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

*Reserved on : 25<sup>th</sup> May, 2018*

*Date of Decision: 4<sup>th</sup> July, 2018*

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**RFA 765/2015**

UNION OF INDIA & ANR.

..... Appellants

Through: Mr. Sanjiv Kumar Saxena and Mr. R. Mishra, Mr. M.K. Tiwari Advocates.  
(M-9811673689)

versus

G SINGH & ANR.

..... Respondents

Through: Mr. Amit Singh Chadha, Senior Advocate with Mr. Kunal Sinha Advocate. (M:9350859333)

**CORAM:**

**JUSTICE PRATHIBA M. SINGH**

**JUDGMENT**

**Prathiba M. Singh, J.**

1. The sentiment of Non-Resident Indians (*hereinafter*, 'NRIs') to be tied to their country is the fulcrum of this dispute. The present appeal is the lead matter in a batch of 26 appeals arising from the same scheme for allotment of lands which was advertised by the Government. All the legal issues are being determined and decided in the present appeal. On facts, separate orders have been passed in each of the appeals.

2. On 6<sup>th</sup> February, 1978, the Government of India launched a scheme for "*Allotment of land in Delhi to Non-Resident Indians*" (*hereinafter*, 'the scheme') living abroad to build residential house in Delhi. The scheme was launched by the Ministry of Works and Housing, L&DO. As per the prospectus and the application form the objective of the scheme was as under:

**“Objectives**

*This scheme is intended to facilitate Non-Resident*

*Indians living abroad to build residential houses in India and thus to satisfy their natural urge to own property in their own country and to settle down therein whenever they wish to do so. As it is difficult for such persons living abroad to acquire properties through Government auctions or private dealers, it has been decided to frame a scheme which will facilitate this.*

*This scheme will, for the present, be introduced in Delhi on an experimental basis.”*

3. All NRIs living abroad, who did not own residential plots/houses or flats, either in their own name or in the name of their immediate family, were entitled to apply for allotment of a house plot under this scheme. The land was located on Badarpur-Mehrauli Road, New Delhi and was under the control of the L&DO. The payment of consideration was to be made in foreign exchange. Only the ground rent and the share of the Government in unearned increase in the value of land on its transfer was payable in Indian rupees. The entire price of the land and cost of construction was payable in foreign currency. The total approximate cost of construction was estimated to Rs.2,43,000/- on a 400 Sq. Yards plot. Permissible cover area was stipulated as 4050 Sq. Feet. Reserve price was Rs.200 per Sq. Feet and the entire price of the plot was payable in lump sum within a period of three months from the date of allotment. Upon allotment, in addition to the cost of the plot, the applicant was also required to remit the entire cost of construction in foreign exchange. The allotment of the plot was to be on leasehold basis for which interest @ 2½ % per annum was payable as annual ground rent. The terms of the lease were also contained in the application form. Two important clauses of the scheme are set out below:

*“IX) Earnest Money*

*The applicant interested in having a plot of land in New Delhi will attach a Demand Draft in the name of the Land and Development Officer for deposit under the head “483 – Capital Outlay and Housing”, as earnest money in foreign currency of an amount equivalent to Rs.10,000 for a plot of 400 sq. yds. (334.452 sq. metres). The earnest money deposit will not carry any interest and shall be forfeited in case the applicant does not accept the allotment of land, if offered to him/her, and/or he/she does not comply with the terms and conditions of allotment within the stipulated period.*

*X) Allotment by Draw of Lots*

*In case the number of applicants exceeds the number of plots available for allotment, the allotment of plots will be made by draw of lots.”*

4. The approved agreement for lease was attached with the prospectus and application form. The same was to be signed and sent back along with the application money to the L&DO. The said document is titled “*AGREEMENT FOR LEASE*” and is a complete lease document, which merely requires the mentioning of the names, plot numbers and signatures on behalf of the Government. The map containing the proposed site was also attached to the scheme. The Plaintiffs/Applicants (*hereinafter, ‘Applicants’*) were to sign an application form. The application form was to be duly signed and filled and sent to the authorities along with an initialed copy of the lease agreement. The extract of the application form is set out below:

**“Government of India”  
MINISTRY OF WORKS & HOUSING  
(NIRMAN AUR AWAS MANTRALAYA)  
LAND AND DEVELOPMENT OFFICE**

## APPLICATION FORM

(In Duplicate)

*Application for the allotment of land measuring in 400 sq. Yds. (334.452 sq. metres) for the construction of a residential house on Badarpur-Mehrauli Road, New Delhi according to scheme for allotment of land in Delhi to non resident Indians living abroad.*

To

*The President of India*

### **THROUGH**

*The Secretary,  
Ministry of Works & Housing,  
Government of India,  
Nirman Bhawan, New Delhi*

Sir

*I hereby apply for allotment of land measuring 400 sq. yds. (334.452 sq. metres) in the above scheme on Badarpur-Mehrauli Road, New Delhi.*

*2. I have read a copy of the prospectus containing the terms and conditions of allotment of land and the scheme for the construction of a residential house at Badarpur-Mehrauli Road, New Delhi to non-resident Indians living abroad and I hereby agree to and shall abide by the terms and conditions contained therein and in the lease agreement and to modifications thereof as may be made from time to time*

*3. I fulfil the qualifications laid down in the said prospectus and I am eligible for the allotment applied for. I hereby return the original copy of the application form duly filled in and signed by me as also the lease agreement initialled by me in token of my acceptance as aforesaid.*

*4. I enclose herewith a Bank Demand Draft No.76/P680099 dated 13<sup>th</sup> Dec, 78 for Rs.10,000/- issued by INDIAN BANK (Please fill up the name of the foreign Bank) drawn on the Reserve Bank of*

*India/State Bank of India, New Delhi in favour of .....for deposit as earnest money for this purpose.*

*5. I also agree that in case I do not sign the agreement for lease within sixty days when called upon to do so or do not fulfil the terms and conditions of allotment the earnest money deposited by me may be forfeited and I shall have no claim over the plot of land allotted to me and the same may be disposed of by you in any manner free of all claims be me.*

*6. I agree that the cost of land shall be fixed by the Government of India in its sole discretion and I shall be bound by it and I shall not under any circumstances question the price so fixed but the same shall not exceed Rs.200/- per yd.*

*Yours faithfully,  
.....”*

5. The application forms were filed by all the Plaintiffs with the authorities. The same was acknowledged by the Government on 28<sup>th</sup> December, 1978. An extract of the acknowledgment given to the Plaintiff is set out herein below:

**“GOVERNMENT OF INDIA  
MINISTRY OF WORKS AND HOUSING  
LAND AND DEVELOPMENT OFFICE  
NIRMAN BHAWAN**

*New Delhi, dated 28-12-1978*

*Received an application No. 4243 from Smt. Suman Singh (passport No. K870427) alongwith a bank draft No.76/P680099 dated 13.12.1978 drawn on Indian Bank for Rs. 10,000/- (Rs. Ten thousand only) and agreement for lease duly signed on each page. This has been accepted subject to the attestation by Indian Embassy at Tehran in due course.*

(D.S. RAIZADA)  
Vigilance Officer  
Land & Development Office,  
New Delhi”

6. The acknowledgment clearly confirms the receipt of the lease deed duly signed on each page and draws attention that the attestation by the Indian Embassy or the High Commission was not carried out. Subject to the attestation being submitted, the receipt of the application was acknowledged.

7. On 7<sup>th</sup> April, 1979, the attested copy was submitted. On 19<sup>th</sup> May, 1979, the receipt of the same was acknowledged and the following information was given to the Plaintiff:

“To

*Mrs. Suman Singh, W/o Shri G. Singh,  
H.No.1109, Sector 34C,  
Chandigarh.*

*Sub : Allotment of land to non-resident Indians living  
abroad on Mehrauli Badarpur Road, New Delhi  
against foreign exchange.*

.....

*Madam,*

*I am to acknowledge the receipt of your letter dated  
7.4.79 alongwith the attested copy of application form  
No.4243. The development of the area has been taken  
in hand and it is anticipated that the allotment of plots  
will be made by the end of 1979”.*

*Yours faithfully,*

(D.S. RAIZADA)  
Vigilance Officer”

8. Thus, at this stage, there was nothing left to be done except the allotment. On 13<sup>th</sup> February, 1980 another letter was issued by the

Government informing the Applicants that the allotment would be made after June, 1980. Surprisingly, however, in September, 1981, it is claimed by the Government that it communicated to the Applicants that it had decided to drop the scheme. Thus, from the initial date of completion, which was to be the end of 1979 and thereafter, June, 1980 i.e., nearly two years later, the Government decided to drop the scheme. The text of the said letter is interesting and is set out below:

*“Government of India  
Ministry of Works & Housing  
Land Development Office  
Nirman Bhawan  
New Delhi, the 19.9.81*

*To,*

*Sh. G.S. Narula,  
Post box 1069  
Kuwait (A. Gulf)*

*Sub : Allotment of land to non-resident Indians living  
abroad on Mehrauli Badarpur Road, New Delhi against  
foreign exchange.*

*Dear Sir,*

*With reference to your letter dated 05.08.81 on the  
subject cited above, I am to say that the Govt. has  
decided to drop the scheme of allotting plots to non-  
resident Indian living abroad.*

*Yours faithfully*

*(PN Gupta)  
Estate Officer”*

9. This letter does not give any reason to drop the scheme nor does it mention anything about the Earnest money paid by the Applicants/Plaintiffs.

Some Applicants have in fact denied having received these letters. Another letter to the same effect is claimed to have been sent on 24<sup>th</sup> October, 1983, which reads as under:

*“Government of India  
Ministry of Works & Housing  
Land Development Office  
Nirman Bhawan New Delhi,*

*Dated the 24.10.83*

*To*

*Mrs. Suman Singh C/o  
Major Sohan Lal  
House No.1109, Sec-34C  
Chandigarh*

*Sub:- Allotment of land to non-resident Indians living  
abroad on Mehrauli Badarpur Road, New Delhi  
against Foreign Exchange.*

*Dear Sir/ Madam,*

*I am to invite your attention on the above subject  
and to say that the Govt. has decided to drop the  
scheme of allotting plot to non-resident Indians living  
abroad in public interest.*

*If you are interested in refund of the amount  
deposited by you as earnest money. Please make a  
formal request so that necessary action may be taken  
in the matter.*

*Yours faithfully,*

*(Har Prasad)  
for Land & Development Officer.”*

10. Thus, the initial scheme, which was floated in 1978, came to be dropped 5 years later simply citing '**public interest**'. Some Applicants challenged the said cancellation of the scheme by way of a W.P.(C)

2372/1981 titled as **R. K. Deka & Ors. v. Union Of India & Anr** (*hereinafter*, 'RK Deka SB'). A learned Single Judge of this Court dismissed the said writ petition and the challenge, therefore, failed. A Division Bench of the Delhi High Court in the judgment reported at **R. K. Deka v. Union of India AIR 1992 Del 53** (*hereinafter*, 'RK Deka DB') upheld the cancellation vide judgment dated 10<sup>th</sup> July, 1999. The SLP challenging the said decision was dismissed on 29<sup>th</sup> January, 1992 in the SLP (civil) 18710/1991 and a review was also dismissed on 15<sup>th</sup> October, 1992.

11. The suit from which the present appeal arises, was filed immediately after the decision of the learned Single Judge, dismissing the writ in **RK Deka SB (supra)**. The relief claimed in the subject suit is for specific performance and damages. The relief prayed by the Plaintiff is as under:

*“That the plaintiff prays that a decree for specific performance of the agreement to transfer and convey the perpetual leasehold rights in a plot of land measuring 400 sq. yards situate in the area shown in the lay out plan of the land on Badarpur Mehrauli Road, New Delhi as per the scheme and/or directing the defendants to transfer the perpetual leasehold rights in the plot measuring 400 sq. yards and execute a sale deed or a deed of conveyance in respect of the said plot measuring 400 sq. yards situate in the area shown in the lay out plan of the land Badarpur Mehrauli Road, New Delhi together with delivery of vacant possession thereof be passed in favour of the plaintiff and against the defendants. In the alternative, if this Hon'ble court finds/holds that the specific performance of the contract or a direction/mandamus/mandatory injunction directing the defendants to execute a sale deed in respect of perpetual leasehold rights in the said plot of land measuring 400 sq. yards situate in the area shown in*

*lay out plan of the land on Badarpur Mehrauli Road, New Delhi cannot be granted or made, a decree for recovery of Rs.10 lakhs as damages including recovery of Rs.10,000/- (Rs.ten thousands only) paid as part price of the plot to the defendants be passed in favour of the plaintiffs and against the defendants with cost. Any other relief which this Hon'ble court deems just and fit in the circumstances of the case be also granted to the plaintiffs."*

12. In the written statement filed on behalf of the Government, the main plea was that there was no contract which came into existence in view of Article 299 of the Constitution of India, as the President of India never accepted the application form sent by the Applicants. It was also alleged that the lease deed, though signed by the Applicants, was not signed by or on behalf of the President of India. A blank agreement of lease cannot confer legal rights. The Government claimed that this was purely a policy matter and a sovereign act, which is not open to challenge in a Court of law. The Government relied upon the judgment of the Delhi High Court in ***RK Deka SB (supra)***.

13. Issues were framed on 9<sup>th</sup> April, 1987. The same are as under:

- "1. Whether the plaintiffs have no locus standi to file this suit on the ground that there was no binding contract between the plaintiffs and the defendants as alleged?*
- 2. Whether the plaintiffs are not entitled to file a suit for specific performance of contract?*
- 3. Whether there is any completed contract in accordance with law for grant of perpetual lease with regard to thke [sic] plot of land measuring 400 sq. yards shown in thke [sic] lay out plan of thke [sic] land situated on Badarpur-Mehrauli Road, New Delhi as*

*alleged?*

*4. Whether the plaintiffs were ready and willing to perform their part of the contract?*

*5. Whether the defendants are bound by equitable and promissory estoppel, as alleged?*

*6. What amount of damages, if at all, the plaintiffs are entitled to claim in the suit?*

*7. Whether the plaintiffs are entitled to specific performance of the contract of perpetual lease established under Issue No.3?*

*8. Whether there has been any change in the policy of the Government? If- so, what is the effect thereof*

*9. Relief.”*

14. With the consent of parties, evidence was filed but the Trial Court directed that no cross-examination was required as all the admitted documents were duly exhibited. Thus, the matter proceeded without oral evidence on the basis of the documents and the affidavits in evidence. The findings of the Trial Court are as under:

- a) The Plaintiffs did not press the principle of promissory estoppel and the suit was to be adjudicated on the principles of Contract Act;
- b) That the finding in a writ petition will not operate as *res judicata* as the nature of the proceedings i.e. a writ and a suit, are different;
- c) In respect of Article 299, the Trial Court found that the said argument of the Government is “strange”.
- d) The Trial Court held that specific performance cannot be sought as the scheme itself was dropped.
- e) The Trial Court held that there was no contract but compensation for breach of agreement unilaterally done by the

Government can be granted. The Trial Court held that the unilateral rescission of the agreement by the Government seems to be an act of criminal negligence and allurement. Accordingly, the Trial Court awarded compensation/damages.

f) The Trial Court arrived at a finding that even as per the circle rate in 2014, the value of the plot would have been Rs.6.84 crores. However, the Trial Court awarded the compensation as per the price of the plot in 1984, which was Rs.3000/- per Sq. Yds. The Trial Court, thus, awarded Rs.2800/- i.e. (Rs.3000/- – Rs.200/-, which was the price to be paid) x 400 Sq. Yds i.e., Rs.11,20,000/- plus 12% interest from the date of filing of suit till the date of payment.

15. Before this Court in appeal, on 16<sup>th</sup> November, 2015, the operation of the judgment and decree was stayed. Submissions have been heard and RFA 765/2015 is treated as the lead matter. Mr. Sanjeev Kumar Saxena addressed arguments on behalf of Appellant/Government and Mr. Amit Chaddha, learned Senior Advocate appeared for the Plaintiff/Respondent in most of the matters. In RFAs 738/2015, Mr. Jog Mohan Chhabra (*sic Mr. Jag Mohan Chhabra*), the Applicant appeared in person and also appeared on behalf of his sister in RFA 310/2016.

### ***Submissions of the Government***

16. Mr. Saxena, learned counsel appearing for the Union of India along with Mr. Ruchir Mishra submits that the issue raised in the present suit is completely covered by the decisions of this court in Writ Petitions filed by similarly placed allottees in ***RK Deka SB (supra)*** and ***RK Deka DB (supra)***. Both the judgments of the Learned Single Judge of this court and of the

Division Bench of this court went into the legality and validity of the same very scheme which is the subject matter of the suit. He submits that the averments raised in the plaint i.e. specific performance qua promissory estoppel, etc. are all dealt with in the said judgments and those decisions operate as *res judicata* in the present case.

17. Mr. Saxena placed heavy reliance on the fact that the learned Trial Court has held in the impugned judgment that only legal questions are involved as all the documents stand admitted between the parties and no cross examination was conducted except the affidavits in evidence, as the question involved is legal. It is Mr. Saxena's submission that if the issue is legal in nature and there were no factual disputes, the decision in the Writ Petitions on the legal issues cannot be re-opened or differed from in a suit proceeding. He submits that the suit of the Plaintiff prays for specific performance and for compensation. The Plaintiff has averred in this plaint that the application is in fact, a lease deed, which it is not. The application and prospectus do not constitute a concluded contract between the parties and hence there was neither any occasion to grant specific performance as held rightly by the Trial Court nor any compensation or damages could have been awarded.

18. The learned counsel for Union of India submits that in paragraph 25 of the plaint, the Plaintiff specifically relies upon the doctrine of promissory estoppel which is the very issue decided in the Writ Petitions. Moreover, he submits that the nature of the application is only an allotment, if any. The Applicants were all aware of the fact that the mere filing of the application does not constitute an allotment automatically. If there were more applications than the number of plots, the allotment would have been made

by a draw of lots. Thus, the allotment was not automatic upon the filing of an application. He further submits that the perpetual lease and the agreement for lease which are attached to the application do not constitute binding contracts inasmuch as those are merely proformas or drafts upon which the Applicants have to express their agreement. It is only after the allotment and payment of the money including the cost of land and the cost of construction that the perpetual lease deed would have been executed by the Government. The application is thus at a very nascent stage, prior to the conclusion of the contract.

19. The relevant portions of the judgments in ***RK Deka SB (supra)*** and ***RK Deka DB (supra)*** relied upon by Ld. Counsel for the Union of India are set out herein below:

***RK DEKA SB – decision dated 27<sup>th</sup> April, 1984***

*“17. This latest decision of the Supreme Court has laid down that the Court can enforce compliance by a public authority of the obligations laid on him if arbitrarily or on his mere whim ignores the promises made by him on behalf of the Government. It would be open to the authority to plead and prove that there were special considerations which necessitated his not being able to comply with his obligations in public interest. The voluntary announcement of the scheme was conceived with a public purpose but the Government is at liberty to vary the scheme in public interest. The Government had not tied its hands by undertaking that the scheme would not be withdrawn in future. The scheme has been dropped in the interests of the general public. I have to accept the averments in the counter-affidavit, as there is no machinery for the Court to ascertain as to what is good for the public. The Government has disclosed to the Court what are*

*the facts, circumstances and consideration on account of which the Government claims to have dropped the scheme and thus exempted from the liability. In my view, the considerations are such as to render it inequitable to enforce the withdrawn promise against the Government.”*

***RK DEKA DB – decision dated 10<sup>th</sup> July, 1991***

*“37. Promissory estoppel is an equitable principle. It cannot be enforced where its enforcement results in inequity. In the present case comparative equities have to be seen. While considering equity in favour of petitioners, who are comparatively smaller in number and belong to an affluent class, the inequity visited upon the general section of the Indian Society consisted of poor people has to be seen. Impact of enforcement of the doctrine on public interest cannot be ignored. Equity, in the circumstances of the present case, demands that the Govt. decision of dropping the scheme which is solely based on public interest, be upheld. To hold otherwise would result in unnecessary drain on our otherwise scarce resources. Ours is a welfare State. The Govt. stands for greatest benefit to the largest numbers. Our resources being limited, the Govt. is bound to set priorities for itself. The object of the scheme was “to facilitate non-resident Indians living abroad to build residential houses in India and thus to satisfy their natural urge to own property in their own country and to settle down therein wherever they wish to do so”. This object does not call for any priority when considered in the light of several other pressing public welfare needs. Public money has to be utilized first for purposes of various more pressing needs of our people. The non-resident Indians living abroad constitute a comparatively smaller group of affluent people who do not need this kind of Govt. support. It would be much better if through our limited resources more mouths could be fed, more children*

*could be provided education and health care, water and electricity could reach every home, the shelterless could have a roof above their head to mention a few of the pressing public needs.*

*38. To the argument of the appellant that the compelling reasons for resiling from the promise should be proved to the hilt by the Govt. our answer is that this is not a case where more details than what is stated in counter are really required to be stated. If at all there was anything which was desired to be stated, it has been made good through production of the official files. Rest is a matter of inference. Taking an overall view of the entire defence or justification offered on behalf of the Govt. for dropping the scheme, we find that the Govt. decision is fully justified and the doctrine of promissory estoppel has to yield to overriding public interest as stated in the M.P. Sugar Mills case (AIR 1979 SC 621). We feel that this case is eminently fit to fall in the exception based on overriding public interest.*

*39. Now coming to the question as to whether petitioners were put to notice of such an eventuality, we have already held that there was nothing in the scheme which prevented the petitioner or other applicants from taking steps for purposes of acquiring other property/land. They were free to do so whenever they liked. Therefore, they could always resume their position. The fact that there was uncertainty of allotment under the scheme for at least two reasons, if not more, (scheme being experimental could have been dropped for want of sufficient response and uncertainty of allotment in the event of larger number of applicants than the number of plots) can be taken to be sufficient notice to the applicants which would have enabled them to resume their position or secure it in any other manner whenever they liked.*

*40. The element of lack of certainty of allotment of plots under the scheme so far as individual applicants were*

concerned to which reference has been made in the preceding paragraph, renders the case of the petitioners for enforcement of the doctrine of promissory estoppel itself very weak. Doctrine of promissory estoppel applies when there is a clear and unequivocal promise to do something on the part of the promisor. If the promisor retains the power of discretion of not being bound by the promise, the whole basis for invoking the doctrine of promissory estoppel goes. In the present case nobody can say that the Govt. was bound to fulfil the scheme even if there were only a few applicants. The scheme itself suggested that it was on an experimental basis. The experiment could be abandoned even at the earliest stage. This alone is sufficient to establish that there was no firm commitment from the Govt. Then in the event of the number of applicants being more than the number of plots, there had to be a draw of lots. Draw of lots would mean that some would not get the allotment. These unlucky applicants could be any. The argument of the appellants in this behalf that at least so much of the applicants as the number of plots could be assured of allotment, misses the point. The uncertainty of allotment looms large for all the applicants because it could be any number out of them who would fail to get the allotment. The uncertainty has to be tested from the point of view of the individual applicants and not otherwise.

**41.** It is also worth mentioning in this context that the scheme does not say that in the event of the number of applicants being more than the number of plots, the allotment will be on a first come first served basis. No seniority list of applicants is envisaged. Therefore, even if the number of applicants could increase by one, all had to face a draw of lots for allotment and the unlucky could be anyone. This means uncertainty looms large on the mind of all.

**42.** These factors suggest that there was no firm

*promise or assurance by the Govt. which was capable of being enforced. Therefore, there is no occasion to invoke the doctrine of promissory estoppel in the present case.*

*43. Before parting with the judgment, we consider it worthwhile to deal with one aspect of the matter on which great stress has been laid by the learned counsel for the appellants. The Supreme Court decision in M.P. Sugar Mills case (AIR 1979 SC 621) (supra) while dealing with the exceptions to the doctrine of promissory estoppel has recognised it as an exception that the Govt. may for compelling reasons have to reverse its policy decision. However, it has been equally emphasised that the reasons should have come into existence subsequent to the policy or promise held out in the first instance. It is submitted by the counsel for the appellants that in the present case the so called reasons for the change in the policy were very much in existence at the time of its initial formulations and, therefore, for the said reasons the Govt. cannot be permitted to resile from the policy. The reasons referred to by the counsel like (a) it is not priority sector scheme; (b) it is for the benefit of non resident Indians who were affluent people; (c) the land is scarce and such resources of the State should be better utilised for other beneficial/welfare measures, if taken in isolation, appear to be quite appealing. However, if an overall view has to be taken combining all the factors together, it will appear that the reasons for change in policy have come up subsequently and are in that sense subsequent events. It is important in this behalf to note that the cumulative effect of these various reasons came into play in a big way in view of the fact that initial response to the scheme was not quite encouraging and the govt. could not undertake the development of the land straightway. We have already noticed that by the initial last date for receipt of applications, i.e. up to 30-4-78, there were only 30*

*applicants and even up to the first extended date, i.e. 31-7-78 there were only 96 applicants. In the face of such a poor response the Govt. could not undertake the development work which was initially planned for 260 plots. There was every justification for the apprehension that in the event of sufficient number of applicants not coming forth, the entire project may have to be shelved and in such circumstances, if development work had started, the cost of development would have gone waste. Keeping all this into consideration, we have already held that the delay in undertaking the development work on the part of the govt. was fully justified.”*

Counsel for Union of India further submits that the Special Leave Petition against the order of the Division Bench was dismissed and a review against the same was also dismissed.

20. The counsel for Union of India further submits that even if the compensation has to be awarded, it would have to be from the date of Annexure- A7 i.e. 19<sup>th</sup> September, 1981 and not on the basis of the rate prevalent on 24<sup>th</sup> October, 1983. He also relies upon a judgment of the Supreme Court in ***Gulabchand Chhotalal Parikh v. State of Gujarat AIR 1965 SC 1153*** (hereinafter, ‘Gulabchand’) to the effect that the decision in a Writ Petition would operate as *res judicata* in a subsequent suit relating to the same matter.

21. Mr. Saxena, alluding to the impugned judgment, submits that the Trial Court has grossly erred in holding that the Government is guilty of criminal negligence or allurement. A mere application cannot result in a finding as to criminal negligence inasmuch as the pre-conditions for criminal negligence are not satisfied. He submits that the allotment or the application for

allotment is not a concluded contract and no compensation can be granted even for mental agony as mental agony has not been pleaded in the plaint.

22. He further relies upon an order in a Writ Petition filed by one, Mr. Raghuveer Khurana, wherein the specific issues of mental agony was also considered by a Learned Single Judge of this court in W.P (C). No.8823/2006 wherein the Learned Single Judge observed as under:

*“The petitioner has sought allotment of an alternate plot under the scheme floated by the Government of India to allot plots to non-resident Indians to build residential houses. The petitioner has also sought compensation for mental agony and harassment meted to the petitioner at the hands of the respondents for the last 26 years.*

*The petitioner is an architect who had been living at Tehran and has returned to India and is residing at East Patel Nagar, New Delhi. The respondent had floated a scheme for allotment of land with the object to facilitate non-resident Indians living abroad to build residential houses in India. The scheme was launched in 1979. The petitioner applied for a plot of 400 square yards under the scheme and sent a draft of Rs.10,000/- drawn on State Bank of India in the account of Land & Development Office as earnest money along with a draft lease deed. The petitioner contended he received an acknowledgment letter with respect to deposit of Rs.10,000/- and the receipt of the lease deed duly signed.”*

*By communication dated 20<sup>th</sup> October, 2005, the petitioner was conveyed that the Ministry of Work and Housing (Now Ministry of Urban Development) has dropped the scheme in public interest and also has taken a decision to suo moto refund the earnest money of Rs.10,000/-. The amount of Rs.10,000/- was forwarded to the*

*petitioner by Cheque No.30121 dated 7<sup>th</sup> November, 2005.*

*The petitioner has challenged the scrapping of scheme and has claimed an alternative plot in his favour at the same rates.*

*The scrapping of scheme for allotment of plot to non-resident Indians was considered in LPA No.47/1984, Dr. R.K. Deka & Others Versus Union of India and others decided on 10<sup>th</sup> July, 1999 and the Division Bench did not find any error in scrapping of the scheme for allotment of plots to non-resident Indians. It was held that even if the doctrine of promissory estoppels was to be applied then also the decision of the Government in dropping the scheme will be protected under the exceptions to the said doctrine and the Government cannot be held liable to fulfil its obligations/promises under the said scheme.*

*The order of the Division Bench was challenged in Special Leave Petitioner No.18710/1990 titled R.K. Deka & Others Vs. Union of India and another and Special Leave Petition was also dismissed by order dated 29<sup>th</sup> January, 1992.*

*Since it has been held that the Government cannot be held liable to fulfil its obligation/promise under the scheme which could be scrapped by the Government, the petitioner is not entitled for allotment of alternative plot under the said scheme nor the petitioner is entitled for any compensation in the facts and circumstances of the case.”*

23. In conclusion he submits that:

- a) There is no concluded contract between the parties;
- b) The application was merely a document which entitled a

Plaintiff to allotment as and when the said allotment was made;

- c) There was no lease deed entered into between the parties;
- d) Specific performance can be only of a concluded contract;
- e) Damages for compensation cannot be awarded inasmuch as all the applicants knew that the Government was ready and willing to refund the amounts in 1983 itself, if not, in 1981. The applicants having not chosen to take the refund are not entitled to compensation.

24. Mr. Saxena further submitted that since the scheme was itself unsettled, no damages can be awarded. With the mere initiation of application form and draft lease deed, the scheme would not result in contract, which was dropped in public interest. He submits that the decision to cancel the scheme, in public interest, having being upheld, compensation, thereafter, cannot be awarded.

### ***Submissions of the Plaintiffs***

25. On the other hand, it is the submission of Mr. Amit Chadha, learned Senior Advocate, that though the decision in a writ petition can constitute *res judicata*, in a suit, in the present case, the Plaintiffs, who were Applicants, were not parties to the said writ petitions. Thus, the decision in the said writ petition would not bind the Plaintiffs. Moreover, the writ petition itself was decided on the basis of promissory estoppel in the realm of public law and not on the basis of breach of contract. He relies upon paragraphs 9 and 10 of the judgment of learned Single Judge, which specifically records that the writ is based only on the doctrine of the promissory of estoppel, where the learned Single Judge in ***RK Deka SB***

(*supra*) observed as under:

“..... It is unnecessary for me in these cases to examine the rights and liabilities of the State under a contract entered into by it, as the petitioners have neither based their claims on contract nor advanced any such plea. There had been no strict compliance of the requirements of Art.299 of the Constitution. This provision is mandatory and not directory. It is enacted as a matter of public policy. There was no concluded contract between the parties within the requirements of Art. 299 of the Constitution by the acceptance of the application of the petitioners for the allotment of land measuring 400 sq. yards for construction of a residential house on Badarpur, Mehrauli Road, New Delhi according to the scheme. Even if there is a concluded contract, the failure of the Government to carry out its part of the obligation may amount to breach of contract for which remedy lies elsewhere. ....”

26. He further submits that this is recognized even in the Division Bench, which repeatedly observed that the challenge in the writ is confined to the applicability of the doctrine of promissory estoppel, and that the Petitioners have based their case solely on the doctrine of promissory estoppel. He relies upon paras 8 & 9 of **RK Deka DB (*supra*)**, which state as under:

*“8. The petitioners applied separately under the scheme and along with their application forms transmitted the amount of Rs.10,000/- in foreign exchange towards earnest money as required under the scheme. The proposed draft of lease agreement were also received by the Land & Development Officer from the various applicants along with their initials thereon. It is the case of the petitioners that after having made the*

applications, they made enquiries from the Land & Development Officer about the likely date of allotment of the plots. On these enquiries they were informed that the development of the area had been taken up and the allotment of plots would follow soon. It is further submitted on behalf of the petitioners that they suddenly learnt about the scheme being dropped through a reply to an unstarred question in the Rajya Sabha by the then Minister of Works and Housing on 26th/27th of August, 1981. In that reply the Minister stated in Parliament that on reconsideration the Govt. had decided to drop the scheme. Without waiting for individual intimation or other information the petitioners moved this court by way of writ petitions under Art.226 of the Constitution of the India challenging the decision of the Govt. in dropping the scheme. According to the petitioners the impugned decision of the Govt. is totally arbitrary, capricious and violative of the doctrine of promissory estoppel. In fact the petitioners have totally based their case before us on the doctrine of promissory estoppel. Before the learned single Judge there was some controversy raised on the question as to the matter being in the realm of contract and, therefore, not amenable to writ jurisdiction of this Court and secondary there being no violation of any fundamental or statutory right. However, as already stated, before us the case has been totally confined to the applicability of the doctrine of promissory estoppel. On this question the stand of the Govt is that the scheme was dropped as it was considered not desirable to divert scarce resources of the country to such a non priority scheme, i.e. providing residential plots to non-resident Indians who were otherwise affluent enough and could afford to pay market price for purchasing

property wherever they wish to. It was also stated in the counter-affidavit that the scheme proposed sale of residential land at a rate of Rs.200/- per sq. yd. at a time when the market rate fixed by the Govt. itself for residential plots in the area stood revised to Rs.600/- per sq. yds. metre w.e.f. 31st March, 1979 and Rs.2000/- per sq. metre w.e.f. 1st April, 1981. It was thus felt that allotment of land at the price of Rs.200/- per sq. yds. was way below the market rate and was totally unjustified. This was considered to be against public interest to divert scarce national resources for serving the interest of a comparatively affluent section of people who were non-resident Indians and were living abroad. Public interest demanded that the scarce resources of the society be not dissipated for the benefit of such an affluent class. Even otherwise it was considered that development of land for purposes of allotment for residential houses was in a non priority areas and the cost of development of land at the relevant time itself was above Rs.one crore which was no in public interest considering the cost at which the land was to be allotted.

9. Since the petitioners/appellants have based their case solely on the doctrine of promissory estoppel, it is necessary to examine its various legal aspects. According to the petitioners the scheme propounded by the Govt. was a promise held out by it to allot plots of the size of 400 sq. yds. to each of the applicants who were eligible under the scheme and who paid the requisite earnest money and were willing to comply with rest of the conditions under the scheme. The petitioners claim to have acted on the promise and altered their position by depositing the earnest money in foreign exchange with the Govt. along with their application forms. Further they

*claim to have been always ready and willing to perform rest of the conditions under the scheme. It is also submitted on behalf of the petitioners that though suffering a detriment is not at all a prerequisite for the applicability of the doctrine of promissory estoppel, yet the petitioners have suffered a detriment inasmuch as apart from parting with their money, they did not apply for allotment of land elsewhere in the hope that they will get the residential plots allotted under this scheme. Thus, according to the petitioners, irrespective of the question of detriment, the necessary ingredients, for enforcement of the doctrine of promissory estoppel are present in the case and the Govt. cannot be allowed to resile from its promise. Further the avowed object of the scheme was to earn foreign exchange. It was not a case of a bare promise being held out. The Govt. had gone ahead much further and even the land had been identified and notice board was displayed in the area showing that the land was meant for this particular scheme. The Government had only to undertake development of the said land before the plots could be allotted to the applicants. The petitioners have placed on record a copy of the map showing the location of the land. The petitioners claim that they have done whatever they were required to do under the scheme and they were always ready and willing to do the rest. Therefore, there is no reason on facts as well as in law, why the Govt. be not held bound to its assurance and why the scheme be not enforced? According to the petitioners it is a fit case for enforcement of the doctrine of promissory estoppel and the Govt. not being allowed to resile from its promise.”*

27. It is his submission that breach of contract was not a subject matter of

the writ petition. He relies upon *Manuelsons Hotels Pvt. Ltd. v. State of Kerala (2016) 6 SCC 766* to argue that promissory estoppel should yield to equity and also *Sheodan Singh v. Daryao Kunwar AIR 1966 SCC 1332* to argue that breach of contract is not subject matter of the writ petition. Mr. Chadha submits that the judgment of the Trial Court is liable to be upheld because damages have been awarded as per the date of cancellation and the Plaintiffs have not sought any enhancement. On the question of conclusion of contract he submits that since the agreement for lease itself was executed and sent by the Plaintiffs, in the very least the same constitutes an agreement to sell, if not an actual sale deed. He further submits that the draw of lots itself having been cancelled, the Government had resiled from its obligations. He relies upon the contents of the various documents, including the application form and the covering letter to submit that since there was such a stringent condition that the Applicant had to sign the agreement of lease, within 60 days upon being called upon to do so, failure of which would lead to the deposit being forfeited, the Government also should be held bound by the same measure. He submits that the payment of earnest money means conclusion of the contract and only formalities remain to be completed. The contract being concluded, specific performance could have been sought, and compensation in any case can be sought. He submits that most of the Plaintiffs did not receive any communication in 1981 and the only communication received was in 1983. He further submits that the Government does not challenge the amount of Rs.3000/-, which was considered by the Trial Court as the market rate per sq. yard. He submits that under Section 73 of the Contract Act, the Plaintiffs are entitled to the damages.

### ***Analysis and Findings***

28. The four broad questions that arise in all these appeals are-

- 1) Whether the judgments by the Ld. Single Judge and Ld. Division Bench in the writ petition W.P.(C) 2372/1981 titled ***RK Deka vs. Union of India*** constitute *Res Judicata*?
- 2) Whether the suits are maintainable in view of the cancellation having been upheld in the said writ petition?
- 3) Whether the contract between the Government and the Applicants stood concluded?
- 4) Whether the Applicants/Plaintiffs are entitled to damages/compensation and if so, to what amounts?

#### **Q 1 Whether the judgments in the writ petition constitute *res judicata*?**

29. The question as to whether the decision in a writ petition can constitute *res judicata* in a suit is settled by the Supreme Court in ***Gulabchand (supra)***. A Constitution Bench of the Supreme Court held as under:

*“(25) It cannot, therefore, be disputed that if the decision which had been given in a writ petition had been given in a regular suit that decision would have operated as *res judicata* in the later suit. The question which arises for consideration is whether such a decision in a writ petition can also bar a later suit on account of its operating as *res judicata*.*

.....

*(53) In Daryao’s Case 1962-1 SCR 574: (AIR 1961 SC 1457), this Court had again dealt with the question of the applicability of the principle of *res judicata* in writ proceedings. The matter was gone through very exhaustively and the final*

*conclusions are to be found at p.592 (of SCR): (at pp.1465-1466 of AIR). We may summaries them thus:*

*1. If a petition under Art.226 is considered on the merits as a contested matter and is dismissed, the decision would continue to bind the parties unless it is otherwise modified or reversed by appeal or other appropriate proceedings permissible under the Constitution.*

*2. It would not be open to a party to ignore the said judgment and move this Court under Art.32 by an original petition made on the same facts and for obtaining the same or similar orders or writs.*

*3. If the petition under Art.226 in a High Court is dismissed not on the merits but because of the laches of the party applying for the writ or because it is held that the party had an alternative remedy available to it, the dismissal of the writ petition would not constitute a bar to a subsequent petition under Art.32.*

*4. Such a dismissal may, however, constitute a bar to a subsequent application under Art.32 where and if the facts thus found by the High Court be themselves relevant even under Art.32.*

*5. If a writ petition is dismissed in limine and an order is pronounced in that behalf, whether or not the dismissal would constitute a bar would depend on the nature of the order. If the order is on the merits, it would be a bar.*

*6. If the petition is dismissed in limine without a speaking order, such dismissal cannot be treated as creating a bar of res judicata.*

7. If the petition is dismissed as withdrawn, it cannot be a bar to a subsequent petition under Art.32 because, in such a case, there had been no decision on the merits by the Court.

....

(60) As a result of the above discussion, we are of opinion that the provisions of S.11, C.P.C., are not exhaustive with respect to an earlier decision operating as *res judicata* between the same parties on the same matter in controversy in a subsequent regular suit and that on the general principle of *res judicata*, any previous decision on a matter in controversy, decided after full contest or after affording fair opportunity to the parties to prove their case by a Court competent to decide it, will operate as *res judicata* in a subsequent regular suit. It is not necessary that the Court deciding the matter formerly be competent to decide the subsequent suit or that the former proceeding and the subsequent suit have the same subject-matter. The nature of the former proceeding is immaterial.

(61)We do not see any good reason to preclude such decisions on matters in controversy in writ proceedings under Arts.226 or 32 of the Constitution from operating as *res judicata* in subsequent regular suits on the same matters in controversy **between the same parties** and thus to give limited effect to the principle of the finality of decisions after full contest. We therefore, hold that, on the general principle of *res judicata*, the decision of the High Court on a writ petition under Art.226 on the merits on a matter after contest will operate as *res judicata* in a subsequent regular suit **between the same parties** with respect to the same matter.”

30. The Plaintiffs have thus rightly conceded that a decision in a writ petition can operate as *res judicata* in a suit. However, the fact remains that none of the Plaintiffs in the present case were parties to the said writ petition. Even the Supreme Court in ***Gulabchand (supra)*** holds that a decision in a writ would operate as *res judicata* in a subsequent regular suit “on the same matter in controversy between the same parties.” The Plaintiffs herein, not being the parties to the writ petition, though the scheme which was challenged was the same, the decisions in the writ petition cannot operate as *res judicata*. However, the same would have enormous persuasive value insofar as the legality of the cancellation is concerned.

**Q2 Whether the suits are maintainable in view of the cancellation having been upheld in the writ petition?**

31. There is no doubt that the same very scheme was upheld by the learned Single Judge and the Division Bench of this Court, and not interfered with by the Supreme Court. The question then would be as to whether in the present suits, the legality of the cancellation can be gone into. The judgments rendered in ***R. K. Deka SB (supra)*** and ***R.K. Deka DB (supra)*** dealt with the issue of cancellation in exercise of Executive authority. The cancellations have been upheld and this Court is bound by the same. However, the Court in the said writ petitions was dealing with the right of the Government to scrap the scheme completely, in public interest. The considerations, that govern the upholding of a decision in public law, are different than those that would govern the determination of the issues in a contractual dispute. Once the scheme was floated in 1978, the Government may have found that the prices of land had spiraled in the city of Delhi, and hence allotment of the plots at the prices, which were determined as per the

scheme, was not in public interest. The Government may have felt that there would be huge losses to the exchequer, if the scheme is taken forward. Both the decisions in ***R.K. Deka SB (supra)*** and ***R.K. Deka DB (supra)***, thus, examined the issue as to whether the Government is entitled to exercise its authority to scrap the scheme, after having accepted the application money. It is in this context that the decisions hold that the acceptance of the earnest money would not prevent the Government from exercising its Executive authority and dropping the scheme. The doctrine of promissory estoppel, according to the Court, did not apply. It is settled law that the Government cannot contract out of exercising its sovereign or executive authority, in public interest. Thus, the floating of the scheme and the acceptance of the application money, by itself, may not prevent the Government from cancelling the scheme completely. The Court observed in the said judgment that public policy cannot remain static and can be exercised for public good. The Court further held that the plea of estoppel does not exist when the Government takes decisions in exercise of its executive functions except for preventing fraud and manifest injustice. Since the announcement of the scheme was voluntary by the Government, it is entitled to vary the scheme and the power to vary the scheme also includes the power to drop the scheme completely. The dropping of the scheme having been a result of a policy decision by the highest decision making body i.e. the Cabinet, the Government was entitled to act on the said decision and withdraw the scheme. These findings in the ***R.K. Deka SB (supra)*** and ***RK Deka DB (supra)*** judgments, though not operating as *res judicata*, would be binding on this Court as it would have a direct impact on the reliefs prayed for by the Plaintiffs. The relief of specific performance, i.e., a relief by which the

Government would be forced to allot the plots in favour of the Plaintiffs, cannot, therefore, be granted. The Plaintiffs have, therefore, rightly not pressed for the said relief.

32. However, though not entitled for the relief of specific performance, are the Plaintiffs entitled to claim compensation/damages? A decision by the Government taken as a matter of public policy or in exercise of executive authority can have consequences in the private law space. The decision taken by the Government may be protected due to 'executive necessity' or 'public policy' – however, does it render the Government immune from being liable for damages.

33. In England, one of the oldest cases considering this issue was ***Rederiaktibolaget 'Amphitrite' vs. The King [1921] 3 KB 500*** (hereinafter, '*Rederiaktibolaget*'), wherein the Court drew a distinction between two kinds of Governmental actions – one is the enforcement of the terms of a commercial contract where the Government is a party and the second, where the Government agrees to fetter its powers under a contract in some manner. The Court held that the latter kinds of contracts would be unenforceable, while the former would be binding. The observations of the Court therein are;

*“All I have got to say is whether there was an enforceable contract, and I am of opinion that there was not. No doubt the Government can bind itself through its officers by a commercial contract, and it does so, it must perform it like anybody else or pay damages for the breach. But this was not a commercial contract; it was an arrangement whereby the Government purported to give an assurance as to what its executive action would be in the future in relation to a particular ship in the event of her coming to this*

*country with a particular kind of cargo. And that is, to my mind, not a contract for the breach of which damages can be sued for in a Court of law. It was merely an expression of intention to act in a particular way in a certain event. My main reason for so thinking is that it is not competent for the Government to fetter its future executive action, which must necessarily be determined by the needs of the community when the question arises. It cannot by contract hamper its freedom of action in matters which concern the welfare of the State.”*

This decision was subject matter of considerable discussion in various subsequent decisions in England.

34. However, in ***Union of India v. Anglo-Afghan Agencies AIR 1968 SC 718***, the Supreme Court refused to follow the distinction drawn in ***Rederiaktibolaget (supra)*** and quoted with approval Anson’s English Law of Contract which opined that the observation in ***Rederiaktibolaget (supra)*** is, “*clearly very wide and it is difficult to determine its proper scope*”. The Supreme Court further held:

*“11. The defence of executive necessity was not relied upon in the present case in the affidavit filed on behalf of the Union of India. It was also not pleaded that the representation in the Scheme was subject to an implied term that the Union of India will not be bound to grant the import certificate for the full value of the goods exported if they deem it inexpedient to grant the certificate. We are unable to accede to the contention that the executive necessity releases the Government from honouring its solemn promises relying on which citizens have acted to their detriment. Under our constitutional set-up no person may be deprived of his right or liberty except in due course of and by authority of law: if a member of the executive seeks to deprive a*

*citizen of his right or liberty otherwise than in exercise of power derived from the law — common or statute — the courts will be competent to and indeed would be bound to, protect the rights of the aggrieved citizen.*

.....  
19. *It was somewhat faintly urged that if the Government is held bound by every representation made by it regarding its intention, when the exporters have acted in the manner they were invited to act, the Government would be held bound by a contractual obligation even though no formal contract in the manner required by Article 299 of the Constitution was executed, and the exporter would be entitled to claim damages contrary to that provision for breach of the contract even though no formal written contract had been executed in the manner provided by that Article. But the respondents are not seeking to enforce any contractual right: they are seeking to enforce compliance with the obligation which is laid upon the Textile Commissioner by the terms of the Scheme, and we are of the view that even if the Scheme is executive in character, the respondents who were aggrieved because of the failure to carry out the terms of the Scheme were entitled to seek resort to the Court and claim that the obligation imposed upon the Textile Commissioner by the Scheme be ordered to be carried out.*

.....  
24. *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.....”*

35. Thus, the Supreme Court felt that the distinction laid down in ***Rederiaktibolaget (supra)*** does not apply in the Indian context. However, in

***M. Ramanatha Pillai v. State of Kerala AIR 1973 SC 2641***, the Constitution Bench of the Supreme Court held in the context of appointments and abolition of posts that the creation or abolition of a post is dictated by administrative exigencies and hence held that there can be no estoppel against the Government, which has been followed recently in ***V. Lavanya & Ors. v. State of Tamil Nadu (2017) 1 SCC 322***.

36. For the present case, however, this Court is not dealing with the question as to whether the Government is to be held liable or not under the doctrine of Promissory Estoppel and whether it enjoys the immunity conferred by the exceptions to Promissory Estoppel. As observed in *Wade-Administrative Law*<sup>1</sup>, irrespective of the question as to whether the Government rightly or wrongly cancelled the allotments, its liability under the contracts, for breach thereof, continues to exist. In the present case, the Government had not in any manner *contracted out* of any decision making, in public interest and thus the present case falls in the first category of contracts as per ***Rederiaktibolaget (supra)***. In such a situation, *Wade on Administrative Law*<sup>2</sup> opines:

*“Very many contracts made by the Crown must fetter its future executive action to some extent. If the Admiralty makes a contract for sale of a surplus warship, that fetters the Crown’s future executive action in that the ship will have to be surrendered or damages will have to be paid. Yet there ought to be a remedy against the Crown for breach of contract in that case as much as in any other. The only concession that need be made to public policy is that remedy*

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<sup>1</sup> H.W.R. WADE & C.F. FORSYTH, ADMINISTRATIVE LAW 710 (11<sup>th</sup> Ed., 2014)

<sup>2</sup> Id

should be in damages rather than by way of specific performance or injunction.”

37. Thus, while in the larger interest of the public, a decision to cancel may be found to be legal, to the extent that the Government acts as a party or a proposed party to a contract, it would be liable in its private *avatar* under the law of contracts. The decision taken in public interest cannot provide an escape to the Government of the legal consequences of the decision, if any, so long as the entire action was not illegal in the first place. The Government while safeguarding the interest of the public has also to be a fair player in the contractual domain. A huge amount of faith is reposed by a person, who contracts with the Government and the role of the Government in the said contractual sphere is that of a promisor. The shield of public policy would not become available to the Government for abrogating its role as a party to a contract. The statutory law of contracts would still be applicable in such situations, and to the extent that the decision-making under public law in exercise of executive functions can co-exist with the role of the Government as a party to a contract, there is no contradiction. Thus, if it is found that the Government had, in any manner, entered into a contract and rescinded it or failed to perform its part, it would be liable to pay compensation. The Government should be ready to face the consequences of its decisions taken in public interest or for purposes of public policy, in the contractual domain. The Division Bench in ***R K Deka DB (supra)*** was conscious of this, while it upheld the Government’s decision to cancel the allotments, but clearly observed that the *‘remedy lies elsewhere’*.

38. Thus, while on the one hand, the Government has the role to safeguard the interest of the general public and the larger public interest, it

also has a role to compensate those private individuals, who have suffered a loss due to a decision taken by the Government in public interest. The present case falls in a category of contracts wherein the Applicants have altered their positions after making their applications for allotment of lands to the Government. In such a case, damages can be granted to compensate the loss suffered by the Applicants, even if the decision to cancel the scheme is upheld in public interest.

**Q3 Whether the contract between the Government and the Applicants stood concluded?**

39. This question takes us back to the fundamental principles of contract law. The prospectus and the application form called upon eligible individuals i.e., Non-Resident Indians to apply for allotment of plots. The application form called upon the Applicants to not merely pay the application fee but asked for much more. As per this form, the money was to be paid in foreign exchange. A commitment was also taken that the Applicant would not be able to resile, after making an application. The terms and conditions, on which the plot was to be allotted, were also clearly specified and in fact the application itself provided “*the plot holder shall enter into an agreement for lease and a lease deed.....*”. The draft agreement for lease was attached to the application. The Applicants were required to sign the draft agreement for lease and return it to the Government. The application provided that “*the lease deed will be executed by the L&DO*”. The Applicants, who received these applications, and who paid the requisite amount of Rs.10,000/-, also agreed as under:

*“I hereby agree to and shall abide by the terms and conditions contained therein and in the lease*

*agreement and to modifications thereof as may be made from time to time.*”

40. Thus, there were two stages. Stage one – signing the Agreement for lease and Stage two – Signing of the final lease deed. The Applicants had signed the Agreement for lease and returned the same to the Government. This was duly acknowledged. Thereafter either draw of lots or allotments was to take place. Upon allotment taking place and the payments being made for the cost of land and the construction, the lease deed was to be signed. The terms of the same were also agreed to by the Applicant. The Applicant had no choice of not agreeing to the lease deed or seeking an amendment or change in the lease deed. When the Applicants signed the applications and the agreements for lease and sent the same back, the Applicants knew that there were only 2 possibilities i.e., that it would either be allotted a plot, or if the number of Applicants were higher than the number of plots, the allotment was to be made by draw of lots. Thus, an Applicant, who sent the form with the earnest money and the signed lease deed, was promised of 2 possibilities: a) Either direct allotment, b) or draw of lots and allotment thereafter. The Government, on receipt of the applications, acknowledges the receipt thereof, of the form, of the earnest money and “*agreement for lease duly signed on each page*”.

41. If the initial launch of the scheme is considered as an invitation to offer, upon a person paying for the prospectus and application form and the same being issued, becomes an offer, and when the Applicant fills the form, makes the payment of earnest money, and signs the agreement for lease, the same would constitute an acceptance. The same is nothing but an Agreement to Sell. Thus, as per the Government itself, the signed document was an

`agreement for lease' though the final 'lease deed' was to be executed after the allotment takes place. In ***Ghaziabad Development Authority v. Union of India (2000) 6 SCC 113*** (hereinafter, '*Ghaziabad Development Authority*'), the Supreme Court held that the applications made in response to a Scheme for allotment of plots constitute an 'offer'. However, in the said case, it is not clear if the Applicants had signed a lease deed and submitted the same to the authority, which the Applicants in the present case were obliged to do as part of the Scheme. Pollock & Mulla in their Commentary on the Contract and Specific Relief Act<sup>3</sup> succinctly draws the distinction as to when a promise comes into existence, as under:

*“Carlill’s case shows the principle that an offer, to be capable of acceptance, must involve promise by the offeror that he will bind himself if the exact terms specified by him are accepted. If a man writes, ‘send me such and such goods, and I will pay for them’, is not the sending of goods an acceptance of the offer? A proposal is in every case accepted by performance of its conditions, i.e., by compliance with its terms. Communication by the acceptor to the proposer or his authorised agent is necessary when the terms consist of or include a counter-promise (for there is no promise at all without communication), but when only acts are required, the communication of their performance may or may not be added as a term of the offer at the will of the proposer, which may be either express or inferred from the nature and circumstances of the proposal. There is a material distinction between acceptance of a proposal that asks for a promise and a proposal that asks for an act on the condition of the proposal becoming a promise. In the former case, where the acceptance is to consist of a promise, there must be*

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<sup>3</sup> 1 POLLOCK & MULLA, THE INDIAN CONTRACT ACT & SPECIFIC RELIEF ACTS, 185 (15<sup>th</sup> ed., 2017)

communication to the proposer. But in the latter class of cases, as for example, dispatching goods ordered by post, the rule is that no further communication of acceptance is necessary than performance of the proposed act. Mere performance of the act prescribed by the proposal is sufficient acceptance of such proposal and converts it to a promise even without further communication of acceptance. This distinction is recognised in ss. 5 and 8 of the Contract Act.”

42. Thus, even without anything more being done by the Government, the receipt of the Application form, the fees, the agreement for lease duly signed itself constituted an acceptance of the proposal i.e., it is not then unilaterally revocable. The ‘Agreement for lease’ is like an ‘Agreement to Sell’ duly enforceable and binding on parties. This is clear from a reading of Sections 5 and 8 of the Contract Act, which are as under:

**“Section 8 - Acceptance by performing conditions, or receiving consideration** – Performance of the conditions of a proposal, or the acceptance of any consideration for a reciprocal promise which may be offered with a proposal is an acceptance of the proposal.

**Section 5 – Revocation of Proposals and acceptance** – A proposal may be revoked at any time before the communication of its acceptance is complete as against the proposer, but not afterwards.

An acceptance may be revoked at any time before the communication of the acceptance is complete as against the acceptor, but not afterwards.”

43. This Court, in **Victor Cables Industries Ltd v. Delhi Electric Supply Undertaking (2009) 108 DRJ 182 (DB)**, has held as under:

*“41. In a formation of contract, the basic ingredient to*

*make it concluding one is the proposal from one party and its acceptance by the other. So long as one of the parties to the transaction could back out of it at his choice, there can be no binding or concluded contract between the parties, although they have an agreement on the material terms. The proposal must be sufficiently definite to permit the conclusion of the contract by mere acceptance. Similarly, an acceptance should be final and unqualified expression of assent, to the terms of an offer. An unqualified unconditional acceptance of the offer creates a contract when communicated to the offeror.”*

44. The Supreme Court also in ***Aloka Bose v. Parmatma Devi (2009) 2 SCC 582*** has held as under:

*“17. Section 10 of the Act provides all agreements are contracts if they are made by the free consent by the parties competent to contract, for a lawful consideration and with a lawful object, and are not expressly declared to be void under the provisions of the Contract Act. The proviso to Section 10 of the Act makes it clear that the section will not apply to contracts which are required to be made in writing or in the presence of witnesses or any law relating to registration of documents. Our attention has not been drawn to any law applicable in Bihar at the relevant time, which requires an agreement of sale to be made in writing or in the presence of witnesses or to be registered. Therefore, even an oral agreement to sell is valid. If so, a written agreement signed by one of the parties, if it evidences such an oral agreement will also be valid.*

*18. In any agreement of sale, the terms are always negotiated and thereafter reduced in the form of an agreement of sale and signed by both parties or the vendor alone (unless it is by a series of offers and counter-offers by letters or other modes of recognized*

*communication). In India, an agreement of sale signed by the vendor alone and delivered to the purchaser, and accepted by the purchaser, has always been considered to be a valid contract. In the event of breach by the vendor, it can be specifically enforced by the purchaser. There is, however, no practice of purchaser alone signing an agreement of sale.*

.....

*20. In any agreement of sale, the terms are always negotiated and thereafter reduced in the form of an agreement of sale and signed by both parties or the vendor alone (unless it is by a series of offers and counter-offers by letters or other modes of recognized communication). In India, an agreement of sale signed by the vendor alone and delivered to the purchaser, and accepted by the purchaser, has always been considered to be a valid contract. In the event of breach by the vendor, it can be specifically enforced by the purchaser. There is, however, no practice of purchaser alone signing an agreement of sale.*

*21. Apart from the above, the evidence of the witnesses also shows that there was a concluded contract. Therefore, even though the draftsman who prepared the agreement might have used a format intended for execution by both vendor and purchaser, the manner in which the parties had proceeded, clearly demonstrated that it was intended to be executed only by the vendor alone. Thus we hold that the agreement of sale (Ext. 2) signed only by the vendor was valid and enforceable by the purchaser.”*

45. The Government had given the draft lease deed to the Applicants – so from the side of the Government the terms were acceptable to it. The Applicants signed the same and submitted it back to the Government. Upon acknowledgement by the Government of receipt of application, the earnest money and the signed agreement for lease, the Government has to either

allot the plots or conduct draw of lots, if the number of applicants are higher than the number of plots. In this case, neither of the two happened and after two extensions, the scheme itself was dropped i.e., the Government revoked a concluded contract without performing it. The objection in respect of Art.299 is also not liable to be entertained, in as much as the Agreement for Lease clearly stipulates that the same is between the '*President of India and the intended Lessee i.e., the Applicant*'. This is sufficient compliance of Art. 299. In any event, the Government cannot be seen to say that the terms of the agreement for lease are acceptable to it and that all applicants have to sign it but since it is not signed by the President of India, the Government cannot bound by it, though all Applicants have signed it. That would be arbitrary to say the least.

46. It cannot, therefore, be said or argued that there was any uncertainty in the contract. The only course of action was either direct allotment or allotment after the draw of lots, if the number of the Applicants were higher. From the facts, it is clear that the scheme was repeatedly extended from time to time. Initially there were only about 30 applications and by 31<sup>st</sup> July, 1978 there were 96 applications and by 30<sup>th</sup> September, 1978, 150 applications were received. By 31<sup>st</sup> December, 1978, 226 applications were received. Finally, the number of plots were increased to 307 instead of 260 and by 31<sup>st</sup> May, 1979, 355 applications were received. Therefore, within a period of 18 months, the number of Applicants exceeded the number of plots. Going by the original scheme, without the extension of date, all the original Applicants would have been entitled to the plots. Even by the end of it, most of the Applicants would have been allotted plots. Thus, there was a clear expectation that the plots would be allotted. Going by the submissions of the

Counsels for the Plaintiffs, at the relevant point of time the price of an equivalent plot in Greater Kailash was Rs.150/- per Sq. Yards whereas what was being paid by the Applicants under this scheme was Rs.200/- per Sq. Yds. NRIs had opted for this scheme as the same was floated by the Government and since they were located in foreign lands, they felt that they could trust the Government. They had altered their positions on this basis.

47. Once all Applicants had made their applications, as per the scheme, the Government could either allot the plot or conduct draw of lots, neither of which was done. A perusal of the documents shows that the scrapping of the scheme was nowhere in the anvil even as on 13<sup>th</sup> February, 1980. There is complete silence in the records between February, 1980 and September, 1981. No reasoning has been shown except as available from the judgments in ***R.K. Deka SB (supra)*** and ***R.K. Deka DB (supra)*** as to why the scheme was dropped. In fact, most of the Applicants did not even receive a communication when the scheme was dropped. It is only in two cases where a copy of the letter dated 19<sup>th</sup> September, 1981 has been placed on record. It was not until 24<sup>th</sup> October, 1983 that the decision to drop the scheme was actually communicated. Even when the same was communicated, the Government did not unilaterally refund the earnest money. It sought to say *“if you are interested in refund of the amount deposited by you as earnest money. Please make a formal request so that necessary action may be taken in the matter.”* Thus, an Applicant who had made an application with the Government for being allotted a plot in 1978, was made to, in October, 1983, express his intention to seek a refund with a formal request after which necessary action was supposed to be taken. This is a breach. This breach by the Government makes it liable to pay compensation as per the

law.

**Q4 Whether the Applicants/Plaintiffs are entitled to damages/compensation and if so, to what amounts?**

48. Section 73 of the Contract Act provides for compensation for loss or damages caused by breach of contract. In *Ghaziabad Development Authority (supra)*, the Supreme Court held :

*“5 .....Some of the offers having been accepted subject to rules of priority or preference laid down by the Authority result in a contract between the applicant and the Authority. The legal relationship governing the performance and consequences flowing from breach would be worked out under the provisions of the Contract Act and the Specific Relief Act except to the extent governed by the law applicable to the Authority floating the scheme. In case of breach of contract damages may be claimed by one party from the other who has broken its contractual obligation in some way or the other. The damages may be liquidated or unliquidated. Liquidated damages are such damages as have been agreed upon and fixed by the parties in anticipation of the breach. Unliquidated damages are such damages as are required to be assessed. Broadly the principle underlying assessment of damages is to put the aggrieved party monetarily in the same position as far as possible in which it would have been if the contract had been performed. Here the rule of remoteness of damages comes into play. Such loss may be compensation as the parties could have contemplated at the time of entering into the contract. The party held liable to compensation shall be obliged to compensate for such losses as directly flow from its breach.....”*

49. As held earlier, the Government had breached the contract and the promises made to the Applicants. The Applicants who had applied under the

scheme with the fond hope of owning a plot of land in Delhi, in the country of their birth, have been deprived of the same. Thus, the Applicants are entitled to compensation for the loss that they have suffered. What should be the amount of compensation?

50. All the Applicants had paid the Earnest money, which binds themselves and the Government. 'Earnest money', as held in ***Jaswant Rai v. Abnash Kumar ILR 1974 Delhi 689*** is the sum of money paid by the buyer of property under a contract for sale in order to bind the seller to the terms of the agreement for sale.

51. When the scheme was dropped, all the Applicants would have had knowledge of the same, either through the communication from the Government, or other sources. The Scheme appears to have been a matter of discussion in various forums. Immediately after the decision to drop the scheme, writ petitions came to be filed by some of the Applicants. Thus, most of the Applicants were aware of the dropping of the scheme. The Government, however, did not leave them with much choice. The only option they had was to seek refund of the amount of Rs.10,000/- which was paid by them. The refund however, does not take into account the opportunity that existed for the Applicants who were planning to buy plots in India at the relevant time. In such situations, damages are awardable for the 'Loss of opportunity' caused to the Applicants. Thus, one measure of damage i.e., which has been adopted by the Trial Court, is to determine the market rates of these plots at the time when the cancellation took place and award the said amount as compensation. Such an approach would not be perverse or illegal and considering that out of the total 355 applicants, only 26 have chosen to file suits seeking compensation, the same also appears

just and equitable. Ld. Counsel for the Government submitted that several of the Applicants have already obtained refunds.

52. In *Satya Jain v. Anis Ahmad Rushdie (2013) 8 SCC 131*, market rate has been held to be a proper measure to determine damages in respect of immovable property. The Supreme Court observed as under:

*“29. The twin inhibiting factors identified above if are to be read as a bar to the grant of a decree of specific performance would amount to penalizing the Plaintiffs for no fault on their part; to deny them the real fruits of a protracted litigation wherein the issues arising are being answered in their favour. From another perspective it may also indicate the inadequacies of the law to deal with the long delays that, at times, occur while rendering the final verdict in a given case. The aforesaid two features, at best, may justify award of additional compensation to the vendor by grant of a price higher than what had been stipulated in the agreement which price, in a given case, may even be the market price as on date of the order of the final Court.”*

53. The Government has, by scrapping the scheme, retained the entire land in its possession and has, hopefully put it to good use. It is prime land located in Delhi. The Applicants have not only litigated with the Government for the last almost 34 years, but they have also been deprived of owning a plot of 400 sq. yds. in a city like Delhi. Thus, compensation is the least that can be given to them under these circumstances. The award of compensation of Rs.11,20,000/- by taking the market rate prevalent at the time of cancellation in 1983, is a reasonable basis to quantify damages due to breach. The same is also completely justified in these facts. While this Court does not agree with some of the observations of the Trial Court in

respect of 'acts of criminal negligence', the conclusion arrived at by the Trial Court, in respect of award of damages, is liable to be upheld.

54. The amount as per the decree passed by the Trial Court, would be liable to be paid by the Government to the Applicants along with 8% interest from the date of filing of suit till the date of payment. The Government is directed to make payment to the Applicants within 8 weeks, failing which 12% interest would be payable on the decretal amount.

55. Appeal is dismissed in the above terms.

**PRATHIBA M. SINGH  
JUDGE**

**JULY 04, 2018/dk**

