payable in Delhi. Thus almost two months after the payment by Darshan Khurana, PICUP did not repudiate the letter dated 3rd February, 2011 issued by the CMD of PICUP discharging the recovery certificate.

56. On the 1st of March 2011, the learned Single Judge consequently recorded the following order :

“Co.Appl.11/2011

The present application has been filed for impleadment of M/s PICUP. With *consent of the parties, the application is allowed. PICUP is impleaded as a party* to the present proceedings. Let an amended memo of parties be filed during the course of the day.

Co.Appl.10/2011

Mr. Sandeep Agarwal confirms that the One Time Settlement amount has been duly paid by the petitioner to PICUP. He however, states that the guarantors have to still furnish an irrevocable bank guarantee for an amount of Rs.30 lacs valid for at least a period of six months.

Mr. Vinod Kumar submits that since the entire OTS amount has been paid, the question of submitting any bank guarantee for RC charges does not arise. He further submits that no RC collection charges are payable in Delhi. Mr. Vinod Kumar also relies upon a *certificate issued by PICUP dated 3rd February, 2011.*

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In view of the aforesaid, ***Mr. Sandeep Agarwal prays for and is granted two days time to obtain instructions.***

At the request of Mr. Sandeep Agarwal, adjourned to 7th March, 2011.

CO.PET. 194/2006

Keeping in view the ***agreement that has been arrived at between the petitioner and the respondent company as well as with PICUP, the Official Liquidator is discharged from the present proceedings.***

List on 7th March, 2011.

Interim orders to continue.”

(Emphasis supplied)

57. It is important also to note what was ordered on the winding up petition. The above order dated 1st March, 2011 was recorded in the presence of the Official Liquidator. The learned Company Judge noted that "***keeping in view the agreement that has been arrived at between the petitioner and the respondents company as well as the PICUP, the Official Liquidator is discharged from the present proceedings***". Thus the only issue which remained pending was as to whether furnishing a bank guarantee for RC Collection charges was required or not? The matter was deferred to ***7th March, 2011*** over this issue alone.

58. The above narration unequivocally establishes the acceptance by PICUP of the validity of the deposit by Shri Darshan Khurana as discharge of Pacquik's OTS liability as PICUP sought the undertaking to pay RC collection charges from the petitioner, if

levied by the concerned district authorities. This had the effect of the consequential satisfaction of the claims of the winding up creditor in terms of the settlement set out in C.A.No.10/2011. As a result, on 7th March, 2011, the court recorded the following order :

“Today in Court, **Mr. D.C. Arya, Deputy Manager (Law) on behalf of PICUP** is present. Mr. Vinod Kumar, learned counsel for petitioner has today once again drawn my attention to the **PICUP's letter dated 26th November, 2010**. The relevant portion of the said letter reads as under:-

“4. **Upon recovery of entire OTS amount and other dues, Corporation shall take steps to withdraw the RC.** However, the company shall directly be liable to pay RC Collection Charges, if claimed by the concerned Distt. Authorities.”

Mr. K.A. Singh, learned counsel for PICUP has no objection to the disposal of the present petition if the petitioners undertake to this Court to pay the RC Collection Charges, if levied by the concerned District Authorities.

Mr. Vinod Kumar, learned counsel states that **petitioner would file an affidavit of undertaking with M/s. PICUP** within a period of one week, undertaking to pay RC Collection Charges, if any, levied on M/s. PICUP by the concerned District Authorities. **Upon the said affidavit of undertaking being filed, M/s. PICUP is directed to release the original title deeds of documents, property and machinery to the petitioner within a period of two weeks thereafter.** With the aforesaid observations, **present petition and pending applications stand disposed of.”**

(Emphasis by us)

PICUP's counsel and Mr. D.C. Arya, its Deputy Manager (Law) were present in court when the winding up petition was thus

disposed of with the directions that Darshan Khurana (and not Pacquik) would file such undertaking with PICUP within a week which would hand over the title deeds to Darshan Khurana on 11th March, 2011. Pursuant to the above directions of court, Shri Darshan Khurana (the petitioner in the winding up petition), filed the requisite undertakings, duly stamped and notarized, with PICUP.

As such, the direction by the learned Company Judge to hand over the title documents to Darshan Khurana became operative.

59. Everything stood evolved in terms of the one time settlement. We now come to the critical part of the conduct on the part of the officials of PICUP, triggered by the direction to hand over the title deeds in the order dated 7th March, 2011.

(ii) Actions of PICUP after disposal of the company petition

60. On the 23rd of March 2011, long after the winding up proceedings had closed, Shri D.C. Arya, Deputy Manager (Law) put a noting on the file, which because it admits knowledge of the full facts, is extracted below :

“ML/DLA/DGMT

Re : Darshan Khurana Vs. M/s Pacquik Industries Ltd.
(C.P. No.194/2006)

May kindly like to peruse the note running from pre-page 412-414. In this regard, following is submitted:-

1- The petitioner namely Sri Darshan Khurana had filed the present ***petition for winding up*** of M/s Pacquik Industries Ltd. in the ***year of 2006*** wherein PICUP was not made a party to the winding up

proceedings. The said petition was *pending* for disposal before the Hon'ble High Court of Delhi *till 7.3.2011*.

2- The petitioner and the directors of respondent company filed a *joint application being CA no.10/2011 under order 23 rule 3 CPC* and company court rule 9 for recording of settlement between the parties and CA no.11/2011 for impleadment of PICUP. The Hon'ble company judge issued notice in both the applications on 07.01.11 and it was also directed that subject to further orders, let the *One Time Settlement offer be complied with* by the parties by depositing Rs.2,29,85,000/- with PICUP.

3- *Our counsel* Sri Sandeep Agarwal *informed the orders of the court as above and we informed our counsel that the said amount has already been deposited with PICUP.* It was also suggested by our counsel that since the order dt.7.1.11 has been complied with, we are not required to file reply affidavit to the application.

4- Since, the matter was listed on 01.03.11 before the company judge, *our counsel asked the present status of the settlement* with the company. *We informed our counsel that the OTS amount has been paid and we have also issued No Dues Certificate to the company subject to the condition that the guarantors of the company shall furnish an irrevocable bank guarantee* for an amount of Rs.24.30 lakhs (being 10% of the amount of OTS as RC collection charges.) *The no dues certificate dt. 14.1.11 was also sent by us to our counsel through fax.*

5- During the hearing held on 01.03.11, the Hon'ble court allowed the application for impleadment of PICUP as party to the proceedings and the petitioner was directed to file amended memo of parties. *Our counsel* Sri Sandeep Agarwal *stated before the court that OTS amount has been duly paid*

to PICUP. He however stated that the *guarantors have to still furnish an irrevocable bank guarantee for an amount of Rs.24.30 lakhs* (being 10% of the amount of OTS as RC collection charges). The counsel appearing for petitioner submitted that since the entire OTS amount has been paid, the question of submitting any bank guarantee for RC charges does not arise. He further submitted that no RC collection charges are payable in Delhi. The *letter dt. 03.02.11 issued by PICUP regarding withdrawal of recovery certificate was also produced by the counsel for the petitioner before the court*. After hearing the parties, the Hon'ble court fixed the next date in the matter for 7.3.11.

6- Since, the undersigned was in Delhi for some other official work between 02.03.11 to 05.03.11, our counsel informed over phone on 5.3.11 that a E.mail has been sent by him on 3.3.11 wherein he had requested us to present before the court on 7.3.11. Accordingly DLA directed the undersigned to attend the hearing on 7.3.11. The issue was also discussed with SMF(DKS) over phone from Delhi. As such, *I attended the hearing on 7th March, 11*. During the hearing, the counsel for the petitioner submitted that the entire OTS amount has been paid to PICUP and PICUP has also issued No dues certificate vide letter dt. 14.1.11. He also submitted that no RC collection charges are payable in Delhi. He also quoted the relevant portion of the letter of PICUP dt. 26.11.10 that "upon recovery of entire OTS amount and other dues, corporation shall take steps to withdraw the RC. However, the company shall directly be liable to pay RC collection charges, if claimed by the concerned Distt. Authorities." *During the hearing the counsel for the petitioner also produced before the court the letter of PICUP dated 3.2.11 written to Collector, Lucknow and to Divisional Commissioner, Delhi whereby it was informed that the OTS amount has*

been paid and a request was made for withdrawal of R.C.

The learned company judge was also of the opinion that once the OTS amount has been paid there is no question of payment of any RC collection charges as no recovery is made by the Distt. Authorities on the basis of recovery certificate issued by PICUP. Otherwise also, the court was of the opinion that the amount of R.C. charges cannot be so huge i.e. Rs.24.30 lakhs. Keeping in mind the above arguments of the parties, the Hon'ble company judge asked our counsel if PICUP is protected by furnishing an undertaking by the petitioner before this court to pay the RC collection charges to PICUP if levied by the Distt. Authorities then there is no bank guarantee is required to be taken from the company. During the hearing, the directors of the company namely Sri Ashish Sahgal, Vandana Sahgal were also present along with their counsel. It was ***stated by them before the court that the title deeds of the property may not be given to the petitioner***, but Hon'ble ***court*** showed displeasure and asked them if the entire payment has been made by the petitioner to the secured creditors then why the title deeds may not be released in their favour by PICUP because entire OTS amount has been paid to PICUP and PICUP has also issued no dues certificate to company.

Accordingly, the Hon'ble court vide **order dt. 7.3.11** (F/X) directed that "the petitioner would file an affidavit of undertaking with PICUP within a period of one week undertaking to pay RC collection charges, if any, levied on PICUP by the concerned Distt. Authorities. Upon the said affidavit of undertaking being filed, PICUP is directed to release the original title deeds of documents, property and machinery to the petitioner within a period of two weeks thereafter. With the aforesaid observations, present petition and pending applications were disposed of."

It is pertinent to mention here that the *company vide its letter dt. 7.1.11 (F/A) had requested PICUP to hand over the title deeds as they have arranged funds from one of company's associates Darshan Khurana who intends to have title deeds in his own hands for securing his interest.*

Further the *company vide its letter dated 10.1.11 (F/B) informed, they have remitted Rs.2,29,85,000/- through online to PICUP's account.* It was *clearly mentioned in the said letter that the said sum is being remitted by Sri Darshan Khurana on company's behalf* and it was also requested by the company that the title deeds may be directly dispatched or handed over to Sri Darshan Khurana. Again the *company vide its letter dt. 12.1.11 (F/C) indicated that the company has entered into an arrangement of clearing of PICUP's dues with Sri Darshan Khurana who on behalf of the company has cleared OTS dues within the stipulated date. Therefore, it is clear that PICUP was fully aware that the payment of OTS are being made by Sri Darshan Khurana on behalf of the company.*

The District Manager on pre-page 412 has indicated that he was not aware about such litigation case filed against PICUP which are being attended by the Legal Division. This contention of the District Manager is not sustainable because when our counsel informed that the aforesaid matter is listed for hearing before the Hon'ble Court on 1.3.2003 as he has received the notice on behalf of PICUP, the undersigned enquired from the District Manager who informed me that in this case, No-Dues Certificate has been issued. I also obtained the office copy of the No-Dues Certificate and faxed the same to our counsel for further necessary action. Therefore, it cannot be said that the District Manager was not aware about the winding up proceedings.

In view of the above this may kindly be *clarified whether the impugned order dt. 7.3.11 passed by the Hon'ble High Court, Delhi is against the PICUP's OTS policy and if so then a decision may be taken for filing of appeal against the said order.* The grounds for filing the appeal may also be spelled out so as to enable us to justify our stand in appeal. We will have to *justify before the Appellate court as to what financial loss has been caused to PICUP by the orders of the company court dt.7.3.11, the same may also be indicated.*”

(Emphasis by us)

The reference to the letter dated 12th January, 2011 above is an error. The reference is to Pacquik's letter of 10th January, 2011. PICUP was thus always aware that the payment of the OTS amount was made by Darshan Khurana who intended to keep the title deeds to secure his interest. The above noting also shows that an unnecessary and irrelevant dispute was being raised by the District Manager of PICUP with regard to the tenability of the payment on behalf of the Company by a third party, which was adequately addressed by Mr. Arya. There is no suggestion of any fraud by the company at any time.

61. The record shows that that PICUP set up a dispute for the first time with regard to receipt of the amount from the winding up petitioner only on 30th March, 2011, when the Deputy Legal Advisor noted as follows :

“8. xxx xxx xxx Though Legal Division has not provided any format of undertaking to *Sri Darshan Khurana*, he *has submitted an undertaking in compliance of the direction of the Hon'ble High*

Court and requested that title deeds be handed over to him as directed by the High Court of Delhi.

9. Sri Ashok Mishra, DM (F) at portion marked "X" on pre page 413 has suggested that ***OTS was done with company and not with Sri Khurana (third party) and if it is to be given to third party then it would have been treated as OTS-cum-sale and for which different action/decision/procedure could have been followed as per OTS Policy.*** The case officer/supervising officer may take a view on the above facts and circumstances in light of the terms of ***para 10 of the OTS letter.***

10. In the meanwhile Sri D.C. Arya, DML has been directed to forward all the relevant records/information to our counsel for seeking his opinion in the matter. There is ***every possibility*** that ***court may direct PICUP to refund the amount*** which has been ***paid by Sri Darshan Khurana*** in the light of court's order dated 7.1.2011.

Case officer/supervising officer may take view on the sanctioned OTS and ***definite stand may be provided*** to Legal Division so that appropriate application be filed for ***suitable directions***. If we do not approach High Court for modification/recall of the order or appeal, in that event we have to comply with the directions of the court. Non compliance of the directions of the court order would amount to contempt. A view may also be taken on the undertaking submitted by Sri Darshan Khurana, placed opposite in the file.

(S.P. Singh)

Dy. Legal Advisor

March 30, 2011"

(Emphasis supplied)

62. We have extracted above the noting dated 7th January, 2011 initiated by Shri Ashok Mishra, Deputy Manager (Finance) duly

approved by Shri D.K. Sharma, Senior Manager (Finance). Shockingly, the same officer i.e. Shri D.K. Sharma effects a complete turn around and initiates a noting dated 18th April, 2011 while approving a draft application proposed by the legal division forwarded by Shri Ashok Mishra. Shri D.K. Sharma suggested incorporation of assertions specifically “*indicating that PICUP was kept completely in the dark with regard to issue of compromise-cum-sale arrangement with the petitioner, Sri Khurana*” and that by not having informed PICUP of the terms of the sale of assets, the company has violated the terms of the OTS.

63. Even in the grounds of present appeal, PICUP admits that it got knowledge of the settlement when it received C.A.Nos.10/2011 and 11/2011 (which was on 6th January, 2011).

64. On 20th April, 2011, Shri Ashok Mishra, Deputy Manager (Finance) put up a draft of a show cause notice for approval. On this, Shri D.K. Sharma has put up yet another noting on 20th April, 2011 alleging “*nexus between the petitioner (Shri Darshan Khurana) and the promoters of the company as the petitioner was an obvious beneficiary of the compromise, that PICUP having been left out of knowledge of relevant facts*”. This was clearly an incorrect statement.

65. It is noteworthy that the background note dated 13th November, 2010, the OTS committee has noted the pendency of the winding up petition as well as other proceedings against Pacquik. This was placed before the OTS Committee on 16th November, 2010 of which Shri D.K. Sharma, Senior Manager

(Finance) was a member. Yet in the noting dated 20th April, 2011, Shri D.K. Sharma writes that the pendency of the winding up had not been disclosed, again a false noting.

66. Let us see what was PICUP's objection even as late as on 20th April, 2011 when it filed **C.A.No.749/2011** dated 19th April, 2011 before the learned Company Judge seeking an extremely simplistic prayer. We extract some relevant portions hereunder :

“1. That pursuant to an application being **CA No.11/2011** filed in the aforesaid case, this Hon’ble Court issued notice of the said application to applicant through counsel. Thereafter on **1.3.2011** the applicant was directed to get instructions as regard the status of the settlement between the applicant and respondent M/s Pacquick Industries Ltd. (hereinafter referred to the Company)

2. That the parties in the said petition had also moved another application being **CA No.10 of 2011**, seeking direction from this Hon’ble Court to record a ***settlement effected between the said parties*** i.e. petitioner and company and its Directors. In the said compromise the petitioner seems to have reached an ***understanding with the company*** that the ***petitioner in order to liquidate the outstanding of the company had agreed to pay a sum of Rs.2,29,85,000/- to PICUP and get the property of the company released from the mortgage with PICUP.***

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4. It is pertinent to note that the ***company at no point of time informed*** PICUP that the OTS payment was to be made by ***selling the mortgaged assets of the company***. It is submitted that as per the policy, the procedure of OTS and OTS cum sale are different.

5. ***Be that as it may, PICUP on 14.1.2011 issued a ‘No Dues Certificate’ to the company after receiving the entire OTS amount.*** However, in the said letter

PICUP informed the *guarantors to furnish an irrevocable Bank Guarantee for a amount of Rs.24.30 lacs* (being 10% of the amount of the OTS as RC collection charges), valid at least, for a period of six months, and extendable, if so required. It was further informed that *the title deeds of the mortgaged property will be released by PICUP, only after furnishing of the Bank Guarantee. Letter dated 14.1.2011* from PICUP to the company is annexed herewith and is marked as **Annexure A-2.**

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8. That *pursuant to the said order dated 7.3.2011, petitioner submitted undertaking with applicant*, where the *Finance Department of applicant had taken serious objections, apart from others, to the fact that the title deeds cannot be released to a third party, where OTS was made with the company.*

9. As a result, the applicant is moving the present application for *modification of the said order dated 7.3.2011, to the effect that the same be modified and for the directions of handing over the title deeds by PICUP should be to the company and not to the petitioner.*

10. The present application is filed bonafide and in the interest of the justice. *No harm or prejudice would be caused to the petitioner or the company, as legally also, PICUP can deliver the title deeds only to the owner of the property and in case the owner sell the property to a third party, then the said party is liable to pay the transfer charges/stamp duty as applicable, on the said sale.* The third party i.e. *petitioner* herein, *cannot take advantage of the order of this Hon'ble Court to escape payment of transfer charges/stamp duty on the said sale*, showing that the sale is made to the pursuant to the Court Orders.”

(Emphasis by us)

67. On these averments, the following prayer was pressed by PICUP:

“(i) *modify the order dated 7.3.2011 to the effect with the directions to PICUP for release of title deeds to the company not to the petitioner and direct the guarantors of company to file undertaking to pay RC collection Charges, if any, levied by the District Authorities.*”
(Emphasis by us)

This application was supported with an affidavit of Shri D.C. Arya, Dy. Manager (Law), PICUP.

68. C.A.No.749/2011 was the first application filed by PICUP in Co.Pet.No.194/2008, after receipt of the OTS amount on 10th January, 2011. PICUP was admittedly fully aware of the arrangement between the company and Darshan Khurana. PICUP had made no objection to the one time settlement or the payment by the respondent no.3. Yet PICUP had the gumption to falsely deny knowledge of the settlement (detailed in C.A.No.10/2011), which had also been noticed in the elaborate noting dated 7th January, 2011. What is important is that PICUP still did not resile from the OTS sanction or the transaction. PICUP was only objecting to release of the title deeds to Mr. Darshan Khurana, a third party. Limited modification of the directions made on 7th March, 2011, only to the extent that PICUP was directed to release the title deeds to the company was prayed for. However, PICUP stated that “be that as it may”, and confirmed that the **OTS amount stood paid**, since the OTS had been done with the borrower

company, the *title deeds be handed over to the borrower company and not to Darshan Khurana*. Most important is the fact that the *only reason* espoused for not doing so was that Darshan Khurana may assert that this was a court sale and deny stamp duty resulting in revenue loss.

69. In this application, filed more than four months after receipt of C.A.No.10/2011 (and more than a month after disposal of the main winding up proceedings), PICUP makes no allegation that any fraud or cheating was committed on it or that the OTS proposal was based on the sale of assets. In fact, by the prayer in C.A.No.749/2011 to the effect that the title deeds be released only to the company, again reinforces and affirms the validity of the one time settlement as well as its satisfaction. It recognizes the fact that a settlement was being negotiated by the parties for the purposes of making payment to it. PICUP unequivocally also ratifies its position that it not only stood by the one time settlement, but also maintained the validity of the no dues certificate issued by it as well as the withdrawal of the recovery certificate.

70. C.A.No.749/2011 came to be listed before court on 25th of April 2011 when there were no proceedings pending before the company court. Keeping in view para 6(a) of C.A.No.10/2011, the learned Company Judge directed PICUP to deposit title deeds of the property with the Registrar of the court within one week. As per the Registry noting, the title deeds were filed on 4th May, 2011 and kept in sealed cover on 10th May, 2011. The title deeds were subsequently deposited in court. PICUP at no point of time offered

return of the money to Darshan Khurana. We have no manner of doubt at all that PICUP treated the tender by the respondent no.3 as a valid tender of the OTS amount on behalf of Pacquik.

III. Withdrawal/cancellation of OTS

71. It seems that this above direction by the learned Company Judge on 25th April, 2011 to deposit the title deeds in court, provoked PICUP to also issue a notice to show cause on the 27th of April 2011 to the company incorrectly alleging that “*the company, its promoters/guarantors*” kept PICUP completely in the dark with regard to issue of “*compromise-cum-sale arrangement*” with the petitioner Shri Darshan Khurana and that by not informing PICUP of the “*terms of sale of assets*”, the company had violated the one time settlement approval dated 26th November, 2010 since the OTS policy of the corporation provided that no sale shall be concluded below the total realizable value, which in this case was ₹3.21 crores. Reliance was placed on Clause 10 of the OTS sanction letter dated 26th November, 2010 and the respondent no. 1 was called upon to show cause as to why the one time settlement not be cancelled. Interestingly, this notice has not been issued by the legal or finance department which was dealing with this whole matter. The notice to show cause has been issued by one Sh. Rajeev Sonker, Dy. General Manager (Tech.) with a copy endorsed to the legal division of PICUP.

72. With regard to this notice, on 13th May, 2011 even the Deputy General Manager of PICUP has noted on file that “*show*

cause notice, which was not called for nor Legal Division has advised”.

73. This notice to show cause is also the subject matter of the following comment by the Dy. Legal Advisor dated 13th May, 2011 in PICUP's records :

“DGM(T)

“X” above is not correct proposition. Legal Division on pre page 429 at point no.9 has advised that the case officer/supervising officer may take a view on the above facts and circumstance-in the light of terms of para 10 of the OTS letter. ***Instead of taking a view in the matter the case officer/supervising officer has issued show cause notice, which was-not called for nor Legal Division has advised.*** If they are satisfied that there is a breach of the terms of the OTS letter, they should have initiated action, as suggested therein. As per the law, against the interlocutory order the appeal is not maintainable.”

74. In the reply dated 1st May, 2011, the company pointed out that the arrangement arrived at with Shri Darshan Khurana and his relatives on 20th December, 2010 (much after the OTS sanction), was only to clear PICUP’s dues within the stipulated period and that the settlement as well as impleadment application were filed before the court at the earliest; as well as all the aforementioned circumstances.

This was followed with a supplementary response dated 10th May, 2011 pointing out that just as to secure PICUP’s loan, title documents were deposited with it, upon release it was proposed to deposit them with Darshan Khurana.

75. On 13th May, 2011, the Finance Department of PICUP considered the response by the company to the notice to show cause and flagged four options available to PICUP. We set down hereunder the noting dated 13th May, 2011 which has been penned by Shri D.K. Sharma, Sr. Manager :

“In respect of the reply to the Show Cause Notice, the ***promoters declined to submit details of the compromise arrangement*** entered into between them and Sri Darshan Khurana as reported at ‘A’ on pre page 4-6, preventing a clear picture in this regard to emerge. ***They have only indicated that as on date there is no agreement to sell between us and the petitioners.***

Now, since the reply of the company to the Show Cause Notice dated 27.4.2011 has not been found satisfactory/convincing, DM(F) Sri Ashok Mishra, has ***opposed*** the options available. May kindly see portion ‘B’ on pre page 457 which is the ***first option***, that the entire issue be left to the Court to decide.

The ***second*** option at portion marked ‘C’ that Sri Darshan Khurana called upon to pay the difference of OTS amount i.e. Rs.2.43 crore and the valuation of assets, i.e. Rs.3.21 crore, is a logical extension of the first option as the Corporation feels that a sale of assets was contemplated by the borrowers but facts were hidden from PICUP.

Option at ***portion marked ‘D’ cancellation of OTS*** will also be worthwhile. But in this event the ***Court may require the OTS amount paid to be deposited/refunded upfront***, as noted in the reports from both the legal and finance officers. Therefore, the option at ‘D’ as suggested may be effective if we ***simultaneously file an appeal as indicated at portion marked ‘E’*** on pre page 458.

It appears that the ***Corporation may have lost ground*** in the case on account of the reasons that, ***firstly*** –

impleadment application remained unopposed; and, secondly – the title deeds have already been deposited with the Court.

Having regard to the above, a view may please be taken on the options pointed out by the Case Officer, DM (F) Sri Ashok Mishra would be briefing the advocate in the matter before the date of hearing, i.e. 20.5.2011 – alongwith an officer from Legal Division.

Sd/- 13.5.2011

(D.K. Sharma)

SM(F)”

(Emphasis by us)

76. The record also reflects that in a noting of 22nd June, 2011, Shri D.C. Arya, Deputy Manager (Law) proposed that instead of taking any final view on the show cause notice, the company could be asked to deposit the difference of valuation of the assets of the company. This noting at page 477 of the record notes that “PICUP has received the payment in pursuance of the company’s letter dated 7.1.2011 and 10.1.2011 and PICUP have accepted the entire OTS amount knowing the fact that there is no privity of contract with Mr. Darshan Khurana in this case”.

77. The above was put up to Shri S.P. Singh, Deputy Legal Advisor on 23rd June, 2011 who also noted the following :

“... In fact, the company vide its two letters dated 7.1.2011 and 10.1.2011 had informed that the OTS amount would be paid by Sri Darshan Khurana on behalf of the company and title deeds may be released to him. Instead of rejecting the request for the simple reason that PICUP will accept the payment through company only. Alternatively, we should inform to the company that the payment as proposed would be sure on the risk and cost of Mr. Darshan Khurana and in case,

there would be any breach of the terms of the contract the amount would be forfeited. *It is worthwhile to mention here that having a clear cut information that the amount is being made by third party namely, Mr. Darshan Khurana, the PICUP have kept silent and waited for receipt of the amount, which was paid by Mr. Darshan Khurana through RTGS, as mentioned in letter dated 10.1.2011.* In the said letter it was clearly indicated that as soon as the amount is paid, the title deeds be handed over to Mr. Darshan Khurana. Since *PICUP has accepted the amount without raising any objection* to the proposal and also *issued No Dues Certificate on 14.1.2011* only the amount of 10% collection charges was remained unsettled and company was required to furnish the bank guarantee, as desired. After issuance of the conditional no dues certificate in favour of the company, PICUP also *recalled the Recovery Certificate issued* against the guarantor on the pretext that *company had made payment under OTS. ... Once we have issued No Dues Certificate in favour of the company, under what circumstances such demand is tenable.* Instead of taking a final view on the breach of contract the matter is being unnecessarily diverted to unimportant issues. Since PICUP has accepted the amount from Mr. Darshan Khurana, as requested by company, the Hon'ble Court directed to deposit the title deeds in the court."

(Emphasis supplied)

78. On 3rd/4th May, 2011, PICUP filed C.A.No.906/2011 wherein it merely sought directions to the court to look into the matter and not to release the title deeds to Darshan Khurana till "Pacquik satisfies PICUP that it had taken its prior permission to sell the mortgaged assets".

79. In a noting dated 8th June 2011 signed by Sh. Ashok Mishra,

DM(F), PICUP noted that the company concealed the facts of sale of the mortgaged assets which was in violation of the OTS policy. It was further proposed that PICUP may ask Pacquik to deposit the difference of valuation of the asset (₹3.21 Crores) and the OTS Amount (₹2.43 Crores) along with surety of RC Collection Charges, failing which the OTS was to be cancelled, the secured asset be sold, and request be made to this Court to return the title deeds. The amount received was to be adjusted against the normal dues of Pacquik.

80. In a subsequent noting dated 15th June 2011 signed by Sh. DC Arya, DM (Law), PICUP noted that the adjustment as proposed on 'XX' at page 471, appeared to be untenable in law. This was in furtherance of the clarification of the Ld. Company Judge that in case the OTS is cancelled, the PICUP would have to refund the amount received. In the same noting, at X-3, it was recorded that the senior management had decided that though handing over the title deeds to Sh. Darshan Khurana was not feasible, however, the OTS remittance was to be awaited. He also went on to note *"In fact, the rejection of the said request was not communicated in writing and it appears that PICUP was silent on the issue which amounts to consent on the request of the company and accordingly the payment was received from Sri Darshan Khurana"*.

81. On 24th June, 2011, Shri Rajeev Sonker, Deputy General Manager (Technical) requested that a final view may be taken urgently. Even on 26th June, 2011, Shri Ashok Mishra, Deputy

Manager (Finance) has noted that the joint applications filed by the respondents on 4th January, 2011 was sent to PICUP on the same day and it was also informed by the court to PICUP's counsel.

82. Despite the above, by a communication dated 9th August, 2011, PICUP made the allegations that the company intended to cheat the corporation and it had decided to cancel the OTS approval communicated on the 26th of November 2010. This was communicated by the letters dated 26th November, 2010 and 18th January, 2011. Interestingly, this cancellation was typed in December, 2010 which date has been scored out and the date of 9th August, 2011 handwritten thereon!

83. C.A.No.13/2012 was filed only on 3rd January, 2012 making the prayer that the title deeds of the mortgaged property deposited in the court be returned to PICUP.

84. It was only thereafter that on the 5th of January 2012, PICUP unconditionally withdrew C.A.No.749/2011.

85. On 27th March, 2012, the court permitted an applicant claiming to be another creditor of Pacquik in C.A.No.2094/2011 to withdraw the application with liberty to approach the court after issuing the statutory winding up notice to the respondent company.

86. On 14th May, 2012, the court directed the Managing Director of PICUP to consider the affidavit of the respondent no.3 stating that the agreement between the parties was only to make payment to PICUP.

87. The applications were listed before the court on the 10th of

April 2013, when on the contention of PICUP that full facts were not placed before it, and in particular that Pacquik had entered into an arrangement whereby Darshan Khurana would pay PICUP the OTS amount, an observation was recorded that the action taken by PICUP to cancel the OTS could not be faulted. In this hearing, PICUP did not place before the Id. Company Judge its original records, including the noting extracted hereinabove, as well as the actions of PICUP (after the service of C.A.No.10/2011 upon it). The averments of PICUP in C.A.No.749/2011 and the prayer in C.A.No.906/2011 were not brought to the attention of the learned Single Judge. The learned Company Judge was also not informed that Pacquik had challenged the withdrawal of the OTS by way of separate proceedings before the High Court of Judicature at Allahabad.

The above observation by the Id. Company Judge is not supported by the actions of PICUP, its notings or its stand in the court as detailed above and does not bind our consideration.

88. We may also note that C.A.No.2437/2012 was filed by one Shri Raj Kumar Arora claiming that an agreement to sell was entered into, by the company qua him in 2007 for purchase of the company's property for ₹2.70 crores. Shri Raj Kumar Arora also filed C.P.No.393/2012 which was also came to be dismissed on 15th October, 2012 being barred by time. By way of C.A.No.2437/2012, the applicant offered to pay ₹3.25 crores for the property in the event that the company intended to sell it to him.

IV. Order dated 8th July, 2013 – finding that if OTS cancelled, PICUP had no right to retain amount paid by the respondent no.3

89. On 4th July, 2013 arguments were heard by the court in C.A.Nos.906/2011, 13/2012 and 2437/2012 and decided by the impugned order dated 8th of July 2013. The learned Company Judge noted the fact that the winding up petition stood concluded and that the limited scope of the proceedings was only whether the title deeds should be returned to PICUP pursuant to the cancellation of the OTS as prayed by way of C.A.No.13/2012.

The learned Company Judge noted that PICUP was aware of the arrangement between the company and respondent no.3 and stood impleaded in the settlement between them and as such it was not open to it to contend that any fraud was played upon it by the company and the respondent no.3. The court noted that PICUP had specifically consented to the impleadment and therefore, could not turn around and say that it was not aware of the proposed sale of the property in favour of Darshan Khurana. The court notes that the amount of ₹2,29,85,000/- stood paid by Darshan Khurana to PICUP in terms of the OTS.

On the aspect of the cancellation of the OTS, it was held that it gave no right to PICUP to retain the money which it had received from Darshan Khurana on account of dues of the company in discharge of the OTS which was then operational and that PICUP could not take up contrary stands that it would cancel the OTS and

yet not return the money to Darshan Khurana. The learned Single Judge has noted that Darshan Khurana himself was not the debtor but had only advanced the money to the knowledge of PICUP. The learned Single Judge therefore, held that PICUP could not say that it was entitled to the return of the title deeds and at the same time also entitled to retain the money remitted by Shri Darshan Khurana.

In this background, by the impugned order dated 8th July, 2013, the learned Single Judge directed PICUP to return the amount of ₹2,29,85,000/- to Darshan Khurana within three weeks and that once the amount was paid as directed, PICUP would be entitled to get back the title deeds from the Registrar of this court by making a separate application. C.A.No.13/2012 was disposed of in the above terms. In view of the orders regarding the title deeds, the learned Single Judge observed that C.A.No.906/2011 warranted no further orders and C.A.No.2437/2012 was disposed of as thus having been rendered infructuous.

This order dated 8th of July 2013 has been challenged by PICUP by way of the present appeal.

90. The contents and prayers in C.A.Nos.10/2011 and 11/2011 clearly manifest that all actions and the proposed settlement rested on PICUP's consent. The same is evidenced by the repeated communications (Fax dated 7th and 10th January, 2011) from Pacquik to PICUP. PICUP's consent to the deposit is manifested in its notings including that dated 7th January, 2011 and actions set out above. Even on 30th March, 2011, PICUP was not faulting the

amount deposited. Therefore, the cancellation of the OTS was not based on the record of either PICUP or of the present case.

V. Whether PICUP stood estopped from withdrawing or cancelling the OTS?

91. This matter may be considered from another angle as well. What is the effect of PICUP's conduct? Is it legally permissible for PICUP to conduct its affairs whimsically without concern for public interest or public funds?

92. Ms. Pooja Saigal, learned counsel for Darshan Khurana urges that the PICUP is a statutory authority and its officials are dealing with public funds. They are liable to discharge their duties with the highest degree of fairness and probity in all their actions and to ensure public interest. It is contended that in the above noted factual narration, PICUP's conduct and stand estops it from making the contentions stated in C.A.No.906/2011 whereby PICUP had requested the court not to release the title deeds to Darshan Khurana till Pacquik had taken PICUP's prior permission to sell the property or cancelling and withdrawing the OTS as well as the prayers in C.A.No.13/2012 seeking return of the title deed.

93. In support of these submissions, reliance is placed on the judicial pronouncements reported at ***AIR 1979 SC 621, M/s. Motilal Padampat Sugar Mills Co. Ltd. v. The State of Uttar Pradesh & Ors.*** We set down the principles laid down in this oft cited judicial pronouncement hereafter :

“7. That takes us to the question whether the assurance given by Respondent 4 on behalf of the State Government that the appellant would be exempt from Sales Tax for a period of three years from the date of commencement of production could be enforced against the State Government by invoking the doctrine of promissory estoppel. Though the origins of the doctrine of promissory estoppel may be found in *Hughes v. Metropolitan Railway Co.* [(1877) 2 AC 439 : 36 LT 932] and *Birmingham and District Land Co. v. London and North-Western Rail Co.* [(1888) 40 Ch D 268, 286 : 60 LT 527] , authorities of old standing decided about a century ago by the House of Lords, it was only recently in 1947 that it was rediscovered by Mr Justice Denning, as he then was, in his celebrated judgment in *Central London Property Trust Ltd. v. High Trees House Ltd.* [(1956) 1 All ER 256 : 1947 KB 130] This doctrine has been variously called “promissory estoppel”, “equitable estoppel”, “quasi estoppel” and “new estoppel”. It is a principle evolved by equity to avoid injustice and though commonly named “promissory estoppel”, it is, as we shall presently point out, neither in the realm of contract nor in the realm of estoppel. It is interesting to trace the evolution of this doctrine in England and to refer to some of the English decisions in order to appreciate the true scope and ambit of the doctrine particularly because it has been the subject of considerable recent development and is steadily expanding. The basis of this doctrine is the inter-position of equity. Equity has always, true to form, stepped in to mitigate the rigours of strict law. The early cases did not speak of this doctrine as estoppel. They spoke of it as “raising an equity”. Lord Cairns stated the doctrine in its earliest form — it has undergone considerable development since then — in the following words in *Hughes v. Metropolitan Railway Company*:

“It is the first principle upon which all Courts of Equity proceed if *parties*, who have *entered into definite and distinct terms involving certain legal results . . . afterwards by their own act, or with their*

own consent, enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, that the person who otherwise might have enforced these rights will not be allowed to enforce them where it would be inequitable, having regard to the dealings which have taken place between the parties.”

(Emphasis by us)

94. In the pronouncement in *Motilal Padampat Sugar Mills*, the Supreme Court has pronounced authoritatively on the applicability of the doctrine of promissory estoppel against public authorities. This enunciation of law is topical and deserves to be reinforced upon PICUP. We set it down in extenso hereafter :

“25. The doctrine of promissory estoppel was also held ***applicable against a public authority*** like a Municipal Council in *Century Spinning and Manufacturing Co. Ltd. v. Ulhasnagar Municipal Council* [(1972) 3 SCR 711 : (1970) 1 SCR 582 : (1970) 3 SCR 854] . The question which arose in this case was ***whether the Ulhasnagar Municipal Council could be compelled to carry out a promise made by its predecessor Municipality that the factories in the industrial area within its jurisdiction would be exempt from payment of octroi for seven years from the date of the levy.*** The appellant company, ***in the belief induced by the assurance and undertaking given by the predecessor Municipality that its factory would be exempt from octroi for a period of seven years, expanded its activities, but when the Municipal Council came into being and took over the administration of the former Municipality, it sought to levy octroi duty on the appellant Company. The appellant Company thereupon filed a writ petition under Article 226 of the Constitution in the High Court of Bombay to restrain the Municipal Council from***

enforcing the levy of octroi duty in breach of the promise made by the predecessor Municipality. The High Court dismissed the petition in limine but, on appeal, this Court took the view that this was a case which required consideration and should have been admitted by the High Court. Shah, J., speaking on behalf of the Court, pointed out:

*“Public bodies are as much bound as private individuals to carry out representations of facts and promises made by them, relying on which other persons have altered their position to their prejudice. The obligation arising against an individual out of his representation amounting to a **promise may be enforced ex contractu by a person who acts upon the promise**: when the law requires that a contract enforceable at law against a public body shall be in certain form or be executed in the manner prescribed by statute, the **obligation** may be if the contract be not in that form be **enforced against it in appropriate cases in equity.**”*

The learned Judge then referred to the decision in the *Indo-Afghan Agencies case* and observed that in that case it was laid down by this Court that “the **Government is not exempt from the equity arising out of the acts done by citizens to their prejudice relying upon the representation as to its future conduct made by the Government**”. It was also pointed by the learned Judge that in the *Indo-Afghan Agencies case* this Court approved of the observations made by Denning, J., in *Robertson v. Minister of Pensions* rejecting the doctrine of executive necessity and held them to be applicable in India. The learned Judge concluded by saying in words pregnant in the hope and meaning for democracy:

*“If our nascent democracy is to thrive **different standards of conduct for the people and the public bodies cannot ordinarily be permitted. A public body is, in our judgment, not exempt from liability to carry out its obligation arising out of representations made by it***

relying upon which a citizen has altered his position to his prejudice.”

This Court refused to make a distinction between a private individual and a public body so far as the doctrine of promissory estoppel is concerned.”

(Emphasis by us)

95. Yet another judgment of the Supreme Court reported at (2004) 6 SCC 465, *State of Punjab v. Nestle India Ltd. & Anr.* considers the precedents on the subject extensively holding as follows :

“5. The *Budget speech* also noted that despite the fact that the State Government had given a large number of *tax concessions* during the year which reduced the inflow of revenue, the collections under the sales tax, excise and other taxes had increased by about 100 crores for the current year.

6. The next circumstance was a *memo of the Financial Commissioner* dated 26-4-1996, addressed to the Excise and Taxation Commissioner, the relevant extract of which reads as follows:

“Pursuant to the announcements made by the Finance Minister, Punjab, on the floor of the House and the *announcement made by the Chief Minister, Punjab on 26-2-1996*, while addressing a public function organised by the Milk-Fed in connection with Milk Day at Milk Plant, Ludhiana relating to exemption of purchase tax on milk, it has been decided in principle, to *abolish the purchase tax* on milk w.e.f. 1-4-1996. You are requested to send proposal along with the financial implication involved therein, immediately.

On the *basis of the above decision*, you are also requested to *issue necessary instructions* to the field officers.”

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24. But *first a recapitulation of the law* on the subject of promissory estoppel. The foundation of the doctrine was laid in the decision of Chandrasekhara Aiyar, J. in *Collector of Bombay v. Municipal Corpn. of the City of Bombay* [AIR 1951 SC 469 : 1952 SCR 43] . There, in 1865, the *Government of Bombay had passed a resolution* authorising the *grant of an area to the Municipality rent-free* for the purpose of setting up a market. Although possession of the site was made over to the then Municipal Commissioner no formal grant was in fact executed as required by the applicable statute. *Acting on the resolution*, the *Corporation spent considerable sums of money* in building and improving the market and was in possession for 70 years during *which period no revenue had been paid to or claimed by the Government*. At this stage, a *demand* was sought to be *raised on account of rent under the Bombay City Land Revenue Act, 1876*. *The Corporation impugned the demand by filing a suit*. The suit was dismissed. An appeal was preferred before the High Court. The *High Court* reversed the decision of the trial court and *held that the Corporation was entitled to hold the land forever without payment of any rent* and the Government had no right to assess the premises. The Collector preferred an appeal before this Court. There was no dispute that by reason of non-compliance with the statutory formalities, *the government resolution of 1865 was not a factual grant passing title in the land to the Corporation*. *There was also no dispute that there was no enforceable contract between the State Government and the Municipal Corporation*. Of the three Judges, Das, J. held that the possession of the Corporation not being referable to any legal title was adverse to the legal title of the Government and the right

acquired by the Corporation to hold the land in perpetuity included an immunity from payment of rent. Patanjali Sastri, J. differed. Chandrasekhara Aiyar, J. concurred with the conclusion of Das, J. but based his reasoning on the fact that by the resolution, representations had been made to the Corporation by the Government and the *accident that the grant was invalid did not wipe out the existence of the representation nor the fact that it was acted upon by the Corporation*. What has since been recognised as a signal exposition of the principles of promissory estoppel, Chandrasekhara Aiyar, J. said: (*AIR p. 476, paras 21 & 22*)

“The invalidity of the grant does not lead to the obliteration of the representation.

Can the Government be now allowed to go back on the representation, and, if we do so, *would it not amount to our countenancing the perpetration of what can be compendiously described as legal fraud which a court of equity must prevent being committed*. If the resolution can be read as meaning that the grant was of rent-free land, the case would come strictly within the doctrine of estoppel enunciated in Section 115 of the Evidence Act. But *even otherwise*, that is, *if there was merely the holding out of a promise that no rent will be charged in the future, the Government must be deemed in the circumstances of this case to have bound themselves to fulfil it. ... Courts must do justice by the promotion of honesty and good faith, as far as it lies in their power.*”

25. In other words, *promissory estoppel* long recognised as a legitimate defence in equity was held to found a cause of action against the Government, even when, and this needs to be emphasised, the representation sought to be enforced was legally invalid in the sense that it was made in a manner which was not in conformity with the procedure prescribed by statute.

26. This principle was built upon in *Union of India v. Anglo Afghan Agencies* [AIR 1968 SC 718 : (1968) 2 SCR 366] where it was said (SCR at p. 385): (AIR p. 728, para 23)

“23. Under our jurisprudence the Government is not exempt from liability to carry out the representation made by it as to its future conduct and it cannot on some undefined and undisclosed ground of necessity or expediency fail to carry out the promise solemnly made by it, nor claim to be the judge of its own obligation to the citizen on an ex parte appraisal of the circumstances in which the obligation has arisen.”

27. However, the superstructure of the doctrine with its preconditions, strengths and limitations has been outlined in the decision of *Motilal Padampat Sugar Mills Co. Ltd. v. State of U.P.* [(1979) 2 SCC 409 : 1979 SCC (Tax) 144] xxx xxx xxx”

96. Placing reliance on *Motilal Padampat Sugar Mills*, in para 29 of *State of Punjab v. Nestle*, the court extracted as follows :

“29. As for its strengths it was said: that the doctrine was not limited only to cases where there was some contractual relationship or other pre-existing legal relationship between the parties. The principle would be applied even when the promise is intended to create legal relations or affect a legal relationship which would arise in future. The Government was held to be equally susceptible to the operation of the doctrine in whatever area or field the promise is made — contractual, administrative or statutory. To put it in the words of the Court:

*“The law may, therefore, now be taken to be settled as a result of this decision, that *where the Government makes a promise knowing or intending that it would be acted on by the promisee and, in fact, the promisee, acting in reliance on it, alters his**

position, the Government would be held bound by the promise and the promise would be enforceable against the Government at the instance of the promisee, notwithstanding that there is no consideration for the promise and the promise is not recorded in the form of a formal contract as required by Article 299 of the Constitution. (SCC p. 442, para 24)

Equity will, in a given case where justice and fairness demand, prevent a person from insisting on strict legal rights, even where they arise, not under any contract, but on his own title deeds or *under statute*. (SCC p. 425, para 8)

Whatever be the nature of the function which the Government is discharging, the Government is subject to the rule of promissory estoppel and if the essential ingredients of this rule are satisfied, the Government can be compelled to carry out the promise made by it.” (SCC p. 453, para 33)

(emphasis added)”

97. Again the following limitations pointed out in *Motilal Padampat Sugar Mills* were noted in para 30 of *Nestle* :

“30. So much for the strengths. Then come the limitations. These are:

(1) Since the doctrine of promissory estoppel is an equitable doctrine, it must *yield when the equity so requires*. But it is *only if the Court is satisfied, on proper and adequate material placed by the Government, that overriding public interest requires that the Government should not be held bound by the promise* but should be free to act unfettered by it, that the Court would refuse to

enforce the promise against the Government. (SCC p. 443, para 24)

(2) No representation can be enforced which is *prohibited by law* in the sense that the person or authority making the representation or promise must have the power to carry out the promise. If the power is there, then subject to the preconditions and limitations noted earlier, it must be exercised. Thus, if the statute does not contain a provision enabling the Government to grant exemption, it would not be possible to enforce the representation against the Government, because the *Government cannot be compelled to act contrary to the statute*. But if the statute confers power on the Government to grant the exemption, the Government can legitimately be held bound by its promise to exempt the promisee from payment of sales tax. (SCC p. 453)”

98. The Supreme Court has also authoritatively noted the legal position in the following terms in paras 34 and 36 of *Nestle* :

“34. The discordant note struck by *Jit Ram case* [(1981) 1 SCC 11 : (1980) 3 SCR 689] was firmly disapproved by a Bench of three Judges in *Union of India v. Godfrey Philips India Ltd.* [(1985) 4 SCC 369 : 1986 SCC (Tax) 11] It was affirmed that: (SCC p. 387, para 12)

“12. There can therefore be no doubt that the *doctrine of promissory estoppel is applicable against the Government in the exercise of its governmental, public or executive functions* and the doctrine of executive necessity or freedom of future executive action cannot be invoked to defeat the applicability of the doctrine of promissory estoppel.”

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36. The **limitations** to the doctrine **delineated in *Motilal Padampat Sugar Mills*** [(1979) 2 SCC 409 : 1979 SCC (Tax) 144] however, were also reaffirmed when it was said: (SCC pp. 387-88, para 13)

“That there can be no promissory estoppel against the legislature in the exercise of its legislative functions nor can the Government or public authority be debarred by promissory estoppel from enforcing a *statutory prohibition*. It is equally true that promissory estoppel cannot be used to compel the Government or a public authority to carry out a representation or promise which is *contrary to law* or which was outside the authority or power of the officer of the Government or of the public authority to make. We may also point out that the doctrine of *promissory estoppel* being an equitable doctrine, it *must yield when the equity so requires*; if it can be shown by the Government or public authority that having regard to the facts as they have transpired, it would be inequitable to hold the Government or public authority to the promise or representation made by it, the Court would not raise an equity in favour of the person to whom the promise or representation is made and enforce the promise or representation against the Government or public authority.”

(Emphasis added)

(i) PICUP discharging statutory functions – effect of its actions in the present case

99. Mr. Prashanto Sen, learned counsel for the appellant has placed before us a copy of the notification dated 11th of December 1986 issued by the Government of India in exercise of powers conferred by Section 46(1) of the State Financial Corporations Act, 1951 making applicable the provisions of Sections 29, 30, 31, 32, 32(A) to (F) to the appellant. A further notification dated 23rd February, 2004 was issued by the Ministry of Finance, Government

of India in exercise of powers conferred by Section 4A(2) of the Companies Act, 1956 notifying the petitioner as a public financial institution.

PICUP is discharging statutory functions and dealing with public monies. Its acts and omissions have to be scrutinised in the light of the above well settled principles.

100. The recommendation to issue the show cause notice to Pacquik rests on the premise that handing over documents to a third party would tantamount to a sale. This is legally incorrect. The OTS scheme considered only “sale” differentially, not deposit of title deeds to secure a borrowing.

101. We find that there was no condition in the sanction letter dated 26th October, 2010 that the OTS amount had to be sourced from company’s own funds or that the OTS was for revival of the company. There was no prohibition in the sanction with regard to the source from which Pacquik had to fund the OTS and Pacquik was not precluded from borrowing or arranging money from other parties to do so.

102. The above notings from the legal department do not point out a single factual or legal prohibition under the one time settlement scheme which bars the party who is entering into one time settlement with PICUP, from arranging funds from third party. It also makes no reference to a fraud or deception or concealment on the part of the company or Mr. Darshan Khurana.

103. Clause 7.1(vii) of the OTS policy is also of importance as it stipulates when a no dues certificate would be issued to the

borrower. This clause of the policy reads thus :

“(vii) No Dues Certificate and Title Paper/Charge in respect of securities shall be released/transferred (as applicable) only after all OTS dues (including ARO dues and Collection Charges as well as interest, if payable) have been received by PICUP.”

104. After appropriating the full amount towards the OTS dues of Pacquik, PICUP withdrew the recovery certificate from the Collector. PICUP in terms of the clause 7.1(vii) of the OTS policy consented to the grant of C.A.Nos.10/2011 and 11/2011 and discharge of the Official Liquidator.

105. The facts placed before us regarding PICUP’s conduct even after issuing the cancellation of the OTS make interesting reading. PICUP does not make any effort to return Darshan Khurana’s money to him, in fact it opposed the return. PICUP stands by the no dues certificate issued by it on the 14th of January 2011 (reproduced in para 49 above) confirming that the *“company has repaid the entire OTS dues to the corporation as per the terms of the OTS sanction letter and there are no dues outstanding against the same”*. PICUP also stands by the withdrawal of the recovery certificate by its letter dated 3rd February, 2011 confirming that *“Pacquik Industries Ltd. have since settled its outstanding under the One Time Settlement”*.

106. PICUP permitted the deposit of the amount by Darshan Khurana and is still standing by its position that it is a deposit on behalf of Pacquik. It has made no effort or offer to return the amount to him. The present appeal has been filed challenging the

direction to refund the same to him. Even in this appeal, PICUP insists that it is entitled to adjust the payment against Pacquik's dues and cannot be called upon to refund the amount to Shri Darshan Khurana.

We have no hesitation in holding that PICUP has and is still treating the deposit of the amount by Mr. Darshan Khurana as a deposit on behalf of Pacquik and stands estopped from questioning the deposit as discharge by Pacquik of the OTS liability.

(ii) Is it PICUP which is approbating and reprobating at the same time – application of doctrine of election

107. Having elected to accept the payment from Darshan Khurana and appropriate the same, can PICUP be permitted at the same time to assail the tender? It is submitted by Ms. Pooja Saigal that PICUP cannot be permitted to approbate and reprobate at the same time, in view of its election to accept the payment by Darshan Khurana.

108. The Supreme Court has dealt extensively with such conduct and unscrupulous litigants by upholding the sanctity of the doctrine of estoppel by election. We may first and foremost note the legal principles on this aspect.

109. In the judgment reported at **(2011) 10 SCC 420, Cauvery Coffee Traders, Mangalore v. Hornor Resources (International) Company Ltd.** the Supreme Court held that the applicants were estopped from making the claim made by them since they had chosen to receive the adjusted price rather than to get the shipment

rejected and they could not retract from their actions. In this regard, we extract paras 32, 34 and 35 of the judgment which read as follows:

“**32.** The transaction stood concluded between the parties, *not on account of any unintentional error, but after extensive and exhaustive bilateral deliberations* with a clear intention to bring about a quietus to the dispute. These negotiations, therefore, are self-explanatory steps of the intent and conduct of the parties to end the dispute and not to carry it further.

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34. A party cannot be permitted to “blow hot and cold”, “fast and loose” or “approve and reprobate”. Where one *knowingly accepts the benefits* of a contract or conveyance or an order, is *estopped to deny the validity or binding effect on him of such contract or conveyance or order*. This rule is applied to do equity, however, it must *not be applied in a manner as to violate the principles of right and good conscience*. (Vide *Nagubai Ammal v. B. Shama Rao* [AIR 1956 SC 593], *CIT v. V.M.R.P Firm Muar* [AIR 1965 SC 1216], *Maharashtra SRTC v. Balwant Regular Motor Service* [AIR 1969 SC 329], *P.R. Deshpande v. Maruti Balaram Haibatti* [(1998) 6 SCC 507: AIR 1998 SC 2979], *Babu Ram v. Indra Pal Singh* [(1998) 6 SCC 358: AIR 1998 SC 3021], *NTPC Ltd. v. Reshmi Constructions, Builders & Contractors* [(2004) 2 SCC 663: AIR 2004 SC 1330], *Ramesh Chandra Sankla v. Vikram Cement* [(2008) 14 SCC 58: (2009) 1 SCC (L&S) 706: AIR 2009 SC 713] and *Pradeep Oil Corpn. v. MCD* [(2011) 5 SCC 270: (2011) 2 SCC (Civil) 712].)

35. Thus, it is evident that the *doctrine of election is based on the rule of estoppel—the principle that one cannot approve and reprobate inheres in it*. The doctrine of estoppel by election is one of the species of

estoppels in pais (or equitable estoppel), which is a rule in equity. By that law, a person may be precluded by his actions or conduct or silence when it is his duty to speak, from asserting a right which he otherwise would have had.”

(Underlining by us)

110. In a landmark judgment of the Supreme Court reported at (2010) 10 SCC 422, *Mumbai International Airport (P) Ltd. v. Golden Chariot Airport*, the court has extensively discussed the doctrine of election & estoppels and its effect. The same is usefully extracted hereunder in extenso:

“42. It may be noted that when the City Civil Court returned the plaint filed by the contesting respondent it came up in appeal against the said order before the Bombay High Court, *it expressly gave up its claim of irrevocable licence in order to revive the suit.* On such stand being taken, the High Court remanded the suit for trial before the City Civil Court. It is therefore clear that the contesting respondent has taken a stand before a court of law and also got the benefit as a result of taking such stand inasmuch as it got the suit revived and tried and got the benefit of an interim order in the said proceedings. *As a result of the aforesaid stand being taken, the suit of the contesting respondent went on* before the Bombay City Civil Court from 2001 to 2004 and in view of the interim protection, *the contesting respondent ran the restaurant during that period.*

43. Now the question is whether the contesting respondent on a complete volte face of its previous stand can urge its case of irrevocable licence before the Estate Officer and now before this Court? The answer has to be firmly in the negative.

44. *Is an action at law a game of chess? Can a litigant change and choose its stand to suit its convenience and prolong a civil litigation on such prevaricated pleas?*

45. The common law doctrine prohibiting approbation and reprobation is a facet of the law of estoppel and well established in our jurisprudence also. The doctrine of election was discussed by Lord Blackburn in the decision of the House of Lords in *Scarf v. Jardine* [(1882) 7 AC 345; (1881-85) All ER Rep 651 (HL)] wherein the learned Lord formulated: (AC p. 361)

“... a party in his own mind has thought that he would choose one of two remedies, even though he has written it down on a memorandum or has indicated it in some other way, that alone will not bind him; but so soon as he has not only determined to follow one of his remedies but has communicated it to the other side in such a way as to lead the opposite party to believe that he has made that choice, he has completed his election and can go no further; and whether he intended it or not, if he has done an unequivocal act ... the fact of his having done that unequivocal act to the knowledge of the persons concerned is an election.”

46. In *Tinkler v. Hilder* [(1849) 4 Exch 187] Parke, B. stated that where a party had received a benefit under an order, it could not claim that it was valid for one purpose and invalid for another. (See p. 190.)

47. In *Clough v. London and North Western Railway Co.* [(1861-73) All ER Rep 646] the Court referred at All ER p. 651 F to Comyn's Digest, wherein it has been stated:

“If a man once determines his election, it shall be determined forever.”

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49. In *Kok Hoong v. Leong Cheong Kweng Mines Ltd.* [1964 AC 993 : (1964) 2 WLR 150 : (1964) 1 All ER 300 (PC)] the Privy Council held that: (AC p. 1018)

“... a litigant may be shown to have acted positively in the face of the court, making an election and procuring from it an order affecting others apart from himself, in such circumstances that the court has no option but to hold him to his conduct and refuse to start again on the basis that he has abandoned.”

50. Ashutosh Mookerjee, J. speaking for the Division Bench of the Calcutta High Court in *Dwijendra Narain Roy v. Joges Chandra De* [AIR 1924 Cal 600], held that it is an elementary rule that a party litigant cannot be permitted to assume inconsistent positions in court, to play fast and loose, to blow hot and cold, to approbate and reprobate to the detriment of his opponent. This wholesome doctrine, the learned Judge held, applies not only to successive stages of the same suit, but also to another suit than the one in which the position was taken up, provided the second suit grows out of the judgment in the first.

(Emphasis by us)

The Supreme Court in *C. Beepathuma's case* [AIR 1965 SC 241: (1964) 5 SCR 836] at AIR p. 246, para 17 also took note of the principle stated in *White & Tudor's Leading Case in Equity*, Vol. 18th Edn. at p. 444, wherein it is stated:

“Election is the obligation imposed upon a party by courts of equity to choose between two inconsistent or alternative rights or claims in cases where there is clear intention of the person from whom he derives one that he should not enjoy both ... That he who accepts a benefit under a deed or will must adopt the whole contents of the instrument.”

(Emphasis by us)

111. In the judgment reported at (1992) 4 SCC 683, *R.N Gosain v. Yashpal Dhir*, the Supreme Court has come down on the litigants who assert that a transaction is valid for one purpose and invalid for the other. In this regard the Supreme Court has held thus:

“10. Law does not permit a person to both approbate and reprobate. This principle is based on the doctrine of election which postulates that no party can accept and reject the same instrument and that “a person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage”. [See: *Verschures Creameries Ltd. v. Hull and Netherlands Steamship Co. Ltd.* [(1921) 2 KB 608, 612 (CA)], *Scrutton, L.J*] According to *Halsbury's Laws of England*, 4th Edn., Vol. 16, “after taking an advantage under an order (for example for the payment of costs) a party may be precluded from saying that it is invalid and asking to set it aside”. (para 1508)”

112. In yet another judgment reported at (1998) 6 SCC 507 *P.R Deshpande v. Maruti Balaram Haibatti*, the Apex Court has usefully adverted to the Black's Law Dictionary and derived the doctrine of election from the rule of estoppel. On the effect thereof, the court observed thus:

“8. xxx xxx xxx By that rule, a person may be precluded by his actions or conduct or silence when it is his duty to speak, from asserting a right which he

otherwise would have had. (vide Black's Law Dictionary, 5th Edn.)”

(Emphasis by us)

113. In the judgment reported at ***AIR 2013 SC 1241 Rajasthan State Industrial Development and Investment Corporation v. Diamond and Gem Development Corporation Ltd.***, the Supreme Court reiterated the position that where one *knowingly accepts the benefits of a contract or conveyance or an order, is estopped to deny the validity or binding effect on him of such contract or conveyance or order. This rule is applied to do equity, however, it must not be applied in a manner so as to violate the principles of right and good conscience.*

114. In a recent pronouncement reported at ***(2014) 15 SCC 144 State of Punjab v. Dhanjit Singh Sandhu***, the Supreme Court further stated that:

“...It is settled proposition of law that once an order has been passed, it is complied with, accepted by the other party and derived the benefit out of it, he cannot challenge it on any ground. (Vide Maharashtra State Road Transport Corporation v. Balwant Regular Motor Service, Amravati, AIR 1969 SC 329)...”

(Emphasis by us)

115. In C.A.Nos.10/2011 and 11/2011, Pacquik and Darshan Khurana set out the details of the settlement and their proposal that Darshan Khurana would pay the OTS dues of Pacquik. PICUP also did not object to the tender of payment by Darshan Khurana in response to C.A.Nos.10/2011 and 11/2011 served on 4th January, 2011. PICUP also had the clear option to reject this proposal

which was also faxed by the Pacquik on 7th November, 2011 but it did not do so. Instead PICUP took a considered decision on 7th January, 2011 electing to accept the RTGS from Shri Darshan Khurana as per noting dated 7th January, 2011, and to thereafter point out the inability only to hand over the documents. As a result, Darshan Khurana was persuaded to alter his stand and part with a huge sum of ₹2,29,85,000/- on 10th of January 2011.

116. So far as the PICUP is concerned, the matter has travelled to the highest authorities including the Chairman-cum-Managing Director. They have recorded the noting dated 7th January, 2011 whereby PICUP took the conscious decision to receive the amount from Darshan Khurana towards Pacquik's OTS liability as committed. Only one objection was articulated by PICUP to handing over of the title deeds on 10th January, 2011 "*across the table*" on receipt of the funds for this reason. which was that "*upon clearance of OTS account*", the corporation initiates the process of issuance of no dues certificate and the borrower is required to clear the ARO dues and any other expenses.

117. On the 7th of January 2011, PICUP had complete knowledge of the transaction between Pacquik and Khurana as, on the 6th January, 2011, it had received copies of C.A.Nos.10/2011 and 11/2011.

PICUP thereafter took no steps to inform either the learned Company Judge or the company or Mr. Darshan Khurana that it was not willing to accept the payment from Khurana or about its diffidence in handing over the title deeds against receipt of the

OTS amount.

The noting dated 7th of January 2011 exhibits that PICUP was clearly aware that the payment on behalf of the company was being tendered by Sh. Darshan Khurana. There was no element of sale or transfer of interest in the immoveable property of the company in such deposit.

118. PICUP has till date, even in the present appeal, not communicated any objection to the payment made by Shri Darshan Khurana.

119. In *New Bihar Biri Leaves Co. v. State of Bihar* [(1981) 1 SCC 537] the Supreme Court observed that it is a fundamental principle of general application that if a person of his own accord, accepts a contract on certain terms and works out the contract, he cannot be allowed to adhere to and *abide by some of the terms of the contract which proved advantageous to him and repudiate the other terms of the same contract which might be disadvantageous to him*. The maxim, qui approbat non reprobat (one who approves cannot reprobate), applies in our laws too.

120. The matter did not end with the deposit made by Mr. Darshan Khurana. It resulted in issuance of the no dues certificate as well as withdrawal of recovery proceedings. It also resulted in discharge of the Official Liquidator in the proceedings held on 1st of March 2011 and subsequent disposal of the company petition on the 7th of March 2011.

121. Even in C.A.No.749/2011, PICUP stood by the validity of the deposit and the discharge of the OTS liability by Pacquik upon

receipt of the payment from Shri Darshan Khurana. The only modification of the order dated 7th March, 2011 sought was limited to the extent that the PICUP be permitted to release the title deeds to Pacquik and not to Shri Darshan Khurana who was a third party.

122. PICUP with alacrity accepted payment from Mr. Darshan Khurana and appropriated it towards Pacquik's OTS liability.

PICUP is thus clearly estopped by the doctrine of election from questioning the discharge of the OTS liability by Pacquik on the ground that the tender by Darshan Khurana of the OTS amount on behalf of Pacquik was not a valid tender entitling it to cancel of the OTS. It also stands estopped also from withdrawing or cancelling the One Time Settlement.

(iii) Application of estoppels by judgment

123. Yet another facet of estoppels arises and applies against PICUP in the present case. Estoppel by judgment means that when a fact has been agreed on, or decided in a court of record, neither of the parties shall be allowed to call it in question, and have it tried over again at any time thereafter, so long as judgment or decree stands unreversed. (**vide Black's Law Dictionary, 6th Edn.**).

124. The principle of estoppels by judgment was reiterated by the Supreme Court in the judicial pronouncement reported at **(2011) 5 SCC 435, Joint Action Committee of Air Line Pilots' Assn. of India v. DG of Civil Aviation** and it went further to say that taking inconsistent pleas by a party makes its conduct far from satisfactory.

125. This principle is clearly applicable to PICUP's conduct in court and its acceptance of the court orders based thereon. PICUP has endorsed the payment by Darshan Khurana as valid discharge of the liability of Pacquik under the OTS settlement. This has been noted by the court in the orders dated 1st of March 2011 and 7th of March 2011. These orders have not been challenged by PICUP by way of either any application or an appeal.

126. In the pronouncement reported at *(2012) 3 SCC 563 Postmaster General & Ors. v Living Media India Limited & Ors*, while considering a plea for condonation of delay by the postal department, the Supreme Court has made observations on the aspect of the Government Departments being treated equally in law to private individuals. These observations are topical and are extracted below:

“28. ... The claim on account of impersonal machinery and inherited bureaucratic methodology of making several notes cannot be accepted in view of the modern technologies being used and available. The law of limitation undoubtedly binds everybody, including the Government.

29. ... The government departments are under a special obligation to ensure that they perform their duties with diligence and commitment. Condonation of delay is an exception and should not be used as an anticipated benefit for the government departments. The law shelters everyone under the same light and should not be swirled for the benefit of a few.”

(Underlining by us)

127. Thus even with respect to Evidence and Contract Laws, the State and its entities stand at an equal footing with Private

Individuals. Therefore estoppel, which is a principle of Evidence applies to State just as assertively.

128. In our considered opinion, the acceptance of funds via the medium of RTGS after full notice of the nature of the deposit led to implied acceptance by performance of conditions as envisaged under Sections 8 and 9 of the Indian Contract Act, 1872. The more conventional example of such acceptance would be encashment of a cheque tendered as consideration for an offer. In today's world with the advent of technological advancements, instantaneous modes of banking have evolved such as “*Real Time Gross Settlement*” (which has the common acronym - ‘RTGS’). Such settlements as the name suggests, happen in real time. The intent of the ‘cheque’ example is that one voluntarily accepts payment by depositing the cheque for clearing. In the present case, PICUP was intimated well in advance and accepted the inward remittance with notice. Any dissatisfaction to the proposal should have been conveyed before the receipt. Thus in our opinion, the acceptance of the RTGS with notice coupled with subsequent silence amounts to implied acceptance of the proposal put forth by Pacquik.

129. It is a well settled position in law that even the invalidity of the representation made by the government would not preclude its estoppel from denial of the existence of the representation or the fact that it stands acted upon by the person to whom the representation was made. (**Ref.: AIR 1951 SC 469, *Collector of Bombay v. Municipal Corporation of the City of Bombay***).

130. In the case at hand, based on its informed decision on 7th

January, 2011 to accept the payment from Mr. Darshan Khurana, PICUP consented and persuade the court to pass orders dated 7th January, 2011 (deposit of amount of ₹2,29,85,000/- with PICUP); 25th April, 2011 (deposit of title deeds with the court); disposal of CAs 10, 11/2011 as well as CP No. 194/2006. PICUP did not even file a contest to CA Nos. 10 and 11/2011. No appeal was filed assailing any order.

131. PICUP consented to the court orders on 1st and 7th March, 2011 which have attained finality. It cannot now challenge the validity of any of the actions of Pacquik and also stands estopped from doing so by the court orders and proceedings which it clearly invited.

VI. *Whether Pacquik concealed material facts in its OTS proposal and committed fraud on PICUP?*

132. It has also been urged before us by Mr. Joy Basu, learned senior counsel for PICUP, that the company did not mention any proposal to sell the property in the OTS proposal and concealed its agreement to sell the property to Darshan Khurana. The submission is that therefore, the company obtained the approval of PICUP by practicing fraud upon it.

133. A month after the filing of C.A.No.749/2011, PICUP filed C.A.No.906/2011 on 4th of May 2011 submitting that the company had withheld the fact that it would pay the OTS amount after “*sale of the mortgaged asset without prior approval of PICUP*” and therefore, a show cause notice stood issued to the company for

cancellation of the one time settlement. An allegation was made that in collusion with the respondent no.3, the company has tried to "hoodwink" PICUP as well as the court into believing that the settlement was with PICUP's consent.

134. Let us examine PICUP's allegation that Pacquik concealed material facts from it. Before us it is also contended by PICUP that submission of the one time settlement proposal and the filing of the winding up petition were fraudulent acts.

135. Ms. Pooja Saigal, learned counsel for respondent no.2 has relied upon several additional judicial precedents on the nature of disclosure by a litigant as well as impact of non-disclosure which would non suit a litigant.

136. Let us at the outset examine those judicial precedents laying down the applicable principles. In the judgment of the Supreme Court reported at (1994) 1 SCC 1, *S.P. Chengalvaraya Naidu (Dead) by LRs. v. Jagannath (Dead)*, it was held thus :

"5. The High Court, in our view, fell into patent error. The short question before the High Court was whether in the facts and circumstances of this case, Jagannath obtained the preliminary decree by playing fraud on the court. The High Court, however, went haywire and made observations which are wholly perverse. We do not agree with the High Court that "there is no legal duty cast upon the plaintiff to come to court with a true case and prove it by true evidence". The principle of "finality of litigation" cannot be pressed to the extent of such an absurdity that it becomes an engine of fraud in the hands of dishonest litigants. The courts of law are meant for imparting justice between the parties. One who comes to the court, must come with clean hands.

We are constrained to say that more often than not, process of the court is being abused. Property-grabbers, tax-evaders, bank-loan-dodgers and other unscrupulous persons from all walks of life find the court-process a convenient lever to retain the illegal gains indefinitely. We have no hesitation to say that a person, who's case is based on falsehood, has no right to approach the court. He can be summarily thrown out at any stage of the litigation.

6. The facts of the present case leave no manner of doubt that Jagannath obtained the preliminary decree by playing fraud on the court. ***A fraud is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss.*** It is a cheating intended to get an advantage. Jagannath was working as a clerk with Chunilal Sowcar. He purchased the property in the court auction on behalf of Chunilal Sowcar. He had, on his own volition, executed the registered release deed (Ex. B-15) in favour of Chunilal Sowcar regarding the property in dispute. He knew that the appellants had paid the total decretal amount to his master Chunilal Sowcar. ***Without disclosing all these facts, he filed the suit*** for the partition of the property on the ground that he had purchased the property on his own behalf and not on behalf of Chunilal Sowcar. ***Non-production and even non-mentioning of the release deed at the trial is tantamount to playing fraud on the court.*** We do not agree with the observations of the High Court that the appellants-defendants could have easily produced the certified registered copy of Ex. B-15 and non-suited the plaintiff. A litigant, who approaches the court, is bound to produce all the documents executed by him which are relevant to the litigation. If he withholds a vital document in order to gain advantage on the other side then he would be guilty of

playing fraud on the court as well as on the opposite party.”

(Emphasis by us)

137. In the judgment of the Supreme Court reported at (2010) 4 SCC 728, *Oswal Fats & Oils Ltd. v. Additional Commissioner (Administration), Bareilly Division, Bareilly & Ors.*, it was held thus:

***“20. It is settled law that a person who approaches the court for grant of relief, equitable or otherwise, is under a solemn obligation to candidly disclose all the material/important facts which have bearing on the adjudication of the issues raised in the case. In other words, he owes a duty to the court to bring out all the facts and refrain from concealing/suppressing any material fact within his knowledge or which he could have known by exercising diligence expected of a person of ordinary prudence. If he is found guilty of concealment of material facts or making an attempt to pollute the pure stream of justice, the court not only has the right but a duty to deny relief to such person.*”**

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23. This Court and different High Courts have repeatedly invoked and applied the rule that ***a person who does not disclose all material facts has no right to be heard on the merits of his grievance***—*State of Haryana v. Karnal Distillery Co. Ltd.* [(1977) 2 SCC 431], *Vijay Kumar Kathuria (Dr.) v. State of Haryana* [(1983) 3 SCC 333], *Welcom Hotel v. State of A.P.* [(1983) 4 SCC 575 : 1983 SCC (Cri) 872], *G. Narayanaswamy Reddy v. Govt. of Karnataka* [(1991) 3 SCC 261], *S.P. Chengalvaraya Naidu v. Jagannath* [(1994) 1 SCC 1], *Agricultural and Processed Food Products v. Oswal Agro Furane* [(1996) 4 SCC 297], *Union of India v. Muneesh Suneja* [(2001) 3 SCC 92 : 2001 SCC (Cri)

433], *Prestige Lights Ltd. v. SBI* [(2007) 8 SCC 449], *Sunil Poddar v. Union Bank of India* [(2008) 2 SCC 326], *K.D. Sharma v. SAIL* [(2008) 12 SCC 481], *G. Jayashree v. Bhagwandas S. Patel* [(2009) 3 SCC 141] and *Dalip Singh v. State of U.P.* [(2010) 2 SCC 114]

(Emphasis by us)

138. Adjudication of this ground of challenge requires this court to consider whether Pacquik had entered into an agreement to sell the property to Darshan Khurana prior to the acceptance of the OTS proposal?

139. The record noted above manifests that the proposal to sell the property to Mr. Darshan Khurana emanated for the first time only in the board resolution dated 10th of December 2010. Therefore, in October, 2010 and November, 2010, PICUP has rightly not treated the settlement with the company as one based on sale of property of the company to Darshan Khurana as is manifested in its applications filed in March, 2011. The sanction by PICUP on 26th November, 2010 of the OTS proposal of Pacquik casts no prohibition on Pacquik from selling the property after its release from the mortgage and satisfaction of the OTS amount.

140. In fact, the order dated 7th of March 2011 records PICUP's admission that it was not treating the transaction between the company and Mr. Darshan Khurana as one which requires prior permission of PICUP. On that date, PICUP merely urged that it could not hand over the title deeds of the property to Darshan Khurana, a third party so far as it was concerned.

141. The minutes recorded by the OTS committee on 16th November, 2010 note that Pacquik had statutory liabilities; that it was facing winding up proceedings as well as complaints under Section 138 of the N.I. Act; and all other relevant material. We find that PICUP was fully conscious of the liabilities of Pacquik and pending legal proceedings against it. Ms. Pooja Saigal and Mr. Preetpal Singh, learned counsel for the respondents have thus rightly pointed that there was no concealment by the company and all facts were fully known to PICUP as well.

142. The above narration would show that amongst the reasons which had weighed with PICUP favouring acceptance of the OTS proposal, was the fact that against the disbursement of the loan to the tune of ₹165.50 lakhs, Pacquik had already paid earnest money of ₹1 lakh; ₹31.34 lakhs towards its second OTS proposal as well as an amount of ₹158.94 lakhs, bringing the total amount paid back to PICUP to more than ₹190.00 lakhs. Thus in the background note dated 13th of November 2010 and the OTS sanction, PICUP had thus noted that the company had paid to it, an amount which was equivalent to more than 90% of the principal amount and could not be branded as a “*wilful defaulter*”.

143. The further reason for accepting the OTS also found in the background note dated 13th November, 2010 shows that the base amount of the one time settlement according to PICUP was approximately ₹225 lakhs whereas the company had offered ₹220 lakhs. Therefore, a careful decision stood taken after evaluating all pros and cons of the proposal submitted, keeping in view the

financial position of the company and the fact that it had been making an endeavour to pay its financial dues.

144. We have noted above that even by way of C.A.No.906/2011, PICUP made the prayer that the title deeds deposited by the applicant of the mortgaged property of the respondent company be ***not handed over to the petitioner till the time the company, furnishes proof of having taken its prior consent for sale of the mortgaged assets.***

Two material facts emerge from this application. Firstly even as on date of 3rd May, 2011, it was not PICUP's case that there was any fraud on the part of the company.

Secondly, it is manifest therefore, that even on 3rd of May, 2011, PICUP was willing to act in furtherance of the OTS subject to "prior permission" to sell the assets. PICUP merely sought a direction that the company does not hand over the sale deed to Darshan Khurana till proof of its prior permission for sale. As against this, Pacquik was submitting that there was no sale and documents were to be handed over only to secure the payment.

145. In the reply dated 16th May, 2011 to C.A.No.749/2011, it was clearly stated that the property had not been sold and that the transfer could be made only by way of a written document registered with the Sub-Registrar duly stamped with transfer charges and stamp duty and that no such thing had been done by Pacquik. It was also pointed out that once payment of the amount under the OTS was made, no restrictions were cast thereunder on the company from dealing with the property.

146. Pacquik's reply to C.A.No.906/2011 reiterated the above and that the arrangement between Pacquik and the respondent no.3 was in the nature of a "financial arrangement" which was fully informed to PICUP; that the arrangement was made so as to "fund/finance the respondent company to clear the dues of the applicant (PICUP) within the stipulated period" and since the respondent company was not having any other collateral or other security, as the primary security was with PICUP, to safeguard the petitioner's (Darshan Khurana) interest, "*PICUP was requested to give the title deeds directly*" to Darshan Khurana.

147. Ms. Pooja Sehgal, Id. counsel appearing for Mr. Darshan Khurana has drawn our attention to the affidavits filed by Shri Ashish Sehgal and Vandana Sehgal in support of the above pointing out that there was no agreement to sell on any material date. The deponents specifically withdrew all assertions with regard to the sale of the property and reiterated that the title of the property was in favour of the company alone.

148. Shri Darshan Khurana - respondent no.3 has also sworn on record on affidavit dated 16th December, 2011 pointing out that he was approached by the directors of the company with a request for assistance in making payment in terms of the OTS amount within the 45 day window up to 10th January, 2011 to enable the company to avail 5% discount and also enabling the company to secure release of the mortgaged property. Darshan Khurana also reiterated that only title deeds would remain in his custody only in order to secure his interest and that of all his family members (who

are all creditors of the company and its directors). Darshan Khurana had clearly declared in the affidavit that no sale of the property, which was lying mortgaged with PICUP, had been effected and that no agreement to sell had been executed by the company. It was reiterated that it was on account of inadvertence that, in the application filed on record, reference to execution of documents had been made.

149. It is noteworthy that the OTS acceptance by the committee was on 16th November, 2010. Whereas, the resolution of the Board of Pacquik to meet the OTS liability proposing the sale of the asset of Pacquik was considered and passed on 10th and 20th December, 2010. C.A.Nos.10/2011 and 11/2011 were filed only on 4th January, 2011 pointing out the difficulties faced by the company in meeting the OTS commitment and circumstances in which help was sought from the respondent no.3 herein. Advance copy of the joint applications being C.A.No.10/2011 (containing the settlement proposal) as well as C.A.No.11/2011 seeking impleadment were served on PICUP by Pacquik of Mr. Darshan Khurana on the 6th of January 2011. PICUP's noting dated 7th January, 2011 sets out full details thereof and contains the PICUP's decision to accept the payment by Mr. Khurana, only unwilling to hand over title documents to the third party.

150. We also find that the orders of the Company Court dated 1st of March and 7th of March, 2011 were both consent orders which have not been challenged by the appellant and have thus attained finality.

151. In para 6(A) of C.A.No.10/2011, Pacquik and Mr. Khurana have clearly mentioned that Pacquik would pay the amount to PICUP and “*get the mortgage redeemed*”, that PICUP would issue a no objection certificate “*showing therein that all their dues have been recovered*” and release the title deeds “*in favour of the petitioner herein*” (i.e. Shri Darshan Khurana).

It needs no elaboration that there could be no sale without redemption.

152. In para 6(F) of C.A.No.10/2011, the parties had noted that a joint application for “*impleading PICUP, the other main creditor as party to the petition and get the approval of the settlement between the parties*” would be moved. PICUP was therefore, on board completely so far as the dealings between Pacquik and Darshan Khurana were concerned.

153. CA No.11/2011 was filed under Order I Rule 10 of the CPC with Rule 9 of Company Court Rules seeking impleadment of PICUP clearly pointing out that the company had mortgaged its land and building with PICUP; the outstanding of ₹2,29,85,000/- and that PICUP was a necessary and proper party for adjudicating on C.A.No.10/2011. It was clearly stated “*that before any settlement is arrived in the matter, the said M/s PICUP is also impleaded as a party. Both parties want the same so that the matter was fully and finally settled in terms of the compromise*”.

The above discussion notes that PICUP not only consented to its impleadment but it clearly stated that it had received the OTS amount.

154. Even on the closest scrutiny, the resolutions of the board of Pacquik contained, at best, the proposal of the company to "offer for sale, the Noida property with building, plant and machinery to Shri Darshan Khurana, Kapil Khurana and Sanjeev Khurana". There are no details of the plant and machinery; the sale consideration or the terms on which the property would be transferred to them. It cannot be said that the averments in the application or these resolutions constitute a valid or a binding agreement to sell. At best they constitute a mere willingness to explore the possibility for sale of the property.

155. All that is on the court record was that the amount of the one time settlement had been paid by the petitioning creditor (in the winding up proceedings) on behalf of Pacquik - the company under liquidation, to PICUP and that it was seeking to retain the documents to secure its monetary interest.

156. There is nothing on record to show that a transaction of sale of asset was even proposed, let alone effected between Pacquik and the petitioning creditors before 11th October, 2010 where the OTS proposal was submitted by Pacquik; the 16th of November 2010 when the OTS committee sanctioned the same or the 26th of November 2010 when the sanction was communicated.

157. The company has never concealed the fact that property was mortgaged with PICUP. Even respondent no.3 admits full knowledge of this fact. In fact, the settlement proposal postulates approval by PICUP. The sale of the property to the respondent no.3 by Pacquik was to be made only pursuant to the redemption of

the mortgage by PICUP.

158. Our attention is drawn to the requirements of Rule 4 of Order VI of the CPC which mandates that all particulars of a fraud have to be disclosed in the pleadings. As is evident from the above, PICUP has made no complaint that Pacquik had committed fraud when the settlement proposal was informed to it. This complaint of PICUP is not made out from its records as well. No such allegation was made when C.A.Nos.10/2011 and 11/2011 were disposed of or in C.A.No.749/2011 filed by PICUP. No details of fraud are pleaded in any of its applications.

159. Furthermore, reliance is placed on Section 14 of the Contract Act which defines 'free consent' and Section 17 defining fraud. For expediency we extract these statutory provisions which read thus :

"14. '**Free consent**'—Consent is said to be free when it is not caused by— —Consent is said to be free when it is not caused by—"

- (1) coercion, as defined in section 15, or
- (2) undue influence, as defined in section 16, or
- (3) fraud, as defined in section 17, or
- (4) misrepresentation, as defined in section 18, or
- (5) mistake, subject to the provisions of sections 20, 21 and 22.

Consent is said to be so caused when it would not have been given but for the existence of such coercion, undue influence, fraud, misrepresentation or mistake."

160. Similarly Section 17 of the statute defines 'fraud' as :

"17. '**Fraud**'—'Fraud' means and includes any of the following acts committed by a party to a contract, or with

his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract:— —‘Fraud’ means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract:—

- (1) the suggestion, as a fact, of that which is not true, by one who does not believe it to be true;
- (2) the active concealment of a fact by one having knowledge or belief of the fact;
- (3) a promise made without any intention of performing it;
- (4) any other act fitted to deceive;
- (5) any such act or omission as the law specially declares to be fraudulent. Explanation.—Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence, is, in itself, equivalent to speech."

PICUP does not point out which act or omission of Pacquik or Darshan Khurana falls under or any sub-section of the above.

161. ‘Fraudulently’ is to be found in Section 25 and in Sections 421 to 424 of the Indian Penal Code.

162. The above narration and discussion would show that the company had made fair disclosure.

It is therefore, not possible to hold that there was any fraud committed by the company when the proposal was submitted to PICUP or when it was considered and sanctioned by it.

163. On the contrary, it is PICUP which has concealed the material notings and actions from the court. The PICUP’s notings

extracted above and the discussion in para 60 onwards also show that wrong facts have been noted therein. In fact, it is PICUP which was responsible for concealment of material facts.

VII. Whether PICUP was entitled to forfeit the deposited amount?

164. The direction to return the amount of ₹2,29,85,000/- to Darshan Khurana by the order of 8th of July 2013 has been assailed before us on the ground that in terms of para 10 of the letter dated 26th November, 2010, PICUP was entitled to forfeit the amount deposited and adjust the same towards the original loan dues. It is submitted that PICUP had cancelled the OTS for the reason that the company concealed the information about the sale agreement with the respondent no.3 qua the mortgaged property and therefore, it was entitled to forfeit the amount of ₹2.29 crores deposited by the respondent no.3. It is contended that the total realizable value of the asset was approximately ₹3.21 crores while the OTS was for the sum of ₹2.43 crores.

165. PICUP's plea that it is entitled to forfeit the deposited amount pre-supposes that the deposit of the OTS amount was by Pacquik, the company which was the debtor of PICUP. It is not so. It was fully within the knowledge of PICUP that the amount was being deposited by Darshan Khurana as also the terms of the arrangement. PICUP took the considered decision to permit the deposit by Mr. Darshan Khurana and accepted the same as valid deposit of the OTS amount on behalf of Pacquik. It is PICUP

which did not object to the arrangement either in its minutes dated 7th January, 2011 or in C.A.No.749/2011 as well as C.A.No.906/2011. In the minutes as well as its applications, PICUP was only concerned either about the recovery charges or about the return of the title documents to the company and not to Mr. Darshan Khurana, who was a third party.

166. The amount was clearly tendered as payment on behalf of Pacquik towards the discharge of OTS liability. PICUP consciously permitted the deposit knowing that it was not by Pacquik but by Mr. Darshan Khurana on its behalf and appropriated it towards the OTS. We have held that, in fact, there were no grounds for cancellation and PICUP had no right or reason to cancel the OTS. If PICUP stands by its cancellation of the OTS, it has no right to forfeit the amount which was deposited by Mr. Darshan Khurana on behalf of Pacquik towards the OTS.

VIII. Whether challenge pending in Allahabad High Court precludes our scrutiny?

167. It has further been contended by Mr. Joy Basu, learned Senior Counsel for PICUP that this court cannot look at the legality and validity of the challenge to the OTS cancellation for the reason that the company - Pacquik has challenged the cancellation of the OTS by way of a writ petition by the High Court of Allahabad. PICUP vehemently urges that the plea for return of money paid in discharge of the OTS is destructive of the challenge to the cancellation and that the company cannot be permitted to approbate

and reprobate at the same time.

168. So far as the first submission is concerned, the challenge in Allahabad is by Pacquik and not by the creditor who is the petitioner in the winding up proceedings.

169. We also find that two applications were filed by PICUP before the learned Company Judge requiring the court to examine this issue. On the 3rd of May, 2011, PICUP filed C.A.No.906/2011. Para 8 of this application details the show cause notice dated 27th April, 2011 and in para 9, PICUP alleges that the company and Darshan Khurana hoodwinked the court that the settlement was with the consent of the PICUP. This application notes that the directors of Pacquik had filed affidavits that no sale of the property in question had taken place. PICUP thus invited the learned Company Judge to look into the matter. This very plea is pressed before us.

170. Again C.A.No.13/2012 was filed by PICUP on 3rd January, 2012 stating that the OTS stood cancelled and prayed that the title deeds deposited in court be returned to PICUP.

171. The contents of C.A.Nos.906/2011 and 13/2012, in fact compel the court to examine the PICUP's contention of fraud on the part of the company.

172. Additionally, in grounds 'B' to 'E' in the present appeal, the issue of fraud and concealment of information; subsequent cancellation of the OTS, have been pressed by PICUP before this court. In ground 'H', PICUP categorically states that it is not possible to return money to "*respondent no.3*" i.e. Shri Darshan

Khurana.

173. PICUP has thus called upon this court as well to examine cancellation of the OTS on the ground that Darshan Khurana and the company had entered into a sale transaction prior to the OTS sanction and had obtained consent of PICUP by fraud. An examination of PICUP's prayer for retention of the money and the title deeds necessarily entails an examination of the legal right and entitlement of PICUP to do so. It essentially incorporates ruling on the contention of Mr. Darshan Khurana before us that the action of PICUP was malafide and completely illegal as well as the submission that by its conduct PICUP was estopped from cancelling the OTS.

174. The prayer for return of the money by Mr. Darshan Khurana stems from the cancellation of the OTS and is premised on the fact that this has left Mr. Khurana without any security for his payment which was made on behalf of Pacquik.

Clearly, the demand by the third party (Mr. Darshan Khurana) of return of his deposit towards the cancelled OTS, certainly cannot imperil Pacquik's challenge by way of the independent proceedings in the other court. For the same reason, the challenge by Pacquik to the cancellation of the OTS in the Allahabad High Court cannot preclude our scrutiny into the rival contentions on the merits thereof pressed by PICUP or Mr. Darshan Khurana before us.

IX. Whether financial loss to PICUP by sanction of the OTS

175. In its applications, PICUP has taken the stand that the OTS has to be pegged at the total amount of the valuation of the assets and that the sanction of the OTS for ₹243 lakhs when the realization value of the assets was ₹321.24 lakhs caused loss of ₹78.24 lakhs by not resorting to coercive action. The answer to this suggestion is found in the noting dated 11th July, 2011 by Shri Ashok Mishra, Deputy Manager (Finance) as a reply by Shri R.K. Sharma, Chairman-cum-Managing Director to an audit objection. This reply is reproduced at page 485 of the original record., the relevant portion whereof is extracted hereunder :

*“...From a perusal of the policy provisions as above, it may be appreciated that the **OTS policy nowhere requires that the amount of OTS be pegged to the total amount of valuation of assets but allows settlement** with borrower to be arrived **at an amount between the ‘minimum indicative amount’ and aggregate of value of assets.***

In this case the valuation of the assets was worked out at ***Rs.321.24 lakhs and as per OTS policy, base amount was at Rs.175.89 lakhs.*** The company submitted OTS proposal of Rs.220.00 lakhs which was negotiated at length and efforts were made to settle the dues at the highest possible amount having company. Hence, the ***OTS amount of Rs.243.00 lakhs as finally negotiated was in accordance with the policy. Therefore, contention of Audit that the Corporation incurred a loss of Rs.78.24 lakhs in the process is not maintainable.***

So far as the observation of audit in respect of resorting to coercive action against the company by way of

enforcing RC and selling assets of the company is concerned, it is to mention that both the efforts were attempted in this case and it was a result of the efforts of coercive action that the company approached for OTS and settled the dues.

With respect to the loss of Rs.24.30 lakh by non *recovery of RC collection charges* it is to mention that the directive referred to by Audit *is in respect of RCs issued in the state of UP and in this case RC was issued at Delhi where no such directives issued by the Delhi govt.* are in the knowledge of the Corporation; even then as a measure of abundant precaution, the Corporation stipulated a condition in the No Dues Certificate issued to the company that the guarantors of the company shall furnish an irrevocable bank guarantee for an amount of Rs.24.30 lakh and the title deeds shall be released only after furnishing the bank guarantee to the satisfaction of the Corporation. Hence if any RC collection charges shall be claimed by the concerned Distt. Authority it shall be paid by the company. Thus it would be clear that no loss to the exchequer has been sustained in the matter.

In view of the above, Audit is requested to kindly drop the para.”

(Emphasis supplied)

176. A reply in these terms appears to have been sent to the audit cell on 14th July, 2011. We have noted above that one of the factors which weighed in favour of Pacquik was the view of PICUP that this company was not a wilful defaulter. Clearly no financial loss resulted to PICUP from sanction of the OTS.

177. We have been carefully taken through the original record by both sides and find that there is no mention of any financial loss caused to PICUP by the sanction of the one time settlement or by

any order of the Company Court. There is also nothing on record to show that PICUP was suffering any loss because it could have recovered beyond the amount quantified in the one time settlement by proceeding with the recovery proceedings. No loss has resulted from the acceptance of the amount towards such settlement.

178. It is important to note that from 10th January, 2011, PICUP has had the huge amount of ₹2,29,85,000/- in its coffers.

179. PICUP has also stood by its no dues certificate dated 14th January, 2011 issued to Pacquik as well as the withdrawal of the recovery certificate on 3rd February, 2011 at all points of time. Despite discharge of the settlement commitment, PICUP was unfairly continuing to retain the original title deeds of the property of the company.

180. We find that learned Company Judge had passed an order dated 26th February, 2014 directing PICUP to deposit the amount of ₹2,29,85,000/- in this court. This direction also was not complied with. Instead CM No.4470/2014 was filed in the present appeal seeking stay of this direction.

181. By the order dated 14th March, 2014 in the present appeal, PICUP was given three weeks time to deposit the amount without prejudice to the rights and contentions of the parties in the present case. PICUP has deposited an amount of ₹2,29,85,000/- only on 3rd April, 2014. It is evident that while making the deposit in this court, PICUP has retained the interest earned on the said amount, which it had no right to do so.

182. PICUP charges interest @21% or reduced by 2% to 19%

compounded quarterly from its borrowers.

183. It has to be borne in mind that PICUP took a conscious decision to permit Shri Darshan Khurana, who was not the borrower, to deposit an amount of ₹2,29,85,000/- and has enjoyed the benefit from the date it was transferred to its account on 10th of January 2011 till 3rd of April 2014 when it came to be deposited in this court. We are informed that PICUP has utilized the money for its business purposes. PICUP has charged the Pacquik interest @21% reduced by 2% compounded quarterly. If the clock has to be reversed, status quo ante would be required to be restored. There is no reason why PICUP should not be called upon to effect restitution on the same terms. Or even till the date 3rd April, 2014 when PICUP deposited the amount in this court?

184. We are informed that interest on such amount from 10th January, 2011 (date of deposit with PICUP) till 3rd of April 2014 (date of deposit by PICUP in court), more than 39 months, if computed :

- (i) @19% compounded quarterly, comes to ₹1,90,00,000/- and odd.
- (ii) @19% simple interest, comes to ₹1,41,93,000/- and odd.

If the cancellation was sustained, PICUP would claim the entire amounts from Pacquik with interest on this basis. In order to effect fair restitution, PICUP would be required to pay interest on the same basis to the depositor, Shri Darshan Khurana.

185. Let us examine one more aspect of the matter. The parties have submitted before us that the price of the property would at

best be around ₹2.5 crores. The parties have pointed out that despite the advertisement by PICUP, even in 2010, there were no buyers for the property and the negotiations invited vide the advertisement for 22nd October, 2010 had to be cancelled. Furthermore, judicial notice is to be taken of the fact that property prices have fallen. It is submitted by counsels that property prices today would still be in the range of ₹2.5 crores. However, no buyers are available in the market. Can cancellation of the OTS is clearly detrimental to PICUP's financial interests?

(i) Whether status quo ante possible

186. There is one more critical aspect of the matter. Based on PICUP's consent, many orders came to be passed in the litigation. It is necessary to see, if those can be reversed and whether status quo ante is possible so far as the litigation is concerned. The respondent no.3 had filed winding up proceedings against the admitted liability of ₹62,53,375/- of the company along with future interest since April, 2006 @18% per annum. Based on the representation of PICUP that its liability had been cleared and its tacit acceptance of the settlement proposed in C.A.No.10/2011, the winding up petition (filed in 2006) came to be disposed of on the 7th of March 2011. The Official Liquidator was discharged as PICUP informed the learned Company Judge that it had received the OTS amount.

187. The order dated 7th March, 2011 disposing of the winding up has not been assailed by PICUP and has thus attained finality.

How is the clock to be reversed and status quo ante fairly restored so far as Shri Darshan Khurana and the winding up proceedings are concerned? Even if the winding up proceedings were revived, it would not be possible to restore the creditor to the same position as subsisted in January, 2011.

(ii) Liabilities of Pacquik

188. The impact of the stand taken by PICUP has to be examined from yet another aspect.

189. If the winding up proceedings (which were pending since 2006), proceeded to fruition, then disbursement of the amounts from the assets of the company would be effected by the Official Liquidator only in consonance with Section 529 of the Companies Act, 1956. Statutory dues including the liability towards the income tax as well as excise tax would get preferential treatment, then secured creditors and lastly the unsecured creditors.

190. According to PICUP, the realizable value of the mortgaged asset of the company was ₹321.24 lakhs.

191. In the winding up petition, the petitioning creditor claimed debt of Pacquik to the extent of ₹62,53,375/- with interest @ 18% since April, 2006.

192. Let us examine what other information is available about the liabilities of Pacquik on record. We find that as back as on the 16th of November 2010, the OTS approval committee had noted that no business was being carried on in the company after death of its Managing Director. We are informed by learned counsel for the

parties that no business has been carried on ever since.

193. In answer to the notice to show cause in the winding up proceeding, Pacquik stated that it owed ₹5.49 lakhs to Income Tax authorities and ₹9,50,000/- to the Excise Department. Mr. Preetpal Singh, learned counsel for respondent no.1 submits that the company owes lease rental to the NOIDA authorities to the tune of ₹1.47 lakhs; sales tax to the tune of ₹66,000/- and water dues of ₹22,000/-.

194. So far as Darshan Khurana's family was concerned, the total debt of the company mentioned in the reply dated 1st May, 2011 to the company petition, was about ₹1.94 crores. In the cases under Section 138 of the Negotiable Instruments Act, which relates to dishonouring of four cheques, filed by Shri Darshan Khurana and his family members against Pacquik India Ltd., the following amounts are involved :

- (i) By M/s Pioneer Multifilms – Proprietor : ₹49.25 lac
Shri Darshan Khurana under Section 138 (originally ₹49.25 Lacs/ simultaneously he has filed winding up petition for ₹62,53,375.00)
- (ii) By Shri Sanjeev Khurana brother of : ₹4.00 lac
Shri Darshan Khurana under Section 138 Negotiable Instruments Act.
- (iii) By Usha Enterprises – Shri Kapil : ₹79.00 lac
Khurana son of Shri Darshan Khurana
Section 138 of the Negotiable Instruments Act.

The total of the claim of the Khurana family would be over ₹145.00 lacs.

These cases are stated to be pending.

195. By the settlement with Pacquik, apart of the payment of ₹2,29,85,000/- to PICUP on behalf of Pacquik, Shri Darshan Khurana was thus writing off liability of over ₹1.45 crores as well. Therefore, so far as Darshan Khurana was concerned, he was in effect expending the total of ₹4,44,85,000/- (being the total of ₹2,29,85,000/- and ₹1,45,00,000/-).

196. We are informed that a winding up petition bearing C.P.No.393/2012 was filed by one Raj Kumar with regard to a claim which was barred by limitation.

197. As per the minutes dated 16th November, 2010 of the Third OTS approval committee, the total amount payable by Pacquik under the OTS was ₹243 lakhs (consisting of principal outstanding of ₹165.50 lakhs and interest amounting to ₹77,50,000/-) payable with 45 days from issuance of the OTS sanction letter. In addition, ARO dues to the tune of ₹80,659/- were projected as payable. If the amount was paid within 45 days, 5% discount on the OTS would be allowed bringing the amount payable to ₹2,29,85,000/-.

198. Had the winding up proceedings continued, the Official Liquidator would first consolidate the assets of the company. His office would then assess and verify all claims lodged with it against the company and only thereafter effect pro rata disbursement amongst the claimants. PICUP would be required to stand in the queue in accordance with the provisions of Section 529 of the Companies Act and wait for payment of its dues after the excise, income tax and other Government departments.

199. As noted above, PICUP had issued a notice under Section 29 of the State Financial Corporation Act on 16th July, 2010. As per the practice of financial institutions, the liability of the debtor gets frozen on such date. According to PICUP, the company was owing an amount of ₹11.06 crores, out of which it had, since inception, repaid only ₹158.94 lakhs.

200. From the above, it would appear that the possibility of recovering even the OTS amount, if the matter proceeded to winding up of Pacquik or to sale of the assets, be it under Section 29 of the State Financial Corporation Act or auction by the Official Liquidator in winding up Pacquik, would have been remote.

The cancellation of the OTS by PICUP does not consider the impact of any of the above on the interest of PICUP at all. Looked at from any angle, the cancellation of the OTS does not appear to be in its best financial interests.

X. Unnecessary Litigation by Government and Public Sector Enterprises

201. We find that the present litigation has been generated at the instance of PICUP. The matters stood resolved, Official Liquidator discharged and the winding up petition disposed of on 7th March, 2011. Long thereafter, PICUP firstly filed C.A.No.749/2011 which it withdrew on 5th January, 2012. During the pendency of this application, PICUP filed C.A.No.906/2011, on 4th May, 2011 and C.A.No.13/22012 on 2012. The present appeal has been filed by PICUP challenging the order by the learned Single Judge dated 8th

of July 2013 deciding its application. The above narration of facts as well as the discussion amply bears out the unwarranted actions of PICUP as well as the mindless litigation generated by this public financial institution concerned with public funds.

202. Unnecessary and unwarranted litigation generated by, or because of, government or public undertakings has been noted by the Supreme Court and commented upon in several cases. In **(2014) 8 SCC 470, Subrata Roy Sahara v. Union of India**, the Supreme Court has commented as follows :

“**193.** This abuse of the judicial process is not limited to any particular class of litigants. The State and its agencies litigate endlessly up to the highest Court just because of the lack of responsibility to take decisions. So much so that we have started to entertain the impression that all administrative and executive decision-making are being left to courts just for that reason. In private litigation as well, the litigant concerned would continue to approach the higher Court, despite the fact that he had lost in every court hithertobefore. The effort is not to discourage a litigant in whose perception his cause is fair and legitimate. The effort is only to introduce consequences if the litigant's perception was incorrect and if his cause is found to be not fair and legitimate, he must pay for the same. In the present setting of the adjudicatory process, a litigant no matter how irresponsible he is suffers no consequences. Every litigant, therefore, likes to take a chance even when counsel's advice is otherwise.”

203. In the judgment reported at **(2012) 8 SCC 781 Gurgaon Gramin Bank v. Khazani**, the Supreme Court noted thus:

“2. The number of litigations in our country is on the rise, for small and trivial matters, people and sometimes

the Central and the State Governments and their instrumentalities like banks, nationalised or private, come to courts may be due to ego clash or to save the officers' skin. The judicial system is overburdened which naturally causes delay in adjudication of disputes. Mediation Centres opened in various parts of our country have, to some extent, eased the burden of the courts but we are still in the tunnel and the light is far away. On more than one occasion, this Court has reminded the Central Government, the State Governments and other instrumentalities as well as to the various banking institutions to take earnest efforts to resolve the disputes at their end. At times, some give and take attitude should be adopted or both will sink. Unless serious questions of law of general importance arise for consideration or a question which affects a large number of persons or the stakes are very high, the courts' jurisdiction cannot be invoked for resolution of small and trivial matters. We are really disturbed by the manner in which those types of matters are being brought to courts even at the level of the Supreme Court of India and this case falls in that category."

(Underlining by us)

204. Coming down on the Government/Public Sector Undertakings for filing bogus litigation and squandering public money, this court in a judgment reported at **(2010) 175 DLT 462, National Textile Corporation Ltd. v. Kunj Behari Lal**, has held thus:

"18. Present petition is most bogus and frivolous one and has been filed just to squander public money and to harass a common man who committed blunder by giving his property on rent to the mighty public undertaking. It is a well known fact that courts across the country are saddled with large number of cases.

Public Sector undertakings indulgences further burden them. Time and again, courts have been expressing their displeasure at the Governments/Public Sector undertakings compulsive litigation habit but a solution to this alarming trend is a distant dream. The judiciary is now imposing costs upon Government/Public Sector undertakings not only when it pursue cases which can be avoided but also when it forces the public to do so.

19. Public Sector undertakings spent more money on contesting cases than the amount they might have to pay with regard to the premises which have been taken on rent by them. In addition there to, precious time, effort and other resources go down the drain in vain. Public Sector undertakings are possibly an apt example of being penny wise, pound foolish. Rise in frivolous litigation is also due to the fact that Public Sector undertakings though having large number of legal personnel under their employment, do not examine the cases properly and force poor litigants to approach the court.

20. Frivolous litigation clogs the wheels of justice making it difficult for courts to provide easy and speedy justice to the genuine litigants. Public Sector undertakings should not indulge in mindless litigation and unnecessary waste the time and public exchequer's money. A strong message is required to be sent to those litigants (whether Government or Private) who are in the habit of challenging each and every order of the trial court even if the same is based on sound reasoning and also to those litigants who go on filling frivolous applications one after another.”

(Emphasis by us)

The petition was brandished as “*meritless, bogus and most frivolous*” and dismissed with costs of ₹50,000/- on the petitioners.

205. In the matter reported at **1992 Supp (2) SCC 432 O.N.G.C. v. CCE**, the Supreme Court has reprimanded the Public Sector Undertakings for carrying out litigation at the expense of the public exchequer with utter callousness. It has held thus:

“3. This Court has on more than one occasion pointed out that Public Sector Undertakings of Central Government and the Union of India should not fight their litigations in Court by spending money on fees of counsel, court fees, procedural expenses and wasting public time. Courts are maintained for appropriate litigations. Court's time is not to be consumed by litigations which are carried on either side at public expenses from the source. Notwithstanding these observations repeated on a number of occasions, the present cases appear to be an instance of total callousness.”

(Emphasis by us)

206. In the judgment of the Supreme Court reported at **AIR 2010 SC (Supp) 504, Urban Improvement Trust, Bikaner v. Mohan Lal**, it is held thus:

“5. It is a matter of concern that ***such frivolous and unjust litigations by Governments and statutory authorities are on the increase.*** Statutory authorities exist to discharge statutory functions in public interest. ***They should be responsible litigants. They cannot raise frivolous and unjust objections, nor act in a callous and high-handed manner. They cannot behave like some private litigants with profiteering motives. Nor can they resort to unjust enrichment.*** They are expected to show remorse or regret when their officers act negligently or in an overbearing manner. When glaring wrong acts by their officers are brought to their notice, for which there is no explanation or excuse, the least that is expected is restitution/restoration to the

extent possible with appropriate compensation. Their harsh attitude in regard to genuine grievances of the public and their indulgence in unwarranted litigation requires to be corrected.

6. This Court has repeatedly expressed the view that Governments and *statutory authorities should be model or ideal litigants* and *should not put forth false, frivolous, vexatious, technical (but unjust) contentions to obstruct the path of justice*. We may refer to some of the decisions in this behalf.

7. In *Dilbagh Rai Jarry v. Union of India* [(1974) 3 SCC 554 : 1974 SCC (L&S) 89] this Court extracted with approval the following statement [from an earlier decision of the Kerala High Court (*P.P. Abubacker case* : SCC p.562, para 25)]

“25. ... ‘5. ... The State, under our Constitution, undertakes economic activities in a vast and widening public sector and inevitably gets involved in disputes with private individuals. But it must be remembered that the *State is no ordinary party trying to win a case against one of its own citizens by hook or by crook*; for the *State's interest is to meet honest claims, vindicate a substantial defence and never to score a technical point or overreach a weaker party to avoid a just liability or secure an unfair advantage, simply because legal devices provide such an opportunity*. The State is a virtuous litigant and looks with unconcern on immoral forensic successes so that if on the merits the case is weak, Government shows a willingness to settle the dispute regardless of prestige and other lesser motivations which move private parties to fight in court. The layout on *litigation costs and executive time* by the State and its agencies is so staggering these days because of the large amount of litigation in which it is involved that a *positive and wholesome policy of cutting back on the volume of law suits by the twin methods of not being tempted into forensic*

showdowns where a reasonable adjustment is feasible and ever offering to extinguish a pending proceeding on just terms, giving the legal mentors of Government some initiative and authority in this behalf. I am not indulging in any judicial homily but only echoing the dynamic national policy on State litigation evolved at a Conference of Law Ministers of India way back in 1957.’ ”

8. In *Madras Port Trust v. Hymanshu International* [(1979) 4 SCC 176] this Court held: (SCC p. 177, para 2)

“2. ... It is high time that Governments and *public authorities adopt the practice of not relying upon technical pleas for the purpose of defeating legitimate claims of citizens and do what is fair and just to the citizens*. Of course, if a Government or a public authority takes up a *technical plea*, the Court has to decide it and if the plea is well founded, it has to be upheld by the court, but what we feel is that *such a plea should not ordinarily be taken up by a Government or a public authority, unless of course the claim is not well founded and by reason of delay in filing it*, the evidence for the purpose of resisting such a claim has become unavailable.”

9. In a three-Judge Bench judgment of *Bhag Singh v. UT of Chandigarh* [(1985) 3 SCC 737] this Court held: (SCC p. 741, para 3)

“3. ... The State Government must *do what is fair and just to the citizen* and should not, as far as possible, except in cases where tax or revenue is received or recovered without protest or where the State Government would otherwise be irretrievably be prejudiced, take up a technical plea to defeat the legitimate and just claim of the citizen.”

10. *Unwarranted litigation by Governments and statutory authorities basically stems from the two general baseless assumptions* by their officers. They are:

(i) *All claims against the Government/statutory authorities should be viewed as illegal and should be resisted and fought up to the highest court of the land.*

(ii) If taking a decision on an issue could be avoided, then it is prudent not to decide the issue and let the aggrieved party approach the court and secure a decision.

The reluctance to take decisions, or tendency to challenge all orders against them, is not the policy of Governments or statutory authorities, but is attributable to some officers who are responsible for taking decisions and/or officers in charge of litigation. Their reluctance arises from an *instinctive tendency to protect themselves against any future accusations of wrong decision-making, or worse, of improper motives for any decision-making*. Unless their insecurity and fear is addressed, officers will continue to pass on the responsibility of decision-making to courts and tribunals.

11. The Central Government is now attempting to deal with this issue by formulating realistic and practical norms for defending cases filed against the Government and for filing appeals and revisions against adverse decisions, thereby eliminating unnecessary litigation. But it is not sufficient if the Central Government alone undertakes such an exercise. The State Governments and the *statutory authorities*, who have more litigations than the Central Government, *should also make genuine efforts to eliminate unnecessary litigations. Vexatious and unnecessary litigations have been clogging the wheels of justice for too long, making it difficult for courts and tribunals to provide easy and speedy access to justice to bona fide and needy litigants.*”

(Emphasis by us)

207. The observations of the court in the judicial precedents noted

above, squarely apply to this litigation generated because of and by PICUP.

XI. Misfeasance in Public Office

208. One more aspect of the matter deserves to be noted. The noting dated 7th January, 2011 prepared by Mr. Ashok Mishra, Dy.Manager (Finance), has been approved by the entire hierarchy of authorities in PICUP up to its Chairman & Managing Director. It shows that PICUP admits receipt of CA Nos. 10&11 of 2011 whereby entire dealings between Pacquik and Sh. Darshan Khurana were set out. PICUP also documents the receipt of the fax message dated 7th January, 2011. With full knowledge, it notes on 7th January, 2011 that it was unable to accede to the request of Pacquik to hand over the title deeds to Shri Darshan Khurana for the reason that ARO dues and the RC collection charges had to be cleared after the OTS account was settled. PICUP took a considered and improper decision to first receive the amount of ₹2,29,85,000/- from him and only subsequently apprise them of the aforesaid "*factual position*". As a result, Sh. Darshan Khurana was persuaded to deposit the amount with PICUP which was appropriated by it.

209. Thereafter PICUP cancelled the OTS and refused to return the money, claiming that it had "*forfeited*" the same despite full knowledge that it belonged to Darshan Khurana and not to Pacquik, the borrower. PICUP was fully aware of the loss and damage to Darshan Khurana by such actions. At the same time, the

loss and damage, financial as well as in terms of manpower resources (needed for defending PICUP's actions and then effecting recovery of its dues from Pacquik) has been consciously ignored by the financial and technical experts in PICUP. Queries and objections raised by the legal department have been deliberately overlooked in the completely unreasonable and arbitrary decision making and actions. As a result, public interest has been damaged and grave financial loss caused to PICUP, extent whereof we are unable to compute.

210. It is urged that it is PICUP which has tried to practice deception on the private respondents. In this regard, elaborate reference has been made by learned counsels for the respondents to the notings dated 7th January, 2011 and 23rd March, 2011 as against those penned on 18th and 20th April, 2011.

211. In the noting dated 7th January, 2011 initiated by Sh. Ashok Mishra, DM (Finance) and approved by Sh. D.K. Sharma, SM (Finance), PICUP duly notes the arrangement between Pacquik and Shri Darshan Khurana. The same officer, Sh. D.K. Sharma, in a later noting effects a complete turn around and suggests incorporation of assertions indicating that PICUP was never informed about the arrangement between Pacquik and Sh. Darshan Khurana. Even in the grounds of the present appeal, it has been admitted by PICUP that it got knowledge of the settlement on 6th January, 2011 when it received the notice of C.A. Nos. 10/2011 & 11/2011. Further, on 20th April, 2011, Sh. Ashok Mishra, DM(Finance), put up a draft of a show cause notice for approval on

which Sh. D.K. Sharma put another noting on 20th April, 2011 alleging that there was a nexus between Pacquik and Sh. Darshan Khurana and PICUP was not apprised of the arrangement. These actions and statements are clearly contradictory to the proceedings recorded in the noting dated 7th January, 2011 of which Sh. D.K. Sharma, having signed, had full notice.

212. Even in the background note dated 13th November, 2010, the OTS Committee (comprising of Sh. D.K. Sharma) noted the pendency of the winding up petition as well as other proceedings against Pacquik. However, in the noting dated 20th April, 2011, Sh. D.K. Sharma notes that the pendency of the winding up had not been disclosed, again a false noting.

213. Tort law propounds “misfeasance in public office” as a tort. Misfeasance is defined as “The improper performance of some act which a person may lawfully do” (*vide Black’s Law Dictionary, Sixth Edition pg 1000*).

214. What is ‘Misfeasance in Public Office’? In the judgment reported at *(1999) 6 SCC 667, Common Cause v. Union of India*, the Supreme Court has authoritatively laid down the law on this subject. The relevant paragraphs are being reproduced here in extenso :

“87. In *Administrative Law* by Sir William Wade, 7th Edn., “misfeasance in public office” has been defined as malicious abuse of power, deliberate maladministration and unlawful acts causing injury. It is further provided in the same book that “misfeasance in public office” is the name now given to the tort of deliberate abuse of power. After considering various decided cases, Prof.

Wade proceeds to say:

“This and other authorities, including the last-mentioned decision of the House of Lords, were held to establish that the tort of misfeasance in public office goes at least to the length of imposing liability on a public officer who does an act which to his knowledge amounts to an abuse of his office *and which causes damage*.”

88. Prof. Wade further proceeds to say as under:

“There are now clear indications that the courts will not award damages against public authorities merely because they have made some order which turns out to be ultra vires, unless there is malice or conscious abuse. Where an Australian local authority had passed resolutions restricting building on a particular site without giving notice and fair hearing to the landowner and also in conflict with the planning ordinance, the Privy Council rejected the owner's claim for damages for depreciation of his land in the interval before the resolutions were held to be invalid. The well-established tort of misfeasance by a public officer, it was held, required as a necessary element either malice or knowledge by the council of the invalidity of its resolutions. In New Zealand also, a company failed in a claim for damages resulting from a Minister's refusal of permission for it to obtain finance from a Japanese concern. The Minister's refusal was quashed as ultra vires, but it was held that this alone was not a cause of action. Nor does it appear that claims of this kind can be strengthened by pleading breach of statutory duty.

The Court of Appeal reinforced these decisions in a case of importance, but since shown to be of doubtful authority, under European Community

law. A ministerial revocation order had prohibited the import of turkey meat from France and was held unlawful by the European Court as being in breach of Article 30 of the Treaty of Rome, which is binding in British law under the European Communities Act, 1972. French traders who had suffered losses under the ban then sued the Ministry for damages. On preliminary issues it was held that they had no cause of action merely for breach of statutory duty, as already related. *Likewise there was no cause of action merely because the Minister's order was unlawful: it could be quashed or declared unlawful on judicial review, but there was no remedy in damages. There would be such a remedy, however, if it could be shown that the Minister had abused his power, well knowing that his order was a breach of Article 30 and would injure the plaintiffs' business.* It was alleged that his conscious purpose was to protect English turkey producers rather than to prevent the spread of disease, and that he knew that this made his order unlawful. *The element of bad faith, or malice as Judges have often called it, seems now to be established as the decisive factor."*

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91. De Smith in *Judicial Review of Administrative Action*, while speaking of tort of misfeasance in public office, says as under:

“A public authority or person holding a public office may be liable for the tort of misfeasance in public office where:

(1) there is an exercise or non-exercise of public power, whether common law, statutory or from some other source;

(2) which is either (a) affected by malice towards the plaintiff or (b) the decision maker knows is unlawful; and

(3) the plaintiff is in consequence deprived of a benefit or suffers other loss.”

92. De Smith further says as under:

“A power is exercised maliciously if its repository is motivated by personal animosity towards those who are directly affected by its exercise. Where misfeasance is alleged against a decision-making body, it is sufficient to show that a majority of its members present had made the decision with the object of damaging the plaintiff. Often there may be no direct evidence of the existence of malice, and in these circumstances the court may make adverse inferences, e.g. from the fact that a decision was unreasonable, that it could only be explained by the presence of such a motive. ***A court will not entertain allegation of bad faith or malice made against the repository of a power unless it has been expressly pleaded and properly particularised.***”

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97. In *Three Rivers District Council v. Bank of England* (No. 3) [(1996) 3 All ER 558] it was held that the tort of “misfeasance in public office” was *concerned with a deliberate and dishonest wrongful abuse of the powers given to a public officer and the purpose of the tort was to provide compensation for those who suffered loss as a result of improper abuse of power*. The conclusions reached in that case were:

“Issue No. 1

Misfeasance in public office

(1) The tort of misfeasance in public office is concerned with a deliberate and dishonest wrongful abuse of the powers given to a public officer. It is not to be equated with torts based on an intention to injure, although, as suggested by the majority in *Northern Territory v. Mengel* [(1995) 69 Aust LJR 527] it has

some similarities to them.

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(3) For the purposes of the requirement that the officer knows that he has no power to do the act complained of, it is sufficient that the officer has actual knowledge that the act was unlawful or, in circumstances in which he believes or suspects that the act is beyond his powers, that he does not ascertain whether or not that is so or fails to take such steps as would be taken by an honest and reasonable man to ascertain the true position.

(4) For the purposes of the requirement that the officer knows that his act will probably injure the plaintiff or a person in a class of which the plaintiff is a member, it is sufficient if the officer has actual knowledge that his act will probably damage the plaintiff or such a person or, in circumstance in which he believes or suspects that his act will probably damage the plaintiff or such a person, if he does not ascertain whether that is so or not or if he fails to make such enquiries as an honest and reasonable man would make as to the probability of such damage.

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99. Tort of misfeasance in public office was also considered by this Court in *Lucknow Development Authority v. M.K. Gupta* [(1994) 1 SCC 243] . Relying upon *Administrative Law* by Prof. Wade, exemplary damages were allowed to a consumer who had initiated proceedings under the Consumer Protection Act, 1986. The Court held that the officers of the Lucknow Development Authority were not immune from tortious liability and then proceeded to say that the National Consumer Disputes Redressal Commission was not only entitled to award value of the goods or services but also to compensate a consumer for injustice suffered by him. The Court, therefore, upheld the award of Rs 10,000 as compensation allowed by the Commission on the ground that the action of the appellant amounted to harassment, mental torture and agony of the respondent. The Court then proceeded to observe as under: (SCC pp.

261-62, para 10)

“But when the sufferance is due to mala fide or oppressive or capricious acts etc. of a public servant, then the nature of liability changes. The Commission under the Act could determine such amount if in its opinion the consumer suffered injury due to what is called misfeasance of the officers by the English Courts. Even in England where award of exemplary or aggravated damages for insult etc. to a person has now been held to be punitive, exception has been carved out if the injury is due to, ‘oppressive, arbitrary or unconstitutional action by servants of the Government’ (Salmond and Heuston on the *Law of Torts*). Misfeasance in public office is explained by Wade in his book on *Administrative Law* thus:

‘Even where there is no ministerial duty as above, and even where no recognised tort such as trespass, nuisance, or negligence is committed, public authorities or officers may be liable in damages for malicious, deliberate or injurious wrongdoing. There is thus a tort which has been called misfeasance in public office, and which includes malicious abuse of power, deliberate maladministration, and *perhaps also other unlawful acts causing injury*.’ ”

100. After quoting from Wade, the Court proceeded to consider the question of award of exemplary damages in the light of the decision in *Cassell & Co. Ltd. v. Broome* [(1972) 1 All ER 801 : 1972 AC 1027 (HL)] as also the earlier decision in *Rookes v. Barnard* [(1964) 1 All ER 367 : 1964 AC 1129 (HL)] and other English decisions including *Ashby v. White* [(1703) 2 Ld Raym 938 : 92 ER 126] and held that exemplary damages could be awarded against the officers of the Lucknow Development Authority.

101. The decision in the *Lucknow Development*

Authority case [(1994) 1 SCC 243] has been followed by this Court in the judgment under review and a notice was issued to the petitioner to show cause why should he not be made liable to pay damages for his mala fide action in allotting petrol pumps to the persons concerned. This notice was issued because the Court was of the opinion: (SCC p. 555, para 26)

“Public servants may be liable in damages for malicious, deliberate or injurious wrongdoing. According to Wade:

‘There is, thus, a tort which has been called misfeasance in public office and which includes malicious abuse of power, deliberate maladministration, and perhaps also other unlawful acts causing injury.’

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

(emphasis supplied)

215. In a judicial pronouncement reported at *(1994) 6 SCC 205 N. Nagendra Rao & Co. v. State of A.P.*, on the facet of a public official being held liable personally for his negligence, the Supreme Court observed thus:

“Therefore, barring functions such as administration of justice, maintenance of law and order and repression of

crime etc. which are among the primary and inalienable functions of a constitutional Government, the State cannot claim any immunity. The determination of vicarious liability of the State being linked with negligence of its officers, if they can be sued personally for which there is no dearth of authority and the law of misfeasance in discharge of public duty having marched ahead, there is no rationale for the proposition that even if the officer is liable the State cannot be sued. The liability of the officer personally was not doubted even in *Viscount Canterbury* [*Viscount Canterbury v. Attorney General*, (1842) 1 PH 306 : 41 ER 648] . But the Crown was held immune on doctrine of sovereign immunity. Since the doctrine has become outdated and sovereignty now vests in the people, the State cannot claim any immunity and if a suit is maintainable against the officer personally, then there is no reason to hold that it would not be maintainable against the State.”

216. In another judicial decision reported at **(1996) 6 SCC 558** *Shivsagar Tiwari v. Union of India*, the Supreme Court has relied upon several foreign pronouncements and expounded on the settled concept that misfeasance by a public servant is a species of tortious liability and warrants exemplary damages to be paid by him personally:

“**11.** A reference to Wade's Administrative Law shows that a breach of statutory duty does give rise in public law to liability, which has come to be known as “misfeasance in public office”, and which includes malicious abuse of power. This aspect has been dealt at pp. 789 et al of the 7th Edn. It has been stated that public authorities or officers may be liable in damages for malicious, deliberate or injurious wrongdoing. The Supreme Court of Canada in *Pon Carelli v. Duplejis* [(1959) 16 DLR (2d) 689] awarded

damages against the Prime Minister of Quebec personally for directing the cancellation of a restaurant-owner's liquor licence. The Supreme Court of Victoria in *Farrington v. Thomson* [1959 VR 280] , awarded damages against a licensing inspector and a police officer who had ordered the plaintiff to close his hotel and cease supplying liquor, though they knew they did not possess such a power. Smith, J. referred in that case to the statement of Best, C.J. made in *Henly v. Lyme Corpn.* [(1858) 5 Bing 91 : 130 ER 995], Bing at 107 reading as below:

“Now I take it to be perfectly clear, that if a public officer abuses his office, either by an act of omission or commission, and the consequence of that, is an injury to an individual, an action may be maintained against such public officer. The instances of this are so numerous that it would be a waste of time to refer to them.”

12. The learned author has then opined that the cases establish that the tort of misfeasance in public offices goes at least to the length of imposing liability on the public officer who does an act which to his knowledge amounts to an abuse of his office.

13. We may also note what has been stated in this regard in *Cases and Materials on Administrative Law* by S.H. Bailey and others at pp. 826 et al of the 2nd Edn. The authors have noted the decision rendered in *Bourgoin SA v. Ministry of Agriculture, Fisheries and Food* [(1985) 3 All ER 585 : (1985) 3 WLR 1027 : 1986 QB 716] , on the subject of misfeasance. In that case damages were claimed against a Minister, which was held permissible. Lord Diplock's observation in *Dunlop v. Woollahra Municipal Council* [1982 AC 158 : (1981) 1 All ER 1202 : (1981) 2 WLR 693] , that this was “well established” position was noted.

14. From the aforesaid it is clear that the above has been accepted as a part of the law of tort practically all over the world. What is more, in some countries exemplary

damages have been awarded for misuse of public power. Reference may be made to *Deshpriya v. Municipal Council, Nuwara Eliya* [(1996) 1 CHRD 115] , which is a decision of the Supreme Court of Sri Lanka dated 10-3-1995, noted at pp. 115 to 117 of 1996 (1) Commonwealth Human Rights Law Digest (CHRD). Therein, aggravated award was ordered where political discrimination was the motive for restricting freedom of expression. The Supreme Court of Bahamas in the case of *Tynes v. Barr*, by a decision rendered on 28-3-1994, ordered for exemplary damages for arbitrary, oppressive or unconstitutional action by State officials. A summary of this decision is reported at pp. 117 to 120 of the aforesaid Law Digest. The need for awarding exemplary damages was felt by Sawyer, J. because of the arrogant, abusive and outrageous disregard shown by the police for the law. The learned Judge awarded \$ 40,505 as special damages; \$ 75,000 for assault, battery and false imprisonment; \$ 1,00,000 for malicious prosecution and \$ 40,000 for breach of the plaintiff's constitutional rights. Reference may also be made to the decision of the Supreme Court of Jamaica in *Samulls v. Attorney General* (noted at pp. 120 to 122 of the aforesaid Digest) in which Reckford, J. by his decision dated 11-11-1994, awarded exemplary damages for assault, battery and malicious prosecution. The award was quantified at \$1,00,000.

15. The world of jurisprudence has thus accepted misfeasance in public office as a species of tortious liability and, to prevent misuse, different courts across the sea have been awarding exemplary damages.”

217. PICUP is a public financial institution and the funds being handled by PICUP are clearly public funds. PICUP has conducted itself with rank callousness and unconcern with public interest in the present matter.

The Chairman cum Managing Director of PICUP is usually a senior IAS Officer of the Uttar Pradesh Cadre, and the other officials are also employees of the State Government of Uttar Pradesh. In CA No. 906/2011 filed by PICUP, it submits at point 10 that “...applicant is a Govt. Institution and is handling public money and as such answerable to the public...”

Therefore, the officials of PICUP are public servants holding public offices handling public funds. And therefore the quantum of responsibility on their shoulders is intensified, as any decision directly affects public interest.

218. The record is replete with allegations of malafide by Pacquik & Sh. Darshan Khurana against PICUP. A reply stood filed by Sh. Darshan Khurana to CA No. 749/2011 in CP No. 194/2006 wherein preliminary objection (g) he pleads:

“...The whole game plan is to harass the petitioner who on the request of the Respondent Company made efforts and was able to clear the dues of the Applicant within the stipulated period and thus became entitled to get the title documents released which is being objected to on one pretext or the other...”

“...An undertaking has already been made by the Petitioner and no amount has been left due and payable and the application is an abuse of process of law.”

In his preliminary submissions Darshan Khurana reiterates that:

“11...The present application is false, frivolous and malafide and devoid of any merits and is liable to be

dismissed with cost.”

Finally he prayed:

“The present application is liable to be dismissed with exemplary costs being devoid of any merits and malafide.”

(Underlining by us)

219. M/s Pacquik Industries also filed a reply to CA No. 906/2011 in CP No. 194/2006 taking the objection that the application was false, frivolous and malafide and misuse of process of law and devoid of any merits and was liable to be dismissed with cost.

220. Sh. Darshan Khurana has also filed a reply to CA No. 13/2012 in CP No. 194/2006 urging that the cancellation was malafide pointing out that the notings dated 7th January, 2011 & 23rd March, 2011 clearly substantiates his contention and belies all averments of PICUP and evidences the malafides of PICUP.

221. The officials thus made a conscious tactical approach to first receive the funds from Sh. Darshan Khurana, who was not the borrower, and only then inform them about the true factual position. Cancellation of the OTS and forfeiture were effected long after the deposit, its appropriation and ratification of the validity of the deposit by withdrawal of the recovery certificate and issuance of the no dues certificate.

222. We have repeatedly queried Mr. Joy Basu, learned Senior Counsel for PICUP on the above. As is obvious from PICUP's pleadings and records, there can be no satisfactory answer. Despite

staunch and able attempt by learned Senior Counsel, no tenable or acceptable explanation can possibly exist for such decision making and actions. It is to be seen that the focal point of the conduct of the officials of PICUP is pure impropriety, even if not dishonesty. Under tort law, this conduct would clearly be termed as “misfeasance in public office”.

Such arbitrary actions by public officials, therefore, warrant imposition of stringent personal liability.

223. Looked at from any angle, it cannot be denied that PICUP has acted with utmost callousness so far as the present case is concerned.

XII. Conclusions

To therefore, sum up :

224. Pacquik, a borrower of PICUP since 3rd December 1996, made two unsuccessful attempts to enter into a One Time Settlement. The third OTS sanction was validly accorded on 26th November, 2010. Thereafter, on 7th January, 2011, PICUP took a considered decision to accept the payment of the OTS amount from Sh. Darshan Khurana on behalf of Pacquik.

225. PICUP admittedly had knowledge of the full facts and arrangement between Pacquik and Sh. Darshan Khurana, in terms of the receipt of the applications (C.A.Nos.10/2011 and 11/2011) on 6th January, 2011, four days before the transfer of money; the fax on the 7th of January, 2011 as well as the letter dated 10th January, 2011.

226. Upon receipt of the full amount, PICUP treated it as a valid tender on behalf of Pacquik and consciously appropriated the same towards the OTS liability of the company.

227. As a result, on 14th January, 2011, PICUP issued the no dues certificate to Pacquik. PICUP also took the decision and by its letter dated 3rd February, 2011 withdrew the recovery certificate & proceedings which it had initiated against Pacquik for recovery of the entire (pre-OTS) liability. PICUP stands by these two action's and documents. It has, till date, neither withdrawn the no dues certificate nor initiated recovery proceedings against the company.

228. PICUP conceded to CA No. 11/2011, jointly filed by Pacquik and Sh. Darshan Khurana in the winding up petition seeking its impleadment as a necessary party to work the arrangement between Pacquik & Darshan Khurana. PICUP, did not put up any objection to these arrangement placed by Pacquik and Sh. Darshan Khurana In CA No. 10/2011.

229. In CA Nos. 749/2011 and 906/2011, PICUP ratified payment of OTS discharge and the arrangement.

230. In view of the above, on the 1st of March 2011, PICUP confirmed on court record that the One Time Settlement amount has been duly paid by Darshan Khurana to PICUP premised on the agreement between Darshan Khurana, Pacquik *“as well as with PICUP”* as a result of which the Official Liquidator was discharged from the proceedings and the Company Petition was disposed of. These proceedings were followed by the order dated 7th March, 2011 recorded in the presence of Mr. D.C. Arya, Deputy Manager

(Law) on behalf of PICUP directing Darshan Khurana to file an affidavit of undertaking to pay RC collection charges, if any, levied on PICUP and subject thereto, directing PICUP to release the original title deeds, all documents, property and machinery to Darshan Khurana.

231. No challenge has been made to the orders of 1st March, 2011 and 7th March, 2011. These orders have attained finality, and bind the parties. These order have led to closure of the winding up proceedings.

232. PICUP, is thereby estopped by election as well as by judgment from cancelling the OTS.

233. By the impugned order dated 8th July, 2013, the learned Single Judge has directed PICUP to return the deposited amount to Darshan Khurana and after its payment, held that PICUP would be entitled to get back the title deeds.

This order however, fails to consider that Shri Darshan Khurana, the winding up petitioner is rendered remedy less with respect to his claim of over rupees one crore in the company petition.

234. The record placed before us discloses a pending application filed by Darshan Khurana (C.A.No.1440/2013) seeking modification of the order dated 8th July, 2013 and praying for a direction to PICUP to additionally refund ₹1.31 lakhs.

235. PICUP has opposed the return of the amount throughout, even in the present appeal. This behaviour exhibits the famous English proverb that PICUP '*wants to have the cake and eat it too*'.

That is to say that they want to hold on the title deeds as well as the amount advanced to them.

236. No fair restitution of status quo ante is possible, given the facts of the present case, and the litigation which has ensued.

237. There is no concealment by Pacquik either at the time of making the OTS proposal or at the time of payment of OTS amount. There is also no fraud by either Pacquik or Darshan Khurana.

238. The officials of PICUP have effected false notings, as is manifest from the recording of the noting dated 7th January, 2011 and the turnaround to that stance made by the senior officials of PICUP in the noting dated 20th April, 2011.

239. We have found that the actions of PICUP disentitle them from recovering dues from the borrower company. It is an admitted position that no business is being conducted by Pacquik ever since the sickness of its Managing Director. The above narration also discusses several liabilities of Pacquik and the litigation which is pending against it. The possibility of financial losses to PICUP on account of cancellation of the OTS is a real possibility. PICUP has noted inability to recover from Pacquik. Recovery proceedings against the guarantors stand withdrawn.

240. Without having effected any recovery from Pacquik, equity demands that PICUP effects restitution to Darshan Khurana on the same terms as it would effect recovery from Pacquik. All these factors undoubtedly point to financial disadvantage to PICUP, in case the OTS was cancelled.

241. The position which subsists, is that pursuant to the order dated 14th March, 2014, PICUP has deposited the amount of ₹2,29,85,000/- in this appeal. In addition, pursuant to the order dated 25th April, 2011 passed by the learned Single Judge, PICUP deposited the title deeds of the property of Pacquik on the record of the company petition. This court would fail in its duty if the disputes were not meaningfully resolved.

242. The challenge to the order dated 8th July, 2013 by way of present appeal is completely misdirected and has to fail. Complete justice shall not result merely by dismissal of the present appeal.

243. The record shows that in view of the unreasonable stands of PICUP long after the disposal of the winding up petition, Darshan Khurana, who has deposited the money has sought refund thereof. A fair and complete resolution is possible only if he is given an opportunity to reconsider his request.

XIII. Result

We, therefore, direct as follows :

- (i) The appeal is completely devoid of factual or legal merit and is hereby dismissed.
- (ii) An option is given to the respondent nos.2 and 3 to reconsider their stand and opt either for refund of the deposited OTS amount or to seek appropriate relief with regard to the title deeds of the properties of Pacquik Industries Ltd. (lying deposited in court) by making an application for the purpose before the learned Single Judge.

(iii) The application, if any, in terms of the above liberty granted to respondent nos.2 and 3 above, shall be filed within four weeks. The title deeds shall be retained in court, till adjudication by the learned Single Judge on the application.

(iv) Orders regarding release of the title deeds shall be passed by the learned Single Judge keeping in view the observations made in this judgment in any case. The Registry shall abide by the orders of the learned Single Judge with regard to the title deeds deposited in the present appeal.

(v) If respondent nos.2 and 3 press for return of the amount deposited with PICUP, the amount of ₹2,29,85,000/- shall be refunded by PICUP with interest @19% per annum w.e.f. 10th of January 2011 till 3rd April, 2014 (the date on which the amount of ₹2,29,85,000/- came to be deposited with the Registrar General of this Court).

(vi) If no application as at Sl.Nos.(ii) and (iii) above is filed as directed, the Registry shall release the amount lying deposited with it along with accruals thereon to respondent nos.2 and 3. PICUP shall pay the amount of interest as directed at Sl.No.(iv) above within eight weeks from today.

(vii) PICUP shall be liable to pay costs of ₹50,000/- to each of the respondent nos.1 and 3 within four weeks from today.

(viii) It is made clear that we have not expressed any opinion on the merits of C.A.No.1440/2013 or any other application pending before the learned Single Judge, who shall decide the same or its own merits.

(ix) In view of the decision on the appeal, CM No.12904/2013 filed by PICUP is also dismissed.

GITA MITTAL, J

P.S.TEJI, J

JANUARY 28, 2016

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