

**IN THE HIGH COURT AT CALCUTTA**  
**Civil Appellate Jurisdiction**  
**Appellate side**

**PRESENT:**

**HON'BLE JUSTICE CHITTA RANJAN DASH**  
**AND**  
**HON'BLE JUSTICE ANIRUDDHA ROY**

**MAT 304 OF 2019**

**Indian Oil Corporation & Ors.**  
**vs.**  
**Soma Saha & Anr.**

**For the Appellants** : **Mr. Jayanta Mitra, Sr. Adv.**  
**Mr. Manwendra Singh Yadav, Adv.**  
**Ms. Satabdi Sarkar Kundu, Adv.**

**For the Respondent No.1** : **Mr. Kalyan Bandopadhyay, Sr. Adv.**

**For the Respondents** : **Mr. Ram Anand Agarwal, Adv.**  
**Ms. Nibedita Pal, Adv.**  
**Mr. Ramesh Dhara, Adv.**  
**Mr. A. G. Mukherjee, Adv.**  
**Ms. Sonam Ray, Adv.**

**Heard on** : **28.07.2022.**

**Judgment on** : **28.09.2022.**

**CHITTA RANJAN DASH, J.:-**

1. This appeal at the instance of the Indian Oil Corporation Limited (who were respondent nos. 1 to 4 in the Writ Petition) stems from the Order dated 06.12.2018 passed by Hon'ble Single Judge in W.P. 18735 (W) of 2018 allowing the Writ Petition in favour of the petitioner (present respondent no. 1).

2. The fact of the case in brief is that the appellant Oil Corporation on 31<sup>st</sup> August, 2017 published an advertisement inviting the applications for LPG distributorship under **SHEHERI YOJONA** in open category at China Town, Kolkata. The petitioner (present respondent no. 1) on 17.10.2017 applied for the aforesaid LPG distributorship by filing requisite application vide Annexure-PI to the Writ Petition. After the initial scrutiny, the present respondent no. 1 was selected for draw of lot. The draw of lot was held on 29<sup>th</sup> May, 2018 and in the said draw fortune knocked in favour of the petitioner (present respondent no. 1) to come out successful.

3. The appellant Oil Corporation then intimated the present respondent no. 1 on 30<sup>th</sup> May, 2018 to deposit an amount of Rs. 50,000/- (rupees fifty thousand) in terms of the unified guidelines for selection of LPG distributor and to submit certain documents. She was also directed to be present at the time of field verification to be carried out by the designated officials of the appellant Oil Corporation on a date to be notified. Two letters were issued to the present respondent no. 1 by the appellant Oil Corporation on 30<sup>th</sup> June, 2018 intimating

therein that the lease deed in respect of the land offered by her for showroom is valid from 1<sup>st</sup> November, 2017 which is a date subsequent to the date of submission of application and in another letter she was intimated that the land offered by her for godown purpose is not meeting the requirement as per advertisement brochure and application submitted vide Annexure-PI to the Writ Petition. She (present respondent no. 1) was, therefore, requested to offer alternate land if any, having registration before the last date of submission of application and inform the competent authority of the appellant Oil Corporation. The petitioner on 4<sup>th</sup> August, 2018 vide Annexure-P4 to the Writ Petition replied to aforesaid query made vide letters dated 30<sup>th</sup> June, 2018 and submitted that there is a mistake in the date of commencement of the lease, so far as land for showroom is concerned, which will be corrected and it was also informed that the petitioner (present Respondent No.1) has additional 5 (five) Kathas land within the advertised location which may be considered. The present respondent no. 1 on 20<sup>th</sup> August, 2018 (Annexure P-5) in continuation of her earlier letter dated 4<sup>th</sup> August, 2018, (Annexure P-4), forwarded another letter for consideration with the corrected lease deed and assertion to the effect that she has 12 K. 13 Inc. 27 Sq.ft. of land under RS & LR Dag No. 85, R.S. Khatian No. 417 and 418, 125, L.R. Khatian No. 273, which includes common passages at two sides measuring about 20 ft. and 12 ft. width and she has absolute right to use 50% of the common passage of both sides as she has been using as such. The aforesaid letter vide Annexure-P5 is stated to have enclosed a site plan of the said land duly

authenticated and confirmed by the authorised representative of the erstwhile owners.

4. It is alleged that the appellant Oil Corporation vide letter dated 30.08.2018 (Annexure P6 to the Writ Petition) rejected the candidature of the petitioner on the following grounds:

- (i) Showroom lease deed is registered on 16.10.2017 but commencing from 01.11.2017.
- (ii) Dimension of godown land is less as compared to required dimension of Sheheri 30 m. x 25 m. as per brochure condition.
- (iii) Candidate has no alternate land for showroom and godown as reported.

5. With the rejection of the candidature of the petitioner Rs. 50,000/- (rupees fifty thousand) deposited by her with the Corporation stood fortified in line with the terms and conditions of the advertisement/brochure condition. The petitioner thereafter made representation before the competent authority of the appellant Oil Corporation on 5<sup>th</sup> September, 2018 alleging that her offer vide Annexure-P5 to the Writ Petition for additional 5 Kathas of land as well as correction in the commencement of date of lease period have not been taken into consideration. It is alleged that the action of the appellant Oil Corporation which is discharging public duty and is a state within the meaning of Article 12 of the Constitution of India in not considering petitioner's representation dated 20<sup>th</sup> August, 2018 (Annexure-P5

to the Writ Petition) and proceeding to reject her candidature on 30<sup>th</sup> August, 2018 (Annexure-P6 to the Writ Petition) is arbitrary and lacks rationality.

6. Against such action of the appellant Oil Corporation the petitioner preferred the Writ Petition. While the Writ Petition was pending the petitioner filed an additional Affidavit in the Writ Petition averring therein in paragraph 3 that in course of pendency of the Writ Petition the petitioner (present respondent no. 1) has obtained a site plan prepared by a registered surveyor in relation to the land offered by the petitioner for godown in her application which demonstrate that the offered land is sufficient for LPG godown having capacity for storage of 8000 kgs LPG. The site plan prepared by the LS surveyor was filed in the additional affidavit vide Annexure P8.

7. From the record we see that no reply-in-affidavit has been filed by the appellant Oil Corporation before the Hon'ble Single Judge. The appellant Oil Corporation on the basis of materials-on-record had put forward their contention before the Hon'ble Single Judge.

8. Hon'ble Single Judge relying on an earlier decision of this Court rendered by co-ordinate Bench in the case of **Palash Roy Vs. Union of India & Ors.** [WP 7741 (W) of 2015 disposed of on 27<sup>th</sup> April, 2015] held that so far as the land offered for godown is concerned the petitioner's case is covered by the decision rendered by this Court in the case of **Palash Roy** *supra*. So far as date of commencement of lease is concerned Hon'ble Single Judge relying on Section 105 of Transfer of Property Act, 1882 held that though the date of commencement of the lease was later to the date of execution of the lease deed i.e. 16<sup>th</sup> October, 2017 and the

mistake in the date of commencement of lease deed was later rectified and date of commencement of lease deed was corrected to 16<sup>th</sup> October, 2017 it cannot be held that possession was not handed over to the lessee i.e. the present respondent no.1 by the lesser on the date of execution of the lease deed inasmuch as there is no mention in the lease deed regarding possession to be given on a future date on commencement of the lease. It was further held that both the lease deed and the declaration for rectification having been duly registered and the mistake having been corrected and especially in view of Section 105 of the Transfer of Property Act, 1882, Court is not convinced that for the interregnum period i.e. from the date of registration of lease deed till the date of commencement of the lease deed as mistakenly mentioned, no consideration was paid and therefore, it is to be held that the lease so rectified is to commence with effect from 16<sup>th</sup> October, 2017 and continue till 31<sup>st</sup> October, 2033 especially when premium by way of salami was paid with execution of the lease on 16<sup>th</sup> October, 2017.

9. Before proceeding to decide the appeal on merit we feel persuaded to note here that no affidavit-in-opposition was filed before Hon'ble Single Judge in the Writ Petition. Along with Memorandum of Appeal a supplementary affidavit has been filed. From the order dated 11.06.2019 passed in this appeal it is found that on that day delay of 40 (forty) days in preferring the appeal was condoned and CAN 3783 of 2019 was allowed. On that day itself order has been passed in the appeal to the effect that **“supplementary affidavit filed in Court be kept with the record”**. In our merited consideration such an order itself does not bring the supplementary affidavit filed by the appellant on record of the Appellate Court

unless leave in specific term is granted by the Court after hearing learned Counsel for the parties to file supplementary affidavit. Taking into consideration the principles contained in Order 8 CPC we do not deem it just and proper to go through supplementary affidavit filed by the appellant in appeal along with the documents filed therewith. We shall confine our discussion to the documents filed along with the Writ Petition.

10. For the purpose of disposal of the appeal on merit, 3 (three) dates are important –

- i) 31<sup>st</sup> August, 2017: Date of the advertisement inviting application for award of LPG distributorship under Sheheri Plan in open category for China Town, Kolkata.
- ii) 17<sup>th</sup> October, 2017: Present respondent no. 1 submitted application for distributorship in respect of the aforesaid area.
- iii) 18<sup>th</sup> October, 2017: Last date for submission of application.

11. According to Mr. Jayanta Mitra, learned Senior Counsel appearing for the appellant, the respondent no. 1 should have fulfilled all the eligibility criteria as on the last date of submission of application i.e. 18<sup>th</sup> October, 2017. From the application form filed by the respondent no. 1 vide Annexure-PI, it is found in note 1 to paragraph 4 below the table that if the application is for Sheheri Bitorak, the plot of land for Godown offered should have minimum dimension of 30 m. X 25 m. Or the constructed LPG Godown should have a minimum storage capacity of 8000

Kg. LPG. The Corporation is conscious that an applicant may offer land owned by him/her or his/her family members or he or she may offer a land leased out. Therefore, in paragraph 4 of Annexure PI it is clearly stated thus:-

*“Provide following details of the plot(s) of land for construction of LPG Godown or constructed LPG Godown owned or registered lease for minimum 15 (fifteen) years in the name of applicant/member of family unit commencing on any date from the date of advertisement up to the last date of submission of application as specified either in the advertisement or in the corrigendum (if any) and meeting the norms specified.*

*Note 1 applicants having registered lease deed commencing on any date prior to the date of advertisement will also be considered provided the lease is valid for a minimum period of 15 (fifteen) years from the date of advertisement.*

*The offered land will be verified during field verification .....”.*

12. Taking us through the information/notes outlined in paragraphs 2 to 4 of Annexure P-1 to the Writ Petition *supra* Mr. Jayanta Mitra, learned Senior Counsel appearing for the Appellants submits that it is well settled rule of administrative law that an executive authority must be rigorously held to the standards by which it professes its action to be judged, and it must scrupulously observe those standards on pain of invalidation of an act in violation of them. Relying on the

case of **Ramana Dayaram Shetty Vs. International Airport Authority of India** [1979 (3) SCC 489] Mr. Mitra, learned Senior Counsel submits that relying on the principle as aforesaid it was held by Hon'ble Supreme Court in the aforesaid case that a tender accepted in breach of the norm is clearly an evidence of arbitrariness on the part of the authority and was clearly discriminatory.

Relying on the case of **Rakesh Kumar Sharma Vs. State** [2013 (11) SCC 58] Mr. Mitra, learned Senior Counsel appearing for the appellant submits that there can be no dispute to the settled legal proposition that the selection process commences on the date when applications are invited. Any person eligible on the last date of submission of the application has a right to be considered against vacancy, provided he fulfils the requisite qualification and in the present case respondent no. 1 having failed to fulfil the requisite qualification by the last date of submission of application cannot claim the benefit in any manner whatsoever.

Relying on the case of **Anapurna Jaiswal Vs. Indian Oil Corporation** (2021 SCC online SC 852), Mr. Mitra would submit that since there was no lease in effect on the date of application or for that matter by the last date of application the respondent no. 1 cannot be said to have met the eligibility criteria.

Mr. Mitra, learned Counsel for the appellant answering the submission by Mr. Kalyan Bandopadhyay, learned Senior Counsel appearing for the respondent no. 1 submits that no new points has been urged in the appeal either in the Memorandum of Appeal or in course of hearing and he has confined his arguments to the letter of the appellant Corporation dated 30.06.2018 (Annexure

P6 to the Writ Petition) wherein the reasons of rejection of the respondent no. 1's application had been clearly spelt out. He further submits that he has tried to fortify the reasons spelt out in Annexure P6 to the Writ Petition with facts from record of the case and decided authorities of Hon'ble Supreme Court.

13. Coming to the Judgment rendered by the Hon'ble Single Judge in the case of **Palash Roy** *supra* it is submitted by Mr. Mitra learned Senior Counsel without admitting the correctness of the observation of the Hon'ble Single Judge in that case that the observation by the Hon'ble Single Judge in **Palash Roy's** case is contrary to the law laid down by the Hon'ble Supreme Court and furthermore, the order passed therein clearly indicates that the Court itself left all questions open by its direction to Indian Oil Corporation to examine the issue. In view of such fact no reliance could have been placed on the Judgment of **Palash Roy** as a binding authority.

14. Mr. Kalyan Bandopadhyay, learned Counsel appearing for the respondent no. 1 submits that the Judgment in the case of **Palash Roy** squarely covers the case of respondent no. 1 especially when the authority of the Indian Oil Corporation has accepted the said Judgment without filing any appeal against the same. The respondent no. 1 now, therefore, cannot be singled out to be targeted. He relies on the case of **Burger Paints India Ltd. Vs. Commissioner of Income Tax, Calcutta** [2004 (12) Supreme Court cases 42] to submit that if the authority has not challenged correctness of the law laid down by the High Court in particular case and has accepted it in case of one assessee, it is not open to the authority to challenge its correctness in the case of another assessee. Relying on

the case of **State of West Bengal & Ors. Vs. Smt. Hushna Banu & Ors.** [2010 (4) CHN 438 (CAN) (DB)] it is submitted by Mr. Bandopadhyay learned Senior Counsel that when the appointment initially made was allowed to remain subsisting even if may not be in conformity with the rules framed by the authority, the same cannot be said to be invalid for the simple reason that the identical method of appointment has been accepted to be regular and valid pursuant to the judicial pronouncement of the Court.

Relying on the case of **Gujarat Steel Tubes Ltd. & Ors. Vs. Gujarat. Steel Tube M. Steel & Ors.** [1980 (2) SCC 593] it is submitted by Mr. Bandopadhyay learned Senior Counsel that an appellate power interferes not when the order appealed is not right but only when it is clearly wrong.

It is submitted by Mr. Bandopadhyay, learned Senior Counsel that the respondent no. 1 in the Writ Petition filed additional affidavit giving details of land offered by her and the averments made in the said affidavit having not been traversed, the doctrine of non-traverse would bar the appellant to now say that the land offered by the respondent no. 1 was in fact lesser than the dimension required by the appellant Corporation. In this regard Mr. Bandopadhyay, learned Senior Counsel would rely on the case of **Dwarkanath Tiwari & Ors. Vs. State of Bihar & Ors.** (AIR 1959 Supreme Court 249).

So far as the lease deed dated 16.10.2017 and the rectification of the same dated 20.08.2018 is concerned, Mr. Bandopadhyay, learned Senior Counsel would rely on the case of **Prasad Technology Park (P) Ltd. Vs. Sub-Registrar and Ors.**

[2006 (1) SCC 473] to submit that unless the essential ingredient as contained in Section 105 of the Transfer of Property Act are not altered, it cannot be said that the parties to the contract entered into a fresh transaction.

Countering the submission advanced by Mr. Jayanta Mitra learned Senior Counsel it is submitted by Mr. Bondopadhyay learned Senior Counsel appearing for the respondent no. 1 that in the instant case there being no breach of norms the decision relied on by the learned Counsel for the appellant in the case of **Ramana Dayaram Shetty** *supra* has no application to the present case. It is further submitted by Mr. Bondopadhyay learned Senior Counsel that the respondent no. 1 having fulfilled all the eligibility criteria by the last date of submission of application, the case of **Rakesh Kumar Sharma** *supra* does not apply to fact of the present case. Lastly, it is submitted by Mr. Bandopadhyay learned Senior Counsel that in the present case the lease deed was very much effective on the date of application since no essential ingredients of the lease deed were altered by the declaration deed as such, therefore, the decision relied on by Mr. Mitra in the case of **Aannapurna Jaiswal** *supra* does not apply to the fact of the present case.

15. Coming to the merit of the case on facts, it is found in Note-1 below the table at page 66 of Annexure P-1 to the Writ Petition that there is clear mention regarding the dimension of land if one is applying under the open land category and also clear mention about the capacity of the godown if one is applying under the constructed LPG godown category. Relevant portion of Note-1 reads thus :-

*“Note (1) – If you are applying for Seheri Bitorak the **plot of land for godown** should have minimum dimension of 25m. X 30m. **Or** the **constructed LPG godown** should have minimum storage capacity of 8000 kg. LPG .....”*

In paragraph 4 of Annexure P1 to the Writ Petition, it is provided thus :-

*“Provide following details of the plot(s) of land for construction of LPG godown or constructed LPG godown owned or registered lease for minimum 15 years in the name of the applicant/ member of family unit commencing on any date from the date of advertisement **up to the last date of submission of the application.....”***

It is further provided that applicants having registered lease deed commencing on any date prior to the date of advertisement will also be considered provided, the lease is valid for a minimum period of 15 years from the date of advertisement. In the application Annexure P-1 to Writ Petition the Respondent No.1 in the table besides giving details of the land has specifically mentioned that the dimension of land is 30m. X 25m. Similarly in paragraph 5 of the application vide Annexure P1 to the Writ Petition she has given details of the leased land in favour of her so far as the showroom is concerned.

16. In the declaration in Annexure P1 which has been supported by an undertaking by the Respondent No.1 herself it is stated thus :-

*“I am aware that eligibility of LPG distributorship will be decided based on the information provided by me in my application. On verification of the oil company if it is found that the information provided by me is incorrect/false/misrepresented then my candidature will stand cancelled and I will be declared ineligible for LPG distributorship.”*

17. From the aforesaid materials, it is found that there are two categories so far as **Sheheri Bitorak** is concerned; one is offer of open land for godown which should have minimum dimension of 30m. X 25m. and another is constructed LPG godown which should have minimum storage capacity of 8000 kg LPG. Both the categories have been divided by the conjunction **“Or”**. Each of the above category, in our merited consideration is exclusive, invariable and absolute. In other words both the categories are mutually exclusive. If one applicant has offered land with the requisite dimension, he/she cannot claim later on that though the land is less than the dimension mentioned, it can very well house a godown with storage capacity of 8000 kg. LPG.

18. It is no more *res integra* that the advertisement for appointment of LPG dealership is an invitation to offer and the particulars mentioned in an application filed is the offer in terms of the condition mentioned in the invitation to offer. So when the application is filed (offer is made) in response to the invitation to offer, it must be filed or made with the eyes open and mind cognizant of the conditions. The offer can be accepted by the principal only if the offer is in conformity with the

invitation to that effect and not otherwise. On acceptance of the offer only a letter of intent is to be issued culminating in agreement/contract between the parties.

19. In the present case, the averments in the Writ Petition throughout has dwelt on the offer of the applicant's open land of a dimension of 30m. X 25m. and even more than that. In the additional affidavit filed in the Writ Petition by the present Respondent No.1 it is asserted that the land offered by her is more than the land required by the Appellants and plan prepared by registered surveyor also shows that the offered land is sufficient to accommodate LPG godown having storage capacity of 8000 kg LPG.

20. From the aforesaid new pleadings in the additional affidavit by the Respondent No.1 in the Writ Petition, it is found that she has two claims :-

*(i) The land offered by her is sufficient than the requirement of the Appellant.*

*(ii) If not, than the offered land can accommodate a godown with storage capacity of 8000 kg. LPG.*

Both the aforesaid claims are alternative to each other.

21. So far as the godown land is concerned Hon'ble Single Judge has returned the finding relying on the case of **Palash Ray** *supra*. We have to see whether said decision of Hon'ble Single Judge is correct or not. The decision in the **Palash Ray's** case *supra* being not a reported decision, we feel it expedient to reproduce the decision below for ready reference :-

**W.P. 7741 (W) of 2015**  
**(Palash Ray Vs. The Union of India & Ors.)**

*“Sri Pratik Prakash Banerjee, learned counsel appears for the petitioner and files a calculation sheet in Court today with copy served on Sri M.S. Yadav, learned counsel for the respondent-Indian Oil Corporation (IOC).*

*Sri Banerjee, learned counsel submits that from the calculation sheet it will be evident that the land provided by the petitioner contains an actual storage area for 8000 kg. of LPG equalling a total of 564 pieces of LPG cylinders. According to learned counsel, by the advertisement the actual required area demanded for storage of 8000 kg. of LPG is 302 sq. mt. whereas the petitioner is willing to provide much more than that totalling 750 sq. mt.*

*Sri Yadav, learned counsel strongly argues that the dimensions of the plot of land required in the advertisement is 25 M X 30 M, thereby specifically indicating that the measurement must conform to that of a rectangle. However, according to Sri Yadav the options with regard to the area of land as submitted by the petitioner do not show the same to be in the nature of a rectangle. Hence, such plot of land cannot be considered.*

*Buttressing his submissions on the basis of a Field Verification Report Sri Yadav points out that it was indicated in the report that the plot of for constructing a LPG godown with the required dimension of 25M X 30M cannot be derived from the plot offered by the petitioner.*

*Sri Yadav also draws the attention of this Court to the requirement of the land being in compliance with the approval and licence to be granted by the Chief Controller of Explosives of Petroleum and Explosives Safety Organisation (PESO) for storage of 8000kg LPG in cylinders. Learned counsel points out that such compliance to the requirements of the Controller of Explosives is strictly necessary.*

***After hearing the parties and considering the documents on record this Court is of the considered view that the dimensions of the land advertised require to have a nexus to the capacity for constructing a godown for storing 8000 kg. of LPG cylinders.***

*It transpires from the application filed by Sri Banerjee's client that the measurements of land indicated are above the measurements required in the*

*advertisement, although Sri Yadav submits that the same is not in the form of a rectangle.*

*In the above view of the matter this Court opines that the respondent – Indian Oil Corporation is required to examine whether the land furnished by Sri Banerjee has the capacity for storing 8000 kg LPG in cylinders by constructing a suitable godown on the dimensions of the land offered.*

*The respondent-Indian Oil Corporation will conduct a fresh Field Verification exercise in the light of the observations made above.*

*The respondent – Indian Oil Corporation shall be free to intimate the date of the proposed Field Verification exercise to the petitioner and the petitioner shall be entitled to offer any clarification as may be required by the experts.*

*The respondent – Indian Oil Corporation shall communicate the Field Verification Report inclusive of its reasoned order to the petitioner within a period of one week from the date of conclusion of the Field Verification exercise and will not give any final effect to the same for a further period of one week thereafter.*

**W.P. 7741(W) of 2015** stands accordingly  
**disposed of.**

*There will be no order as to costs.*

*Since no affidavit-in-opposition is used the  
allegations made in the writ petition are deemed not to  
have been admitted.*

*Urgent certified photocopy of this order, if applied  
for, will be made available to the parties subject to  
compliance with all requisite formalities.”*

22. Cursory reading of the aforesaid decision in **Palash Ray**'s case makes it clear that Hon'ble Single Judge proceeded on the premise that the dimension of the land advertised required to have a nexus to the capacity for constructing a godown for storing 8000 kg. LPG cylinders. We do not know what were the guidelines that were presented before the Court at the time of hearing and from what materials learned Counsel for the Oil Company in the aforesaid case came to submit that the land offered must be of rectangular size. So far as the present case is concerned, we have discussed different conditions in paragraphs 15, 16 and 17 *supra* and come to finding that the requirement of open land of 30M. X 25M. dimension and constructed LPG godown with storage capacity of 8000 kg. LPG are mutually exclusive. We are not in a position to concur with the observation of Hon'ble Single Judge in **Palash Ray**'s case that the dimension of the land advertised required to have a nexus to the capacity for constructing a godown for storing of 8000 kg. LPG cylinders.

Further, we find that Hon'ble Single Judge has not taken into consideration any document in arriving at his conclusion. Further without issuing any writ of mandamus the matter has been remanded back to the Oil Company to conduct fresh field verification exercise in the light of observation in the Judgement and take a decision in the matter. From the aforesaid order, we do not find the process of reasoning by which Hon'ble Judge has decided the case in favour of one party and against the other. In judicial proceedings, the whole process of reasoning has to be set out for deciding the case one way or the other. In view of such fact, we are constrained to hold that the Order in **Palash Ray's** case does not have any precedent value.

23. Hon'ble Single Judge in **Palash Ray's** case *supra*, having not laid down any law and no precedent value being attached to the said Judgement as held by us, the Judgement cited by Mr. Kalyan Bandopadhyay, learned Counsel for Respondent No. 1 in the case of **Burger Paints India Ltd. Vs. State of West Bengal & Ors.** (paragraph 14 *supra*) have no application to the facts of the present appeal.

24. Before going to discuss the legal point raised by Mr. Mitra, learned Senior Counsel appearing for the Appellant and Mr. Bandopadhyay, learned Senior Counsel appearing for the Respondent, we are constrained to hold here that we having already come to finding that the requirement of open land 30M. X 25M. and constructed godown with storage capacity of 8000 kg. LPG being mutually exclusive, it cannot be held that any applicant who has applied giving open land in offer, in the midst of process of selection switch on to the claim that the land

offered by him/her can house a godown to be constructed with storage capacity of 8000 kg.'s of LPG.

25. In view of our finding as above now the entire issue involved in this case revolves round the questions –

(i) whether by the last date of submission of application the Respondent No. 1 (Writ Petitioner) had offered required land as mentioned in her application for both the godown and showroom;

(ii) whether the lease of the land, which was offered for showroom had the currency on the last date of submission of application inasmuch as necessary correction was made subsequently i.e. on 20.08.2018 making the lease effective prior to last date of submission of application i.e. 18.10.2017.

26. The first question posed above is taken up for consideration on the basis of materials available on record. Taking into consideration the information supplied by Respondent no. 1 in her application vide Annexure-P1 to the Writ Petition, her application was selected and she was found to be eligible to participate in the draw of lot because more than one applicants were there in the same category. In the draw of lot, the Respondent No. 1 came out successful. Vide Annexure-P2 to the Writ Petition (dated 30.05.2018), Respondent No.1 was asked to give self-attested photocopy of certain documents along with such documents pertaining to

land/godown/showroom in the name of applicant or member of family unit, registered sale deed/gift deed/lease deed (15 years minimum)/mutation and Government record. She was also informed vide Annexure-P2 that further field verification shall be carried out by the officials of the Appellant Corporation, on a designated date and time wherein the information submitted by the applicant online in the application form shall be verified with the original document. Field verification was conducted on 30.06.2018 as found from Annexure-P3 to the Writ Petition in presence of Respondent No.1, her husband - Sri. Biswajit Saha, surveyor planner - B. N. Naskar and Senior Manager (Plant) of the Appellant Corporation. On field verification, it was found that the land for godown offered by the Respondent No.1 is measuring 25m. X 27m. X 24m. X 31m. (less than the dimensions mentioned in the application Annexure P-1 to the Writ Petition). On verification of land document during field verification, it was also found that the above dimension of land is mentioned in the conveyance deed submitted by the Respondent No.1 along with her application (Annexure-P1 to the Writ Petition). So far as the lease in respect of showroom is concerned, it was found that though the lease deed was executed before the date of submission of application the lease was to commence from 1<sup>st</sup> November, 2017 as per the terms of the lease.

27. Accordingly, vide Annexure-P3 to the Writ Petition dated 30.06.2018, Respondent No. 1 was informed about the aforesaid discrepancy in the land offered for godown as found on field verification and the land offered for showroom as found from the lease deed. She was asked to offer any alternate land for both

showroom and godown which should have been sold, leased out or gifted in her favour before the last date of submission of application.

28. Vide Annexure-P3 to the Writ Petition dated 30.06.2018, two letters in the aforesaid context were addressed to Respondent No.1. She vide Annexure-P4 to the Writ Petition answered to both the aforesaid letters. The relevant portion of Annexure-P4 submitted by the Respondent herself with her subscription addressed to Senior Manager (Plant) reads thus :-

- i) I have adjoining land, next to the offered land for Godown registered under Khatian No. 417 and 418, JL No. 9, Dag No. 85. However, the adjoining land is not registered yet.
- ii) I also have 5 Kathas land which is not adjoining the offered land for Godown as mentioned above. Since the land measures only 5 Kathas, this land by itself will not be enough for Godown.
- iii) Besides the above, I do not have any other land for Godown.
- iv) Regarding lease deed for showroom I wish to clarify that there has been a mistake on part of our lawyer regarding validity of the lease agreement. The owner of the offered land for showroom, Sri. Krishnadas Malakar has assured us that he will give a fresh

declaration confirming that lease agreement valid from  
16.10.2017.

She also asked for 7 (seven) days' time to put her papers in order in her letter vide Annexure-P4 to the Writ Petition.

29. Much after expiry of 7 (seven) days as sought by Respondent No.1 before the competent authority of the Appellants, she vide Annexure-P5 to the Writ Petition dated 28.08.2018, clarified that she is registered and recorded owner of the land measuring about 12 k. 13 inc. 27 Sq.ft. under R.S. & L.R. Dag No. 85, R.S. Khatian No. 417, 418, 125, LR Khatian No. 273 which includes common passage on two sides measuring about 20 ft. width on front side and 12 ft. width on northern side and it is further clarified by her that she has absolute right to use 50% of the common passage of both sides and in fact she has been using that passage as such. It was asserted by her that if it is considered as required measurement as required by the Corporation for the Godown purpose, she has excess land and it is evident on physical verification. It was further explained by Respondent No. 1 in Annexure P5 that the deed of conveyance inadvertently does not contain the common passage and as such in order to affectuate her legal right a site plan of the said land duly authenticated and confirmed by the authorised representative of the erstwhile owner has also been prepared. It was also clarified by her that the lease deed registered on 16.10.2017 has been duly rectified with the date of commencement of lease from the date of registration i.e. 16.10.2017.

30. We have to consider whether the godown land as asserted by Respondent No.1 as per the measurement claimed in Annexure-P5 to the Writ Petition was there before the authority before the last date of submission of application i.e. 18.10.2017. Respondent No.1 for the first time in Annexure-P5 to the Writ Petition dated 20.08.2018, a date subsequent to 18.10.2017 the last date of submission of application asserted that the land which she possess is far more in extent than the dimension of land required by the Appellant Corporation because she has absolute right to use 50% of common passage of both sides as described *supra*. She has asserted that she has been using the passage as such since the date of taking over possession of the land by her.

31. Such an assertion in Annexure-P5 by Respondent No.1 cannot be accepted without a pinch of salt for the following reasons :-

- (i) The deed of conveyance given along with the application Annexure P-1 to the Writ Petition does not mention her right over the passage as asserted by her and if she has any right over the passage, it came to light after the last date of submission of application i.e. 18.10.2017.
- (ii) If she has been using the passage in exercise of her absolute right from the date of possession of the land, she could have asserted such right over the passage on the date of field verification during which she was present. She has however not done that as found from the field verification report as discussed *supra*.

- (iii) In Annexure-P4 to the Writ Petition she has specifically mentioned that she has got no other land for godown except the land mentioned in Serial Nos. 1 and 2 of Annexure-P4 but she herself has admitted in Annexure-P4 that the adjoining land mentioned in Serial No.1 of Annexure-P4 has not been registered in her name and the land mentioned in Serial No.2 of Annexure-P4 is not sufficient for godown.

32. Though there is assertions by Respondent No.1 in Annexure-P5 to the Writ Petition dated 20.08.2018 for the first time regarding the extent of land which also includes 50% of passages being not there on record by the last date of submission of application the aforesaid land for godown being not also offered by the Respondent No.1 in the application cannot be accepted to be there on record by the last date of submission of application.

33. Here we feel expedient to address the submissions advanced by learned Counsels for both the parties on the issue. Mr. Kalyan Bandopadhyay, learned Senior Counsel appearing for the Respondent No.1 submits that in the additional affidavit filed in the Writ Petition the details of land offered by Respondent No. 1 has been given along with the map prepared by a qualified surveyor. That assertion having not been traversed by the Appellant Corporation, it is to be held that Respondent No.1 had offered the land as asserted in the additional affidavit by the prescribed date. Mr. Bandopadhyay, learned Senior Counsel relies on the case of **Dwarkanath Tiwari & Ors.** *supra* to substantiate his contention. Mr.

Jayanta Mitra, learned Senior Counsel for the Respondent No. 1 submits that the facts averred in the additional affidavit having seen the light of the day on the date it was filed, it cannot be said that the facts averred in the additional affidavit was there before the authority of the Appellant Corporation on the last date of submission of application i.e. 18.10.2017.

34. Doctrine of non-traversal or non-traverse which stands as a legal phrase for **“if not denied, accepted”** is a well settled position of procedural law enshrined in Order VIII Rule 5 of the Code of Civil Procedure. It means that where a material averment is passed over without specific denial, it is taken to be admitted. The provisions of Order VIII applies to suits and execution proceedings but in *stricto sensu* it does not apply to petitions under Article 226 and 227 of the Constitution of India though the general principles underlying the provisions in the order relating to pleadings and failure to traverse averments in a petition applied to such petitions under Article 226 and 227 of the Constitution of India.

Hon'ble Supreme Court in the case of **Balraj Taneja & Anr. Vs. Sunil Madan & Anr.** (AIR 1999 SC 3381) in paragraphs 28, 29 and 30 of the Judgment has held thus: -

*“.....But if the plaint itself indicates that there are disputed questions of fact involved in the case regarding which two different versions are set out in the plaint itself, it would not be safe for the Court to pass a Judgement without requiring the plaintiff to prove the facts so as to settle the*

*factual controversy. Such a case would be covered by the expression “the Court may, in its discretion, require any such fact to be proved” used in sub-rule (2) of Rule 5 of Order 8, or the expression “may make such order in relation to the suit as it thinks fit” used in Rule 10 of Order 8.*

*Therefore, in a suit for specific performance to plead readiness and willingness of the plaintiff to perform his part of the contract being a mandatory requirement, the Court, before passing judgment against defendant under Order 8 Rule 10 has to scrutinise the facts set out in the plaint to find out whether the requirements, specially those indicated in Section 16 of the Specific Relief Act, have been complied with or not.....”.*

35. In the present case also even if no affidavit in opposition has been filed and the facts averred in the additional affidavit has not been traversed we have to find out for our satisfaction whether Respondent No. 1 as Applicant has complied with the terms and conditions embodied in the invitation to offer and whether her offer is in consonance with the invitation to offer. We are conscious in taking such a view because of the authoritative pronouncement by Hon’ble Supreme Court in the case of **Ramana Dayaram Shetty** (paragraph 12 *supra*) wherein in paragraph 10 of the Judgement it has been held thus :-

“.....10. Now, there can be no doubt that what para (1) of the notice prescribed was a condition of eligibility which was required to be satisfied by every person submitting a tender. The condition of eligibility was that the person submitting a tender must be conducting or running a registered IInd Class hotel or restaurant and he must have at least 5 years' experience as such and if he did not satisfy this condition of eligibility, his tender would not be eligible for consideration. This was the standard or norm of eligibility laid down by Respondent 1 and since the Respondents 4 did not satisfy this standard or norm, it was not competent to Respondent 1 to entertain the tender of Respondents 4. It is a well-settled rule of administrative law that an executive authority must be rigorously held to the standards by which it professes its actions to be judged and it must scrupulously observe those standards on pain of invalidation of an act in violation of them. This rule was enunciated by Mr. Justice Frankfurter in **Viteralli v. Saton** [359 US 535 : Law Ed (Second series) 1012] where the learned Judge said:

“An executive agency must be rigorously held to the standards by which it professes its action to be judged .... Accordingly, if

dismissal from employment is based on a defined procedure, even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed .... This judicially evolved rule of administrative law is now firmly established and, if I may add, rightly so. He that takes the procedural sword shall perish with the sword.”

This Court accepted the rule as valid and applicable in India in **A.S. Ahluwalia v. Punjab** [(1975) 3 SCC 503] and in subsequent decision given in **Sukhdev v. Bhagatram** [(1975) 1 SCC 421], Mathew, J., quoted the above-referred observations of Mr. Justice Frankfurter with approval. It may be noted that this rule, though supportable also as an emanation from Article 14, does not rest merely on that article. It has an independent existence apart from Article 14. It is a rule of administrative law which has been judicially evolved as a check against exercise of arbitrary power by the executive authority. If we turn to the judgment of Mr Justice Frankfurter and examine it, we find that he has not sought to draw support for the rule from the equality clause of the United States

Constitution, but evolved it purely as a rule of administrative law. Even in England, the recent trend in administrative law is in that direction as is evident from what is stated at pp. 540-41 in Prof Wade's "*Administrative Law*", 4th Edn. There is no reason why we should hesitate to adopt this rule as a part of our continually expanding administrative law. Today with tremendous expansion of welfare and social service functions, increasing control of material and economic resources and large scale assumption of industrial and commercial activities by the State, the power of the executive Government to affect the lives of the people is steadily growing. The attainment of socio-economic justice being a conscious end of State policy, there is a vast and inevitable increase in the frequency with which ordinary citizens come into relationship of direct encounter with State power-holders. This renders it necessary to structure and restrict the power of the executive Government so as to prevent its arbitrary application or exercise. Whatever be the concept of the Rule of Law, whether it be the meaning given by Dicey in his "*The Law of the Constitution*" or the definition given by Hayek in his "*Road to Serfdom*" and "*Constitution of Liberty*" or the exposition set forth by Harry Jones in his

*“The Rule of Law and the Welfare State”*, there is as pointed out by Mathew, J., in his article on “The Welfare State, Rule of Law and Natural Justice” in *“Democracy, Equality and Freedom”* [ Upendra Baxi, Ed. : Eastern Book Co., Lucknow (1978) p. 28] “substantial agreement in juristic thought that the great purpose of the rule of law notion is the protection of the individual against arbitrary exercise of power, wherever it is found”. It is indeed unthinkable that in a democracy governed by the rule of law the executive Government or any of its officers should possess arbitrary power over the interests of the individual. Every action of the executive Government must be informed with reason and should be free from arbitrariness. That is the very essence of the rule of law and its bare minimal requirement. And to the application of this principle it makes no difference whether the exercise of the power involves **affectation of some right or denial of some privilege.....”**.

36. The aforesaid decision of Hon’ble Supreme Court in the case of **Ramana Dayaram Shetty** by now has attained the status of *locus classicus*. Taking a cue from the aforesaid Judgement we feel it expedient to say here that any act done in contravention of the norms vitiates the action irrespective of whether it involves

**“affectation of some right or denial of some privilege”**. In the present case as we have discussed *supra* and as found from the statement of Respondent No. 1 in Annexure-P4 to the Writ Petition the land for godown offered by her by the last date of submission of application i.e. 18.10.2017 was not in accordance with the norms specified in the advertisement i.e. the invitation to offer. Any development that took afterward has no consequence whatsoever so far as rejection of her application on the ground stated in Annexure-P6 to the Writ Petition is concerned.

37. It is also contended by Mr. Kalyan Bandopadhyay, learned Senior Counsel appearing for the Respondent that his case is covered by the decision of this Court rendered in the case of **Palash Roy**. In view of our discussion *supra* and we having already held that the requirement of open land with minimum dimension of 30m. X 25m. and constructed godown with storage capacity of 8000 kg. LPG being mutually exclusive, the aforesaid decision in the case of **Palash Roy** is of no avail to Respondent No.1, who now claims that on the land offered by her a godown with a storage capacity of 8000 kg. LPG can be constructed.

38. The case of **Rakesh Kumar Sharma** *supra* relied on by Mr. Mitra, learned Senior Counsel appearing for the Appellants though relates to selection process for a particular post prescribing a particular qualification as on the last date of submission of application can be applied to the facts of the present case to find out whether Respondent No. 1 was eligible with all the requirements as per norms in the advertisement issued by the Appellant Corporation as on the last date of submission of application i.e. 18.10.2017. The discussion *supra* clearly shows that neither on the last date of submission of application nor on the date of field

verification nor by the time she wrote Annexure-P4 to the Writ Petition to the authority, Respondent No. 1 had adequate land for godown as per requirement in the advertisement.

However, in Annexure P-7 to the Writ Petition which is a representation dated 05.09.2018 by the Respondent No.1 addressed to DGM (LPG Sales) Indian Oil Corporation Ltd. some allegations have been made against the Senior Manager (Plant) to the effect that Annexure P-4 to the Writ Petition was written by her under duress and coercion. There is, however, no pleadings to that effect in the Writ Petition. A Writ Petition is decided on the basis of affidavits filed by either parties. An Annexure to a Writ Petition is a document to substantiate the pleading or to clarify or explain the pleadings. Any assertions made in an Annexure cannot automatically take the status of pleading. In view of such position of law, we are constrained to hold that whatever has been written in Annexure P-4 by the Respondent No.1 has been written by her with her knowledge and conscience.

39. Coming to the next question of currency of lease as on the last date of submission of application, it is submitted by Mr. Mitra, learned Senior Counsel appearing for the Appellants that the lease deed though executed on 16.10.2017, it was to commence from 01.11.2017, a date posterior to the last date of submission of application i.e. 18.10.2017. Mr. Bandopadhyay, learned Counsel appearing for the Respondent No.1 relying on the case of **Prasad Technology Park (P) Ltd.** *supra* submits that unless the essential ingredients as contained in Section 105 of the Transfer of Property Act are altered, it cannot be said that the parties to the contract entered into a fresh transaction. Admittedly, the lease deed was rectified

between the lessee (present Respondent No.1) and the lessor on 20.08.2018 making the lease effective from the date of registration i.e. 16.10.2017. By the last date of submission of application, the currency of lease with effect from 16.10.2017 was not there on record. We are, therefore, posed with the question whether such rectification of lease deed between the lessor and the lessee on a posterior date to the last date of submission of application bears any meaning so far as the Appellant Corporation is concerned.

40. So far as decision relied on by Mr. Bandopadhyay, learned Senior Counsel appearing for the Respondent No. 1 in the case of **Prasad Technology Park (P) Ltd.** *supra* is concerned, it speaks of a relationship between the lessor and the lessee in the event of alteration made in the lease deed afterwards and we do not dispute the proposition of law that unless the essential ingredients as contained in Section 105 of the Transfer of Property Act are altered, it cannot be said that the parties to the contract entered into a fresh transaction. The aforesaid decision in any manner does not answer our question. Per contra the decision of Hon'ble Supreme Court in the case of **Annapurna Jaiswal** relied on by Mr. Mitra, learned Counsel appearing for the Appellants squarely applies to the facts of the present case as found from paragraphs 14 to 20 of the said Judgement.

41. In view of our discussion we are constrained to hold that on the last date of submission of application i.e. 18.10.2017, there was no subsisting lease in favour of Respondent No. 1 though the lease was commencing from a posterior date and it was rectified later by action of the lessor and the lessee.

42. Coming to the conclusion, we feel persuaded to refer to the Judgement of Hon'ble Supreme Court cited by Mr. Kalyan Bandopadhyay, learned Senior Counsel for the Respondent No.1 in **Gujarat Steel Tubes Ltd. & Ors.** wherein it has been held that appellate power interferes not when the order appealed is not right but only when it is clearly wrong. It is settled law that Judgements delivered by a Court is not to be interpreted. We do not propose to differentiate the words **"not right and wrong"**. But our discussion *supra* clearly shows that Hon'ble Single Judge in the impugned order not only reached a wrong conclusion but also proceeded to arrive at the finding on wrong premises so far as the godown land is concerned as well as the showroom land taken on lease is concerned. We are constrained to say so inasmuch as Hon'ble Single Judge on the question of lease has delved deep into the matter in the light of Section 105 of the Transfer of Property Act and question of possession, payment of salami etc. which according to us was not a proper consideration in the facts and circumstances of the case. Therefore, in our considered view the appellate power must interfere when the impugned order before us is clearly wrong.

43. Lastly much emphasis was given by Mr. Kalyan Bandopadhyay, learned Senior Counsel appearing for the Respondent on the aspect of equity which should address the grievance of Respondent No. 1. As discussed *supra* we are dealing with a commercial transaction casting some duties and obligations on either parties. In such a case the terms and conditions in the advertisement i.e. the invitation to offer has to be strictly complied with in letter and spirit as indicated in the invitation to offer itself or corresponding guidelines etc. We say so because there

should be certainty so far as terms, conditions and norms of selection is concerned. There can be no certainty in selecting a candidate for a dealership in such a case if variable interpretations on subjective and equitable principles are given to the terms and conditions enumerated in the advertisement or corresponding guidelines. It is, however, settled law that in a commercial transaction between the State or an entity of a State and a private individual there is vertical application of fundamental rights and any contract between the parties is subject to observance of principle of fundamental rights. Here in this case, however, there is no allegation of contravention of fundamental rights of Respondent No. 1. Rather if in spite of lack of eligibility the case of Respondent No. 1 is taken into consideration by applying any variable interpretation of the terms and conditions on the basis of subjective and equitable principles many of the candidates similarly circumstanced with Respondent No. 1 shall be deprived of their rights guaranteed under Article 14 of the Constitution of India.

44. Taking into consideration our discussion *supra* we are constrained to set aside the impugned Judgement/Order passed in W.P. 18735 (W) of 2018 on 06.12.2018 and accordingly allow the appeal.

45. There shall be no order, however, as to cost.

**I agree.**

**(Aniruddha Roy, J.)**

**(Chitta Ranjan Dash, J.)**