



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

% **Judgment reserved on: 09 October 2023**
Judgment pronounced on: 06 December 2023

+ W.P. (C) 2496/2020 & CM APPL. 8717/2020 (Stay), CM APPL. 26858/2022 (Recall Of O. D. 26-05-2022), CM APPL. 10831/2023 (Adjournment of Next Date of Hearing)

BHARAT HOTELS LTD. & ANR. Petitioners
Through: Mr. Neeraj Kishan Kaul and
Mr. Darpan Wadhwa, Sr. Advs.
with Ms. Sheyl Trehan, Ms.
Sonali Jaitley, Mr. Jaiyesh
Bakhshi, Mr. Ravi Tyagi, Mr.
Mayank, Ms. Manmilan Sidhu,
Ms. Sudiksha Saini, Mr. Ankit
Tyagi, Mr. Amer Vaid & Mr.
Vignesh, Advs.

versus

NEW DELHI MUNICIPAL COUNCIL Respondent
Through: Mr. Sanjay Jain, ASG with Ms.
Geeta Luthra, Sr. Adv. with Mr.
Ankur Chhibber, ASC with Mr.
Anshuman Mehrotra, Adv.
Ms. Kanika Agnihotri, ASC
with Ms. Snehal Kaila, Adv.
and Mr. Radha Krishan,
Director Estate – I, NDMC.

+ W.P. (C) 2497/2020 & CM APPL. 8719/2020 (Stay), CM APPL. 26863/2022 (Recall Of O. D. 26-05-2022), CM APPL. 10833/2023 (Adjournment of Next Date of Hearing)

BHARAT HOTELS LTD. & ANR. Petitioners

Through: Mr. Neeraj Kishan Kaul and
Mr. Darpan Wadhwa, Sr. Advs.



with Ms. Sheyl Trehan, Ms. Sonali Jaitley, Mr. Jaiyesh Bakhshi, Mr. Ravi Tyagi, Mr. Mayank, Ms. Manmilan Sidhu, Ms. Sudiksha Saini, Mr. Ankit Tyagi, Mr. Amer Vaid & Mr. Vignesh, Advs.

versus

NEW DELHI MUNICIPAL COUNCIL Respondent

Through: Mr. Sanjay Jain, ASG with Ms. Geeta Luthra, Sr. Adv. with Mr. Ankur Chhibber, ASC with Mr. Anshuman Mehrotra, Adv.
Ms. Kanika Agnihotri, ASC with Ms. Snehal Kaila, Adv. and Mr. Radha Krishan, Director Estate – I, NDMC.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA

J U D G M E N T

1. Bharat Hotels, a licensee of the respondent **New Delhi Municipal Council**¹ has petitioned this Court impugning the Notice dated 13 February 2020 demanding arrears of license fee as well as a communication of the same date purporting to terminate the **License Agreement**² dated 22 April 1982. While W.P. (C) 2496 of 2020 came to be instituted first and assails the demand in respect of alleged arrears of license fee, W.P. (C) 2497 of 2020 came to be preferred once the Council proceeded to issue the Notice of Termination. For

¹ Council

² License Agreement



the purposes of succinctly capturing the essential facts leading up to the institution of the two writ petitions, we deem it apposite to refer to the facts as set out in W.P. (C) 2497 of 2020.

2. On 22 April 1982, a License Agreement came to be executed by the Council in favour of the petitioner. As would be evident from the various recitals forming part of the said License Agreement, the same pertained to a plot of land admeasuring 6.0485 acres in the commercial complex at Barakhamba Lane, New Delhi. The license came to be granted in favour of the petitioner with the avowed objective of construction and commissioning of a Five Star Hotel as also incorporating various provisions enabling the petitioner to create sub-licenses and thus apart from the Five Star Hotel, establishing a commercial hub as part of the complex. The salient provisions of the License Agreement are extracted hereinbelow:-

“This agreement of licence made at New Delhi on this 22nd day of April, 1982 (One thousand nine hundred and eighty two) between the New Delhi Municipal Committee, Parliament Street, New Delhi (hereinafter called the Licensor, which expression shall, unless requires another and different meaning thereof, include its successors and assignee), of the one part and M/s Bharat Hotels Ltd. 6, Tilak Marg, New Delhi, a Company registered under the Companies Act, 1956 (hereinafter called the licensee which expression shall, unless the contract required another and different meaning include its executors, successors, administrators assigns) having its registered office at 6, Tilak Marg. New Delhi acting through its Managing Directors by the Board of Directors vide Resolution No.2 dated 04.01.1982 of M/s Bharat Hotels Ltd. to execute this deed, on behalf of the licenceors of the other part.

Whereas through licence deed dated 11th day of March, 1981 the licensor had entered into agreement with M/s Delhi Automobiles Pvt. Ltd. 3/15-A. Asaf Ali Road, New Delhi whereby the licensor granted licence to M/s Delhi Automobiles Pvt. Ltd. to use the plot of land measuring 6.0485 acres (approximately) in commercial complex at Barakhamba Lane, New Delhi for the construction and commission of a 5 Star Hotel Building latest by



31.12.1984. And whereas clause No.2 of the said licence deed was to the effect the licensee (M/s Delhi automobiles Pvt. Ltd) hereinafter called as former licensee shall within a period of 12 calendar months from the date of consignment of the licence agreement from a public limited company in constituted on the terms and conditions incorporated in the said agreement dated 11.03.1981. And whereas former licensor have floated a Public Limited Co. under the name and style of Bharat Hotels Ltd. registered as a Company under the Companies Act, 1956 and has desired that the licence agreement be now executed with M/s Bharat Hotels Ltd. in terms of clause 2 of the Licence deed dated 11.03.1981 entered by between NDMC and former licensee, therefore, this licence deed witnesseth as under:-

1. The licence shall be for a period of 99 years with effect from 11th March, 1981.

xxx

xxx

xxx

3. Save as provided in clause 2, the licence fee of Rs.1,45,00,000/- (Rupees one crore forty five lacs) P.A. only in respect of the said plot of land shall commence from the date of handing over the possession of the said plot of land by the licensor to the licensees including former licensees and the licence fee of Rs. 1,45,00,000/- (Rupees one crore forty five lacs) only shall be payable annually in advance latest on the anniversary of handing over of the possession of the said plot of land on which the annual advance licence fee falls due in each year. The licensees shall pay an interest at 15% per annum to the licensor on the licence fee remaining outstanding beyond the due date and falling in arrears. Such interest shall be charged for full month if the payment of licence fee is not made by the due date with arrears, if any, and such interest shall continue to accrue to the licensor month by month till the accounts are finally squared up.

4. In the event of the licensees falling to make the payment of licence fee, interest due thereon or any other payment due against the licensees for any reason whatsoever of the amount demanded by the licensor in full or in part, the licensor shall have absolute discretion without further reference to the licensees to revoke/cancel the licence with immediate effect for running the said hotel in terms of this licence, to take possession of the licensed premises by recourse to law as provided in the public premises (Eviction of Unauthorised Occupants) Act, 1971 or any other such law in force at that time, after revocation of the licence and the Licences shall have no claim on the premises but only seek arbitration under clause 5 of this agreement.

xxx

xxx

xxx



6. The license will be liable for termination if at any time the licencees commit any breach of the terms, conditions and covenants on their part to be observed and performed under this license deed. But before any action is taken in this behalf, the licensor shall communicate in writing to the licencees M/s. Bharat Hotels Ltd the breach, if any, of the terms and conditions on their part to be observed and performed under this licence deed and it will be open to the licencees to satisfy the licensor that there had in fact been no such alleged breach to the satisfaction of the licensor.

XXX

XXX

XXX

11. The licencees shall not be at liberty in any way to sublet, underlet, encumber, assign or transfer their rights and interest or part with possession of the land and the building thereon or any part thereof or share therein to any person, directly or indirectly without the previous written consent of the licensor. But the licencees shall have the right to sub-license the licensed property as stipulated in clause 29 of this license agreement.

12. The allotment of land measuring about 6.0485 acres will be allotted to the licencees on license basis for the duration of the construction of the building, its furnishing, providing facilities and services till completion of the building and commissioning of the Five Star Hotel for the period of license for 99 years with effect from 11th March 1981.

13. The licencees shall have a bare license only to enter upon the piece of land to be allotted by the New Delhi Municipal Committee for the purpose of building and executing works thereon as hereinafter provided in this license agreement and for commissioning a Five Star Hotel conforming to the approved standard for Five Star Hotel rating prescribed by the Govt. of India, Department of Tourism. The licencees shall be deemed to be bare licencees only of the land subject to payment of license fee as has been agreed to between the licencees M/s. Bharat Hotels Ltd. and the licensor, New Delhi Municipal Committee.

14. Nothing contained in these documents shall be construed as a demise in law of the said land hereby agreed to be demised or any part thereof so as to give to the licencees, M/s Bharat Hotels Ltd. any legal right, title or interest therein. The licencees shall only have a license to enter upon the said land for the purpose of building and executing works thereon as hereinafter provided and for running a Five Star Hotel conforming to the approved Five Star rating prescribed by the Govt. of India, Department of Tourism.

XXX

XXX

XXX



29. The licencees shall run the Five Star Hotel themselves. However, the licencees may allow sub-licencees within the period of license for running car parking, cycle scooter stand for parking and shopping arcade, banks offices (within the shopping arcade) etc. The licencees shall be further responsible for the conduct of various sub-licencees shall be further responsible to answer that the sub-licencees shall not get any right over and above the rights and privileges of the licencees.

30. Save as provided in the proceeding area, the license deeds during the tenure of the license shall not transfer, assign or part with the building any portion thereof permanently or temporarily to anybody else.

xxx

xxx

xxx

41. In the event of license having both termination earlier in the terms of the relevant clause, the licencees shall vacate the premises in a peaceful manner and clear all the dues of the licensor forthwith.

42. In the event of breach of any of the terms and conditions of the licence, the licensor shall terminate and revoke the licence. On the revocation being made, it shall be the duty of the licencees to quit and vacate the premises without any resistances and obstruction and give the complete control of the premises to the licensor.

43. If the licencees default in the terms of the licence fee or cease to do business in the said Five Star Hotel Building or commit breach of any of the terms of the licence fully or otherwise, the licensor may give a notice in writing the licencees for remedying the breach and if the licencees fail to do so within a reasonable period as may be determined by the licensor, the licensor may terminate licence forthwith.

xxx

xxx

xxx

45. The licence shall stand ispo-facto determined and possession/ occupation transferred to the licensor without any right to compensation whatsoever to the licencees in any of the following events:-

- a. If the licencees being any individual or if a firm, any partner in the said firm shall die or any time be adjudged insolvent or shall have a receiving order or order for administration of his estate made against him or shall take any proceedings for liquidation or composition under any Insolvency Act for the time being in force or made any conveyance or assignment of his effects or enter into any arrangements or composition with the creditors or suspend



payment or shall introduce a new partner or shall change the constitution of the partnership or if the firm is dissolved under the Partnership Act; or

b. If the licencees being a company shall pass a Resolution or the court shall made an order for the liquidation of its affairs or a receiver or manager on behalf of the debenture holders shall be appointed or circumstances shall have arisen which entitle the court or debenture holders to appoint a receiver or manager.

Provided always that such determination shall not prejudice any right to action or remedy which shall have accrued or shall thereafter accrue to the licensor.

xxx

xxx

xxx

48. The license fee will be enhanced after every 33 years provided that the increase in the license fee at each such time shall not exceed 100% of that immediately before the enhancement is due. For determination of the increase the percentages increase would depend on the market value of the plot at the relevant time. In this regard, decision of the licensor shall be final and binding on the licencees.”

3. In terms of the provisions of the License Agreement, the Five Star Hotel was to be established strictly in accordance with the time frames stipulated therein and the license itself was for a period of 99 years commencing from 11 March 1981. In terms of Clause 29 extracted above, the petitioner was permitted to create sub-licenses for car parking, cycle and scooter stands, a shopping arcade, banks, offices and other commercial establishments. The petitioner while being accorded that right stood restrained in terms of Clause 30 from transferring, assigning or parting with the building or any portion thereof permanently or temporarily.

4. Clause 48 made provisions for enhancement of license fee, which was payable every 33 years subject to the condition that the increase in the license fee would not exceed 100% of that immediately



prevailing in the previous term of 33 years. The Council while determining the increase was entitled to take into consideration the market value of the plot as prevailing at the relevant time. In terms of the License Agreement, the original license fee was fixed at INR 1.45 crores payable annually and in advance.

5. The record further bears out that the settlement of the land in question came to be challenged by way of a writ petition titled **S.S Sobti vs. Union of India & Ors.**³ The petitioner assailed the entire transaction asserting that the writ petitioner had been granted the license on political considerations and that the settlement itself was violative of public interest having been concluded at a price lower than what the property could have fetched in an auction or tendering process.

6. As noticed above, amongst the various objections that were raised, the petitioner also questioned the grant of the licence by way of a negotiated arrangement. Negating the aforesaid challenge, the Division Bench of the Court in *S.S Sobti* held as follows:-

“8. The petitioner's challenge based on Section 238 (2) (b) of the Punjab Municipal Act, 1911, is based on the contention that under S. 238(2)(c) all property of the Committee vests in the State Government on the supersession of the Committee. It is contended that Shri P.N. Behl could, therefore, not grant a license to the 4th respondent. This point has no substance in the present case because the New Delhi Municipal Committee was superseded on 27th Feb., 1980. The plot in question was neither at the disposal of the Committee nor was the property of the Committee on that date or even later. The allotment had been cancelled in 1978, so this question did not arise. It was on 17th Feb., 1981, by letter Annexure 'R-11' filed along with the Government's reply to the show cause notice that this land was placed at the disposal of the New Delhi Municipal Committee in order to set up a 5 Star Hotel to meet the requirements of the Asian Games 1982. It was stated in

³ 1981 SCC Online Del 254



this letter that a formal lease would be drawn up later, but the land was being allotted to meet the requirement of hotel accommodation and the hotel was to be built by the New Delhi Municipal Committee. It was provided that land should not be sublet in favour of any other party, but such arrangement could be made for constructing and running the hotel as would not involve the subletting of the plot. Thus, the land was placed at the disposal of the New Delhi Municipal Committee which was already superseded and hence the powers in relation to this land, granted by the allotment (which was to become a lease) has to be exercised only by Shri P.N. Behl under S. 238(2)(b) of the Act. As a suit was pending in relation to this very arrangement it appears that there was a compromise resulting in the license in favour of the Delhi Automobiles (P.) Ltd., in Mar. 1981.

9. The transaction is, therefore, not hit by S. 238(2)(c) of the Act as Shri P.N. Behl, who can be described as the Administrator of that Committee for purpose of convenience of expression, was not transferring or selling any property vested in the Union of India under S. 238(2)(c), but was acting in accordance with the allotment made by the Union Government of its own land. Learned counsel for the petitioner has urged that the subsequent transaction, is invalid because Art. 299 of the Constitution had not been complied with. However, it is clear from the letter of allotment that intimation has been given and a later formal lease deed is to be drawn up. If no such lease is granted and the transaction does not go through as contemplated, then of course, the license by which the hotel is to be set up and run will also fall through. However, in view of the terms of the allotment which is to be followed by a formal lease, it is clear that what has happened is that the New Delhi Municipal Committee is setting up a hotel through the agency of M/s. Delhi Automobiles (P.) Ltd., and this is what was contemplated by the allotment. It is generally the practice in the matter of allotments and sales, etc., to first take provisional action and then to draw up the formal deed later, as the completion of the same takes time.

10. This brings us to the next question which is whether the 4th respondent has been granted this license on political considerations. We do not really think that this question arises. The facts are quite clear. Originally, this hotel plot was given to M/s. Delhi Automobiles (P.) Ltd., after tenders had been obtained in 1976. From facts brought to our notice there appears to have been a number of tenderers including some well-known hoteliers. The highest offer was of M/s. Delhi Automobiles (P.) Ltd. We have been shown some comparative figures of the rates at which plots were given to Maurya Hotel and Taj Hotel in more or less the same period for outright transfers, we do not find the initial license-fee



to be any lower. Thus, if the transaction at the initial stage, was made in accordance with an appropriate procedure, all subsequent events would flow from the same. Those events, were the cancellation of the allotment bringing to an end the initial transfer the filing of the suit in 1979 and the compromise in the suit. It may be said that there was no necessity to compromise the suit, and even it has been suggested that the suit for specific performance was not meritorious. We cannot go into this question, as a decree of the Court was pasted. As pointed out by learned Solicitor General, it would have been difficult to get some new party to agree to take the hotel while the suit was pending. Keeping in view the large investment necessary for setting up a hotel, we agree that it would be almost impossible for some third party to take the hotel which he might lose in case the suit was decreed in favour of the plaintiff. In view of the fact that the license fee of Rs. 37.78 lakhs has been raised to Rs. 1.45 crores, it does seem that the Union of India and the New Delhi Municipal Committee are not worse off financially than if the original tender of 1976 or 1977 had been acted upon.

11. Apart from the fact just set out, we may now examine the contention of the petitioner to the effect that the only way in which the New Delhi Municipal Committee could have entered into the arrangement was by examining open public tenders. It is submitted that all other methods are barred. We cannot agree with this. Even in *Ramana Dayaram Shetty's case* (AIR 1979 SC 1628) the Supreme Court noted that it was open for the authority to give the restaurant on a negotiated basis without inviting tenders. That case was based on what happened when tenders were actually invited. The question whether open tenders are to be invited and the public generally allowed to participate in a particular transaction, depends more largely on the nature of that transaction. The field of choice should naturally be as large as possible. Generally, the subject-matter of the transaction governs what procedure should be followed. If a building has to be constructed, then the generally accepted pattern is to allow recognised contractors to submit their tenders. In a transaction which involved both financial commitment such an investing in a hotel building and also the obligation to run that hotel, the field of choice was obviously very limited. It is well known that the hotel industry in India is not much developed. Only a handful of hotels are to be found even in larger towns. Keeping in view the nature of the transaction, we think that it would be enough for the New Delhi Municipal Committee to ask some recognised hoteliers and others of that type and capable of undertaking a big Project of this type and capable of raising the necessary finance to make a restricted tender. In such a case the feasibility of the project and its ultimate successful completion is



of greater importance than the question whether a larger or lesser sum can be realised from the tenderer. This sort of analysis has to be made in all big construction contracts. It is not for us to say how it should be done, but we find nothing illegal in the manner of the tender and the initial payment in 1976. The next stage was reached when this whole project was cancelled in 1977. After its cancellation, the question of re-opening the transaction and making the hotel arose because of the proximity of the Asian Games which made the lack of hotel accommodation in New Delhi obvious to all. At that stage, it was a question of reversing the decision to abandon the project. It may be noticed that if it was a mere political question, then the old tender could have been accepted which was for Rs. 37.78 lakhs annually as license fee. Keeping in view the rise in the land value, it seems that the New Delhi Municipal Committee took care that the figure was increased and Rs. 1.45 crores annually does not seem to be at all low. At least we do not see why it is illegal to revive the project, especially when it had obviously become necessary in view of the forthcoming Asian Games, 1982.

12. It must also be kept in view that the sum of Rs. 1.45 crores is the amount to be paid out of the earnings of the hotel and, therefore, has to be earned from the hotel business. As the hotel is meant for public purpose, there is a limit to which the amount can be raised. The purpose of the license is such that it requires a very rapid construction of a large building. It does not seem to us that there are many persons who can undertake to build a large building at high speed. If there are some who have been affected adversely by the decision taken by the Union Government and the New Delhi Municipal Committee, they have not moved this Court. In the circumstances, we do not find that the transaction can be treated as a political act in itself.

13. Some reference was made to what was stated by the 7th respondent in Parliament in a debate concerning the same issue as is before us. It is said that the Minister concerned described the decision as a political one. We are not at all concerned with that debate. But, it may incidentally be mentioned that the Minister stated that the license was not given because the Government changed, and then it was stated that; this Government can also take a political decision and the Government decided to give the plot to the New Delhi Municipal Committee. This does not in any way mean that the decision to allot the plot to the 4th respondent was a political decision because it seems to flow out of the events already narrated above. In fact it seems that the decision to allot the plot in favour of M/s. Delhi Automobiles (P.) Ltd., was taken much earlier and the politics concerning the same arose later. We are not concerned with those political matters. We have to see the legality



of the transaction and the fact that it was not arbitrary. We are of the view that the decision was not arbitrary, but arose out of the circumstances when this very plot was originally to be licensed to the 4th respondent, M/s. Delhi Automobiles (P.) Ltd, for building and running a hotel, but the transaction was cancelled in 1977 leading to the filing of the suit. When the transaction was renewed, it could be granted to the same party and this is particularly so when a much higher amount of licence fee was agreed to by the party concerned. We would accordingly dismiss the petition in limine.

Petition dismissed”

7. Pursuant to the rights as conferred in terms of the License Agreement, the petitioner is stated to have created sub-licenses during the original term of the lease itself. Details of those sub-licenses have been collectively placed on the record as Annexure P-6. The petitioners also rely upon a letter dated 10 September 1985 in terms of which the respondents accorded it permission to enter into sub-license agreements for permitting the premises being licensed to offices, banks and other commercial establishments. On 17 November 1989, a Completion Certificate is also stated to have been applied for and duly granted in its favour.

8. On 04 February 1994, the petitioner entered into a sub-license agreement with M/s Sonia Farms Pvt Ltd in respect of shop/office space nos. 28, 29, 30 and 31 situated on the ground floor of the World Trade Centre. In terms of Clause 15 of that Agreement, the sub-licensee stood proscribed from undertaking any illegal activity and in case of violations of its terms, the sub-license being liable to be terminated. The sub-licensee was further placed on caution from undertaking any business or activity which may be regarded as a contravention of any of the terms and conditions stipulated in the original License Agreement. M/s Sonia Farms Pvt. Ltd. had originally



nominated one Mr. Amresh Bahadur as its nominee in terms of the sub-license agreement. On or about 25 April 2011, Mrs. Ghazala Shameem and Mr. Owais Usmani were substituted in his place. On 31 March 2016 and 04 May 2016, M/s Indian Wind Power Association was substituted as the nominee by way of an endorsement made on the original sub-license agreement dated 04 February 1994.

9. It is asserted by the petitioner that Mrs. Ghazala Shameem and Mr. Owais Usmani on 01 May 2016 proceeded to execute four documents titled as 'Full and Final Agreement of Sale, Purchase and Transfer' in favour of M/s Indian Wind Power Association. It is the specific and asserted case of the petitioner that the aforesaid transfer instruments were executed by Mrs. Ghazala Shameem and Mr. Owais Usmani without its consent or knowledge.

10. The aforesaid sale agreements are thereafter stated to have been presented for registration before the concerned Sub-Registrar. On 12 January 2017, the Collector of Stamps issued a notice to the petitioner requiring it to produce the original License Agreement. The petitioner submitted a response on 08 June 2018 asserting that it was a mere license granted by the Council as opposed to the tentative view expressed by the Collector of Stamps viewing the instrument as a lease. On 26 June 2018, the Collector of Stamps passed an order declaring the License Agreement to be in the nature of a lease and framed consequential directions for payment of deficit stamp duty.

11. In the meanwhile and upon coming to know of the presentation of the transfer documents which had been executed by Mrs. Ghazala Shameem and Mr. Owais Usmani, the petitioner addressed the communication dated 12 July 2018 requiring them to withdraw and



cancel the instruments purported to have been presented for registration forthwith. It was specifically asserted that neither of the two individuals noted above had a right to sell or transfer ownership of the sub-licensed premises and which continued to vest with the Council. Purporting to act on the aforesaid communication, M/s Indian Wind Power Association vide its letter dated 17 July 2018 apprised the Sub-Registrar of its intent to withdraw from the aforesaid transaction and consequently requesting the authority not to take further action in connection therewith.

12. The petitioner also appears to have informed the Council of the passing of the order dated 26 June 2018 by the Sub-Registrar by way of various communications which have been placed on the record. Parallely, it also preferred a revision petition under Section 56 of the **Indian Stamp Act 1899**⁴, before the **Chief Controlling Revenue Authority**⁵ assailing the view as taken by the Collector of Stamps and embodied in the said order dated 26 June 2018. The aforesaid revision is stated to be pending before the said authority.

13. During the pendency of the aforesaid revision petition, the Collector of Stamps proceeded to adopt coercive measures for recovery of the deficit stamp duty as adjudicated constraining the petitioner to file W.P. (C) 11232 of 2018 before this Court. On 25 October 2018, the Court disposed of the writ petition restraining the Collector of Stamps from taking any coercive steps till the CCRA takes a final decision on the revision petition which had been preferred.

⁴ The 1899 Act

⁵ CCRA



14. On 20 May 2019, the Council is stated to have issued a demolition order in purported exercise of powers conferred by Section 247 of the **New Delhi Municipal Council Act, 1994⁶** alleging that certain parts of the premises had been constructed in violation of the sanctioned building plans. The petitioner is stated to have taken an objection to the aforesaid process as initiated and ultimately approached this Court by way of W.P. (C) 6239 of 2019. By way of a detailed order passed on 29 May 2019, the Court prima facie found that the demand of misuse charges and penalties as contained in the Demand Notice dated 22 March 2019 as well as the Demolition Order dated 20 May 2019 were untenable. On a due consideration of the rival submissions, the Court proceeded to place the aforementioned two orders in abeyance. We are informed that the aforesaid writ petition is still pending consideration of this Court.

15. It has also come on the record that in the meanwhile, the Council also denied the petitioners rights of renewal in respect of various operating licenses for swimming pool, restaurants, nightclub/discotheque, wellness spa etc. constraining it to file separate applications in W.P. (C) 6239 of 2019. Pursuant to the directions issued on those applications, those licenses are stated to have been extended on provisional basis periodically. On 13 February 2020, the respondent simultaneously initiated two actions. It firstly raised a Demand Notice of that date purporting to recover INR 1063,74,59,852/- as arrears of license fee calculated at the rate of INR 98 crores per annum with effect from 11 March 2014 along with interest, arrears thereof, as well as alleged non-payment of statutory

⁶ 1994 Act



dues.

16. It becomes pertinent to note that the aforesaid notice rests on an understanding of Sections 141 and 416 of the 1994 Act and the respondents taking the position that the cap of 100% as placed in terms of Clause 48 of the License Agreement is inconsistent with the requirement of Section 141(2) of the 1994 Act and which obliges the Council to ensure that any property sold, leased or otherwise transferred would be at a value which would be equivalent to what could have been fetched in “*normal and fair competition*”. Sections 141 and 416 of the 1994 Act are reproduced hereinbelow:-

“141. Disposal of immovable property. — (1) The Chairperson may, with the sanction of the Council, lease, sell, let out on hire or otherwise transfer any immovable property belonging to the Council.

(2) The consideration for which any immovable property may be sold, leased or otherwise transferred shall not be less than the value at which such immovable property could be sold, leased or otherwise transferred in normal and fair competition.

(3) The sanction of Council under Section 140 or this section may be given either generally for any class of cases or specially for any particular case.

(4) Subject to any conditions or limitation that may be specified in any other provisions of this Act the foregoing provisions of Section 140 and this section shall apply to every disposal of property belonging to the Council made under, or for any purpose of this Act.

(5) Every case of disposal of property under sub-section (1) of Section 140 shall be reported by the Chairperson without delay to the Council.

416. Repeal and savings.—(1) As from the date of the establishment of the Council, the Punjab Municipal Act, 1911 (Punjab Act 3 of 1911), as applicable to New Delhi, shall cease to have effect within New Delhi.

(2) Notwithstanding the provisions of sub-section (1) of this section;



(a) any appointment, notification, order, scheme, rule, form, notice or bye-law made or issued, and any license or permission granted under the Act referred to in sub-section (1) of this section and in force immediately before the establishment of the Council, shall, in so far as it is not inconsistent with the provisions of this Act continue in force and be deemed to have been made, issued or granted, under the provisions of this Act, unless and until it is superseded by any appointment, notification, order, scheme, rule, form, notice or bye-law made or issued or any license or permission granted under the said provisions;

(b) all debts, obligations and liabilities incurred, all contracts entered into and all matters and things engaged to be done by, with or for the New Delhi Municipal Committee before the establishment of the Council shall be deemed to have been incurred, entered into or engaged to be done by, with or for the Council under this Act;

(c) all budget estimates, assessments, valuations, measurements or divisions made by the New Delhi Municipal Committee shall in so far as they are not inconsistent with the provisions of this Act, continue in force and be deemed to have been made under the provisions of this Act unless and until they are superseded by any budget estimate, assessment, valuation, measurement or division made by the Council under the said provisions;

(d) all properties, movable and immovable and all interests of whatsoever nature and kind therein, vested in the New Delhi Municipal Committee immediately before the establishment of the Council shall with all rights of whatsoever description, use, enjoyed or possessed by New Delhi Municipal Committee vest in the Council;

(e) all rates, taxes, fees, rents and other sums of money due to the New Delhi Municipal Committee immediately before the establishment of the Council shall be deemed to be due to the Council;

(f) all rates, taxes, fees, rents, fares and other charges shall, until and unless they are varied by the Council continue to be levied at the same rate at which they were being levied by the New Delhi Municipal Committee immediately before the commencement of this Act;

(g) all suits, prosecutions and other legal proceedings instituted or which might have been instituted by or



against the New Delhi Municipal Committee may be continued or instituted by or against the Council.”

17. The respondents further asserted that the 100% cap would not be in accord with the principles enunciated by the Supreme Court in the **Presidential Reference judgment i.e., Natural Resources Allocation in Re., Special Reference No. 1 of 2012⁷** and which had set out the principles which must necessarily guide the transfer of public properties.

18. The Notice of Demand dated 13 February 2020 is extracted hereinbelow:-

“File No. U-34031/02/2019/Estate I* Com. No. 21690
NEW DELHI MUNICIPAL COUNCIL
PALIKA KENDRA: NEW DELHI

No. D-69/SOI (Estates--)/2020

Dated: 13.02.2020

**NOTICE OF DEMAND TO PAY ARREARS OF LICENSE
FEE WITH EFFECT FROM 11.03.2014**

Whereas an agreement of license was made on 11th March, 1981 between the New Delhi Municipal Committee and M/s. Delhi Automobiles Private Limited for a period 99 years, from the date of execution of the license agreement for construction of a Hotel on a plot of land measuring 6.0485 acres at Bara Khamba Lane, New Delhi.

Whereas M/s. Delhi Automobiles Private Limited was to form a Public Limited Company within a period of 12 months from the date of commencement of License Agreement and apply for the transfer of license to the said Public Limited Company.

Whereas M/s. Delhi Automobiles Private Limited formed a Public Limited Company i.e. M/s. Bharat Hotels Limited.

Whereas an Agreement of License was made between the New Delhi Municipal Committee and M/s. Bharat Hotels Limited on 22.04.1982 in continuation of the earlier agreement dated 11th March, 1981.

Whereas after the enactment of the NDMC Act, 1994, the New Delhi Municipal Committee became the New Delhi Municipal Council.

⁷ (2012) 10 SCC 1



Whereas in accordance with the License Deed dated 11.03.1981, License Fee was fixed at Rs. 1.45 crore per annum in respect of the above mentioned property admeasuring 6.0485 Acres.

Whereas Clause-48 of the License Deed dated 22.04.1982 provided as under:-

"The license fee will be enhanced after every 33 years provided that the increase in the license fee at each such time shall not exceed 100% or that immediately before the enhancement is due. For determination of the increase the percentage increase would depend on the market value of the plot at the relevant time. In this regard decision of the licensor shall be final and binding on the licensees."

Whereas Sections 141 (1) and (2) of the NDMC Act, 1994 provide as under:-

"Disposal of immovable property.-(1) The Chairperson may, with the sanction of the Council, lease, sell, let out on hire or otherwise transfer any immovable property belonging to the Council.

(2) The consideration for which any immovable property may be sold, leased or otherwise transferred shall not be less than the value at which such immovable property could be sold, leased or otherwise transferred in normal and fair competition."

Whereas the Sections 416 (1) and (2) of the NDMC Act, 1994 provide as under:-

"Repeal and savings. -- (1) As from the date of the establishment of the Council, the Punjab Municipal Act, 1911 (Punjab Act 3 of 1911), as applicable to New Delhi, shall cease to have effect within New Delhi.

(2) Notwithstanding the provisions of sub-section (1) of this section, -- (a) any appointment, notification, order, scheme, rule, form, notice or bye-law made or issued, and any licence or permission granted under the Act referred to in sub-section (1) of this section and in force immediately before the establishment of the Council, shall, in so far as it is not inconsistent with the provisions of this Act continue in force and be deemed to have been made, issued or granted, under the provisions of this Act, unless and until it is superseded by any appointment, notification, order,



scheme, rule, form, notice or bye-law made or issued or any licence or permission granted under the said provisions;

Whereas though the aforesaid clause 48 purports to place a cap of 100% on the enhancement of license fee, significantly, the same clause also mandates market value of the plot to be taken into consideration.

Whereas, irrespective of the above, the said restriction is otherwise contrary to the law laid down in the NDMC Act, besides being opposed to public policy and is thus non-est, inoperative and unenforceable; the same cannot and does not bind the NDMC to the extent that it places restriction on increase upto 100% only. The above legal position mandates the NDMC to make best use of its immovable property to ensure that the same fetches a value, which is not less than what it would fetch in normal and fair competition.

Whereas it is otherwise obligatory for the NDMC, in terms of the Presidential Reference Judgment [(2012) 10 SCC 1] of the Hon'ble Supreme Court of India that as a public body, it makes best endeavour to ensure that an asset belonging to the public is not an under-yielding asset but that the same yields maximum return which can be fetched in the open market by adopting a system which facilitates such maximum return.

Whereas the realization of best commercial value from its immovable properties is also a mandate as per section 141 (2) of the NDMC Act, 1994.

Whereas the cap of 100% as provided in clause 48 of the licence agreement ibid is inconsistent with the provisions of Section 141(2) of the NDMC Act, 1994; the same is also inconsistent with the ratio of the aforesaid Presidential Reference Judgment [(2012) 10 SCC 1] passed by the Hon'ble Supreme Court of India.

Whereas this cap of 100% is not binding within the meaning of Section 416(2) of the NDMC Act, 1994.

Whereas the NDMC was, therefore, advised not to restrict the enhancement of license fee to a mere 100% of Rs. 1.45 crores per annum, as the said enhanced amount would substantially be lower in comparison to the prevalent market value in general and the value being fetched/ fetchable from other similarly/ identically used properties in particular, besides being detrimental to the public interest and thus being contrary to the public policy.

Whereas the NDMC passed a resolution No. 15 (L-01) dated 26.04.2016 to have the market rate of the above property in the occupation of M/s BHL, determined through SBI CAP.



Whereas the NDMC also decided in the same resolution to fix and recover an enhanced licence fee in the meantime, as an interim/ provisional measure, at a rate which was calculated by taking the market value of land as on 11.03.2014 and the constructed area on the plot.

Whereas in accordance with the above decision, a provisional demand was raised @ 4.4. crore per annum w.e.f. 11.03.2014 in the month of December 2016.

Whereas the above was challenged by M/s. BHL through Writ Petition No. 484/2017, which was disposed off by the Hon'ble High Court through its Order dated 18.01.2017 providing inter alia as under:-

"7. The impugned provisional bills are accordingly quashed and set aside, with directions issued to the respondent/NDMC to raise fresh bills towards the enhanced license fee on the petitioners, as expeditiously as is possible. While issuing the said bills, the basis of making the calculation shall be spelt out.

8. It is made clear that this order shall not be construed as an expression on the merits of the case which the court has not examined. If a fresh grievance is raised by the petitioners in the future, the parties shall be at liberty to take all the pleas that may be available to them both on facts and in law.

9. The petition is disposed of, along with the pending applications."

Whereas another Writ Petition No. 6953/2017 was also filed by M/s. BHL which was disposed off by the Hon'ble High Court of Delhi through its Order dated 23.08.2017, the relevant portion of which is reproduced below :-

"The respondent will issue the appropriate /final bill within four weeks from today. No further orders are called for in this petition.

Petition is disposed with additional liberty to the petitioner to raise all other contentions in appropriate proceedings which he may take up subsequently."

Whereas SBI CAP submitted its report in April, 2019 based upon the assessment made by the following two international property consultancy firms:-

- CBRE South Asia Pvt. Ltd. (CBRE), part of the CBRE Group, Inc... USA



- Knight Frank India Pvt. Ltd. (Knight Frank), part of Knight Frank Group

Whereas adopting the "Discounted Cash Flow" method and based on their independent opinion about return expectations on investment on such properties, the two valuation sub-consultants i.e., CBRE and Knight Frank gave the following assessment about the annual licence fee that M/s BHL needs to pay to NDMC: -

Likely Licence Fee @ per annum basis (excluding Unauthorized Area)

Name of IPC CBRE	Range of Likely Licence Fee chargeable Rs. 92.5 crore to Rs. 96.5 crore (Hotel Rs. 51.7 crore to Rs. 53.7 crore) (Commercial Block - Rs. 40.8 crore to Rs. 42.8 crore)
Knight Frank	Rs. 86.5 crore to Rs. 98.0 crore (Hotel - Rs. 42.5 crore to Rs. 50.0 crore) (Commercial Block - Rs. 44.0 crore to Rs. 48.0 crore)

Likely Licence Fee @ per annum basis (including Unauthorized Area)

Name of IPC	Range of Likely Licence Fee chargeable
CBRE	Rs. 92.70 crore to Rs. 96.70 crore (Hotel - Rs. 51.7 crore to Rs. 53.7 crore) (Commercial Block – Rs. 41 crore to Rs. 43 crore)
Knight Frank	Rs. 87 crore to Rs. 98.50 crore (Hotel Rs. 42.5 crore to Rs. 50.0 crore) (Commercial Block - Rs. 44.50 crore to Rs. 48.50 crore)

Whereas the report of SBI CAP was placed before the Competent Authority in NDMC on 20.12.2019 by way of Agenda item No. 45 (L-05). The report of SBI CAP is enclosed herewith, as **Annexure-I**

Whereas it was resolved by the NDMC that based on the recommendation of Knight Frank to SBI CAP, as reflected in the report of SBI CAP, it would be just and fair to fix license fee @ Rs



98 crore per annum, with effect from 11.03.2014 i.e. upon expiry of first 33 years, till the subsistence of the License Deed.

Whereas the determination and fixation of the above license fee, with effect from 11.03.2014 is otherwise in accordance with Section 141(1) and (2) of the NDMC Act, 1994 and the Presidential Reference Judgment [(2012) 10 SCC 1] and compliant to the public policy and the public interest.

Whereas the NDMC decided to accordingly raise a demand for the said license fee, with effect from 11.03.2014.

Whereas at the same time, it came to the notice of the NDMC that an instrument styled as a *Sale Agreement* was executed between Mrs. Gazala Shameem and Mr. Owais Usmani on one hand and M/s Indian Wind Power Association on the other hand relating to properties bearing shops/office space No. 28, 29, 30 and 31 at ground floor, World Trade Centre, Babar Road, New Delhi - 110001. It is pertinent to note that the aforesaid shops/ office space are located in the World Trade Centre i.e. a commercial block constructed by M/S. BHL in the plot of land which is covered under the license deed between the NDMC and M/s BHL.

Whereas the above revelation clearly showed that M/s BHL committed a fundamental breach of the license deed by selling, alienating and creating a third party interest, in respect of part of the licensed premises.

Whereas the NDMC therefore resolved to cancel / terminate the license deed of M/s. BHL for the abovementioned incurable and fundamental violations of terms and conditions of the license deed. The NDMC is in the process of taking an independent action arising out of the said fundamental breach.

Whereas according to the above mentioned decision of the NDMC, M/s. BHL is liable to pay an amount of Rs. 1063, 74, 59, 852/- (Rupees One thousand Sixty three Crores Seventy four Lakhs fifty Nine thousand Eight hundred fifty two only) as the arrear of license fee @ Rs. 98 crore per annum w.e.f. 11.03.2014 with interest, arrear of outstanding licence fee with interest, arrear of interest and arrear of statutory payments with interest.

Whereas a detailed Statement of Account giving the particulars of calculation for the above mentioned amount is enclosed as **Annexure-II** to this Order.

Now therefore, a demand is hereby raised on M/s. BHL to pay Rs. 1063, 74, 59, 852/-, in three equal installments within 90 days from the date of this communication, the first installment being payable on 13/03/2020, second installment being payable on 12/04/2020 and the third and final installment being payable on



12/05/2020, failing which further necessary action for the recovery of the aforesaid amount, to the extent not paid, along with interest will be taken in accordance with the law.

It is hereby clarified that this notice of demand is without prejudice to the notice of termination and that the payment of the demanded amount will not eclipse the termination and the consequences ensuing the termination, such as recovery of damages, if any, and proceeding for eviction, in accordance with law, if compelled to.

Encl: As stated above

(Hari Singh)
Dy. Director (Estate-1)

**M/s. Bharat Hotels Ltd. (The Lalit)
Bharat Hotel, Bengali Market,
New Delhi-110001**

Copy to:-

- 1. PS to Chairperson, NDMC for his kind information please**
- 2. PS to Secretary, NDMC for his kind information please**
- 3. PS to F.A., NDMC for his kind information please**
- 4. PS to Chief Auditor, NDMC for his kind information please**
- 5. Chief Architect for information please**
- 6. Director (H/L) for information please**
- 7. Director (EBR) for information please"**

19. The action of termination as would be evident from the separate notice of the same date rested on the purported transfer effected by Mrs. Ghazala Shameem and Mr. Owais Usmani with the respondents taking the view that the creation of that interest constituted a fundamental breach of the License Agreement. The respondents assert that in terms of the License Agreement, the petitioner had only been conferred a right to create a sub-license with the prior consent of the Council and that it could not have, in any case, sold or transferred the subject property. The respondents, as a consequence of the above, proceeded to terminate the License Agreement with immediate effect



and further declared the petitioner to be in unauthorized occupation of the licensed premises.

20. The Notice of Termination dated 13 February 2020 is extracted hereinbelow:-

“File No. U-34031/02/2019/Estate-1 Com. No. 21690
NEW DELHI MUNICIPAL COUNCIL
PALIKA KENDRA: NEW DELHI

No. D-70/501/Estate/2020----

Dated: 13/02/2020

COMMUNICATION OF TERMINATION

Whereas an agreement of license was made on 11th March, 1981 between, the New Delhi Municipal Committee and M/s. Delhi Automobiles Private Limited for a period of 99 years from the date of execution of the license agreement for construction of a Hotel on a plot measuring 6.0485 acres at Bara Khamba Lane, New Delhi.

Whereas M/s. Delhi Automobiles Private Limited was to form a Public Limited Company within a period of 12 months from the date of commencement of License of the said Public Limited Company.

Whereas M/s. Delhi Automobiles Private Limited formed a Public Limited Company i.e. M/s. Bharat Hotels Limited.

Whereas an Agreement of License was made between New Delhi Municipal Committee and M/s. Bharat Hotels Limited on 22.04.1982 in continuation of the earlier agreement dated 11th March, 1981.

Whereas after the enactment of the NDMC Act, 1994, the New Delhi Municipal Committee became the New Delhi Municipal Council.

Whereas notwithstanding Clause-6 of the license deed dated 22.04.1982, which provides for a notice before termination, a decision has been taken by the NDMC to summarily terminate the license with immediate effect, i.e. from the date of issuance of this communication, on account of the fundamental breach committed by the licensee – M/s. BHL, as set out herein below.

Whereas Clause-11 of the License Deed dated 22.04.1982 provides as under:-



“The Lincensees shall not be at liberty in any way to sublet, underlet, encumber, assign or transfer their rights and interest or part with possession of the land and the building thereon or any part thereof or share therein to any person, directly or indirectly without the previous written consent of the licensor. But the licensees shall have the right to sub – licence the licence property as stipulated in clause 29 of this license agreement.”

Whereas Clause-29 of the licence Deed dated 22 April 1982 as mentioned in clause - 11 above provide as under:-

“The licensee shall run the Five star Hotel themselves. However, the licensees may allow sub-licences within the period of license for running car parking, cycle scooter stand for parking and shopping arcade, banks offices (within the shopping arcade) etc. The licensees shall be further responsible for the conduct of various sub-licences and observance of rules and regulations etc. The licensee shall be further responsible to answer that the sub-licensees shall not get any right over and above the rights and privileges of the licensees.”

Whereas Clause-13 of the License Deed dated 2.04.1982 provided as under:-

“The licensees shall have a bare licence only to enter upon the piece of land to be allotted by the New Delhi Municipal Committee for the purpose of building and executing works thereon as hereinafter provided in this license agreement and for commissioning a Five Star Hotel conforming to the approved standard for Five Star Hotel rating prescribed by the Govt. of India, Deptt. of Tourism. The licensees shall be deemed to be bare licensees only of the land subject to payment of license fee as has been agreed to between the licensees M/s. Bharat Hotels Ltd. And the licensor, New Delhi Municipal Committee.”

Whereas Clause-14 of the license deed dated 22 April 1982 provided as under:-

“Nothing contained in these documents shall be construed as a demise in law of the said land here by agreed to be demised or any part thereof so as to give to the licensees, M/S Bharat Hotels Ltd. any legal right, title or interest therein. The licensees shall only have a license to enter upon the said land for the



purpose of building and executing works thereon as hereinafter prayed and for running a Five Star Hotel conforming to the approved Five Star rating prescribed by the Govt. of India, Department of tourism.”

Whereas Clause-30 of the License Deed dated 22.04.1982 provided as under:-

“Save as provided in the preceding para, the licensees during the tenure of the license shall not transfer, assign or part with the building or any portion thereof permanently or temporarily to anybody else.”

Whereas the aforesaid clauses 11, 29, 13, 14 and 30 are essence of the license deed and are core to the subsistence of the license deed, the same being inviolable, non-negotiable and absolutely non-compromisable.

Whereas if in any eventuality, the sanctity of the aforesaid clause is violated, compromised or diluted in any manner, the same would constitute a fundamental breach, rendering the license deed terminable, immediately forthwith, without notice or any opportunity and with no recourse to clause 6.

Whereas the above clauses stand violated and compromised by the licensee M/s BHL, as would be clear from the narrative hereunder, rendering the license deed liable to be terminated, immediately forthwith, on account of fundamental breach.

Whereas as it so transpired that in the ordinary course an Order bearing No. F. No. 10 (1296) COS (Ch. Puri) dated 26.06.2018 of the Collector of Stamps, Chanakya Puri, New Delhi from the Revenue Department, Govt. of NCT of Delhi was received in the NDMC, pursuant to which enquiries were made as regards the same.

Whereas from the contents of the above mentioned order of the Collector of Stamps, it was revealed to the NDMC, to its utter shock and dismay that an instrument styled as a *Sale Agreement* was executed between Mrs. Gazala Shameem and Mr. Owais Usmani on one hand; and M/s Indian Wind Power Association on the other hand relating to properties bearing shop/office space No. 28, 29, 30 and 31 at ground floor, World Trade Centre, Babar Road, New Delhi-110001.

Whereas upon further analysis of the said order of the Collector of Stamps, it was revealed to the NDMC that a sub-licence was initially executed between M/s Bharat Hotels Ltd., and M/s. Sonia Farms Private Ltd in respect of shop No. 28, 29, 30 and



31, Ground Floor, World Trade Centre, Babar Road, new Delhi-110001 on 04.02.1994. Subsequently, M/S Sonia Farms Private Ltd transferred all the rights in the above said license agreement to one Sh. Amresh Bahadur S/o Late Sh. Rang Bihari, which was subsequently sold to M/s Indian Wind Power Association on 04.05.2016 by the subsequent Sublicensee i.e. Mrs Gazala Shameem and Mr. Owaisi Usmani after receiving of consideration amount of Rs. 3.03 crores (approximately) for final agreement of sale/purchase. It is part of the record that the aforesaid transfer took place with the active participation, knowledge and consent of the lincensee M/s. BHL.

Whereas the above said shops/office spaces are located in the World Trade Centre i.e. a commercial block constructed by M/S. BHL in the plot of land which is covered under the license deed between the NDMC and M/s. BHL.

Whereas, it is pertinent to note that the Collector of Stamps came to a conclusion vide its order dated 26.06.2018 that it was a sale/purchase agreement and accordingly, treated the sub licence as a lease and consequently stamp duty along with penalty was imposed on M/s Bharat Hotel Ltd.

Whereas, M/s. Bharat Hotel Ltd., was asked to pay the total deficient stamp duty of Rs. 5,10,40,000/- (Rs. 46,40,000/- as stamp duty and Rs. 4,64,00,000/- a penalty) within 30 days of the order, failing which the amount shall be recovered as arrear of land revenue under section 48 of the Indian Stamp Act, 1899.

Whereas it is noted that the License Deed dated 22.04.1982 is a License Agreement between the NDMC and M/s. BHL and consequently the3 right of M/s. BHL is confined only to create sub-licenses, with prior consent of the NDMC and the said right does not extend to create any lease, registered or otherwise, or execute any document effecting transfer of property, s contemplated under the Transfer of Property Act.

Whereas the above-mentioned act of creating leasehold/ownership right in part of the property, which is the subject-matter of the license deed constitutes a fundamental breach of the license deed and militates against the essence of the core clauses of the license deed, namely, clause 11, 13, 14, 29 and 30, on account of which the NDMC as a licensor has become entitled to take immediate action of termination of license deed, summarily, without according any opportunity, as contemplated under clause 6 of the license deed.

Whereas in view of the above position, the matter was placed before the competent authority in NDMC, which has decided to cancel/terminate the license of M/s. BHL for incurable



and fundamental violations of the terms and conditions of the licence deed; as M/s Bharat Hotels have sold out the part of the licensed property, which is a Public property (i.e. Bharat Hotels) in a most illegal and fraudulent manner by resorting to an act, which amounts to criminal breach of trust and/or committing fraud. None of the acts of M/s BHL are capable of being condoned and no amount of explanation can dilute the enormity of illegality and violability of the license deed involved in the said act.

Whereas M/s. BHL stands notified that the license which was granted to M/s BHL, by virtue of license deed dated 22.04.1982 has been terminated with immediate effect, i.e. the date of issuance of this communication, whereupon and whereby, M/s BHL is no longer authorized to occupy the licensed premises at Bara Khamba Lane, New Delhi with immediate effect and that henceforth, the occupation of the said premises by M/s. BHL has become “unauthorized occupation” within the meaning of Section 2 (g) of the Public Premises (Eviction of Unauthorised Occupants) Act, 1971.

Now therefore, M/s. BHL is required to hand over the peaceful possession of the said premises to the NDMC within 90 days, and also pay the arrears of the license fee along with any other statutory or non-statutory dues, till the date of vacation. In the event, M/s BHL fails and neglects to end its “unauthorized occupation” of the licensed premises, appropriate steps to evict M/s BHL will be taken, in accordance with law. Besides the above, appropriate steps to recover the arrears of license fee, interest and damages will also be taken, in accordance with law, in such an eventuality.

(Hari Singh)

Dy. Director (Estate-1)

**M/s. Bharat Hotels Ltd. (The Lalit)
Bharat Hotel, Bengali Market,
New Delhi-110001**

Copy to:-

- 1. PS to Chairperson, NDMC for his kind information please**
- 2. PS to Secretary, NDMC for his kind information please**
- 3. PS to F.A., NDMC for his kind information please**
- 4. PS to Chief Auditor, NDMC for his kind information please**
- 5. Chief Architect for information please**
- 6. Director (H/L) for information please**
- 7. Director (EBR) for information please”**



21. On 04 March 2020, when W.P. (C) 2496 of 2020 was taken up for consideration, a statement was made on behalf of the Council that it was not proposing to take any coercive action till the next day fixed. A similar statement was taken on board on W.P. (C) 2497 of 2020. It is the aforesaid statement which has continued and has bound the respondents as would be evident from the various orders passed on these two writ petitions extending interim protection to the petitioner.

22. While closing the factual narrative, it may only be additionally noticed that on 04 August 2020, while considering W.P. (C) 2497 of 2020, the Court additionally placed the petitioner on terms requiring it to deposit an amount of Rs. 10 crores in addition to the originally stipulated annual license fee of Rs. 1.45 crores with effect from 11 March 2014.

23. Appearing for the writ petitioner, Mr. Kaul, learned senior counsel, has addressed the following submissions. The attention of the Court was firstly drawn to the judgment rendered in *S.S. Sobti* with Mr. Kaul contending that the challenge to the license deed on the ground of it being a negotiated transaction and thus being violative of Article 14 of the Constitution was negated with the Division Bench clearly holding that the Council not only had the requisite authority to settle the land on a negotiated basis without inviting tenders but was on facts justified in proceeding in the manner that it did.

24. The decision in *S.S. Sobti*, Mr. Kaul pointed out, had also borne in consideration the imperatives which guided the action of the Council and which was desirous of identifying interested parties who



would be able to construct a Five Star Hotel, had the requisite experience in the hotel industry and could bear the financial commitments involved.

25. It also took into consideration the initial forays which were made by the Council for kickstarting the development initiative and which could never fructify. The Division Bench also appears to have borne in consideration the Council being constrained to proceed with expedition bearing in mind the impending Asian Games which were to be hosted by New Delhi.

26. Mr. Kaul also laid emphasis on the Division Bench having soundly refuted the allegation of the transaction being tainted by political patronage and it taking into account the undisputed fact that the Council as per the original tendering process had received an offer of only INR 37.78 lakhs whereas that submitted by the petitioner was of INR 1.40 crores. In *S.S. Sobti*, the Division Bench also took into consideration the undisputed fact that the annual license fee of INR 1.45 crores was to be funded out of the earnings of the hotel itself.

27. The Division Bench ultimately and on an overall consideration of the imperative of the Five Star Hotel being constructed and being made serviceable before the commencement of the Asian Games, 1982 negated the challenge that stood raised. Mr. Kaul thus contended that the assertion of the respondent that the License Agreement is liable to be annulled being contrary to the principles laid down in the *Presidential Reference* judgment is wholly arbitrary and unjustified.

28. Mr. Kaul further submitted that even in the *Presidential Reference* judgment, the Supreme Court had not held that the grant of largesse must inevitably follow the tender or the auction route. It was



his submission that the Constitution Bench had itself recognized various exigencies in which the auction or the tendering process may not be expedient. Learned senior counsel referred to the following passages from that decision:-

“81. Our reading of these paragraphs suggests that the Court was not considering the case of auction in general, but specifically evaluating the validity of those methods adopted in the distribution of spectrum from September 2007 to March 2008. It is also pertinent to note that reference to auction is made in the subsequent para 96 with the rider “perhaps”. It has been observed that “a duly publicised auction conducted fairly and impartially is *perhaps* the best method for discharging this burden”. We are conscious that a judgment is not to be read as a statute, but at the same time, we cannot be oblivious to the fact that when it is argued with vehemence that the judgment lays down auction as a constitutional principle, the word “perhaps” gains significance. This suggests that the recommendation of auction for alienation of natural resources was never intended to be taken as an absolute or blanket statement applicable across all natural resources, but simply a conclusion made at first blush over the attractiveness of a method like auction in disposal of natural resources. The choice of the word “perhaps” suggests that the learned Judges considered situations requiring a method other than auction as conceivable and desirable.

XXX

XXX

XXX

83. Moreover, if the judgment in *2G case* [(2012) 3 SCC 1] is to be read as holding auction as the only permissible means of disposal of all natural resources, it would lead to the quashing of a large number of laws that prescribe methods other than auction e.g. the MMDR Act. While dealing with the merits of the Reference, at a later stage, we will discuss whether or not auction can be a constitutional mandate under Article 14 of the Constitution, but for the present, it would suffice to say that no court would ever implicitly, indirectly, or by inference, hold a range of laws as ultra vires the Constitution, without allowing every law to be tested on its merits. One of the most profound tenets of constitutionalism is the presumption of constitutionality assigned to each legislation enacted. We find that *2G case* [(2012) 3 SCC 1] does not even consider a plethora of laws and judgments that prescribe methods, other than auction, for dispensation of natural resources; something that it would have done, in case it intended to make an assertion as wide as applying auction to all natural resources. Therefore, we are convinced that the observations in paras 94 to 96 could not apply



beyond the specific case of spectrum, which according to the law declared in *2G case* [(2012) 3 SCC 1] , is to be alienated only by auction and no other method.

xxx

xxx

xxx

85. The President seeks this Court's opinion on the limited point of permissibility of methods other than auction for alienation of natural resources, other than spectrum. The question also harbours several concepts, which were argued before us through the hearing of the Reference, that require to be answered in order to derive a comprehensive answer to the parent question:

(i) Are some methods ultra vires and others intra vires the Constitution of India, especially Article 14?

(ii) Can disposal through the method of auction be elevated to a constitutional principle?

(iii) Is this Court entitled to direct the executive to adopt a certain method because it is the “best” method? If not, to what extent can the executive deviate from such “best” method?

An answer to these issues, in turn, will give an answer to the first question which, as noted above, will answer the Presidential Reference.

xxx

xxx

xxx

120. Therefore, in conclusion, the submission that the mandate of Article 14 is that any disposal of a natural resource for commercial use must be for revenue maximisation, and thus by auction, is based neither on law nor on logic. There is no constitutional imperative in the matter of economic policies—Article 14 does not predefine any economic policy as a constitutional mandate. Even the mandate of Article 39(b) imposes no restrictions on the means adopted to subserve the public good and uses the broad term “distribution”, suggesting that the methodology of distribution is not fixed. Economic logic establishes that alienation/allocation of natural resources to the highest bidder may not necessarily be the only way to subserve the common good, and at times, may run counter to public good. Hence, it needs little emphasis that disposal of all natural resources through auctions is clearly not a constitutional mandate.

xxx

xxx

xxx

146. To summarise in the context of the present Reference, it needs to be emphasised that this Court cannot conduct a comparative study of the various methods of distribution of natural resources and suggest the most efficacious mode, if there is one universal



efficacious method in the first place. It respects the mandate and wisdom of the executive for such matters. The methodology pertaining to disposal of natural resources is clearly an economic policy. It entails intricate economic choices and the Court lacks the necessary expertise to make them. As has been repeatedly said, it cannot, and shall not, be the endeavour of this Court to evaluate the efficacy of auction vis-à-vis other methods of disposal of natural resources. The Court cannot mandate one method to be followed in all facts and circumstances. Therefore, auction, an economic choice of disposal of natural resources, is not a constitutional mandate. We may, however, hasten to add that the Court can test the legality and constitutionality of these methods. When questioned, the courts are entitled to analyse the legal validity of different means of distribution and give a constitutional answer as to which methods are ultra vires and intra vires the provisions of the Constitution. Nevertheless, it cannot and will not compare which policy is fairer than the other, but, if a policy or law is patently unfair to the extent that it falls foul of the fairness requirement of Article 14 of the Constitution, the Court would not hesitate in striking it down.

xxx

xxx

xxx

148. In our opinion, auction despite being a more preferable method of alienation/allotment of natural resources, cannot be held to be a constitutional requirement or limitation for alienation of all natural resources and therefore, every method other than auction cannot be struck down as ultra vires the constitutional mandate.

xxx

xxx

xxx

149. Regard being had to the aforesaid precepts, we have opined that auction as a mode cannot be conferred the status of a constitutional principle. Alienation of natural resources is a policy decision, and the means adopted for the same are thus, executive prerogatives. However, when such a policy decision is not backed by a social or welfare purpose, and precious and scarce natural resources are alienated for commercial pursuits of profit maximising private entrepreneurs, adoption of means other than those that are competitive and maximise revenue may be arbitrary and face the wrath of Article 14 of the Constitution. Hence, rather than prescribing or proscribing a method, we believe, a judicial scrutiny of methods of disposal of natural resources should depend on the facts and circumstances of each case, in consonance with the principles which we have culled out above. Failing which, the Court, in exercise of power of judicial review, shall term the executive action as arbitrary, unfair, unreasonable and capricious due to its antimony with Article 14 of the Constitution.”



29. Mr. Kaul then submitted that the action of termination would also not sustain on the view as taken by the respondent and resting on Section 141 of the 1994 Act. It was submitted by Mr. Kaul that at the time when the License Agreement came to be executed, it was the provisions of the **Punjab Municipal Act, 1911**⁸ which held the field and which empowered the Council to enter into contracts in terms of Section 47 and Section 56 thereof. It was submitted that the Act came into force only in 1994 and it was only then that the 1911 Act came to be repealed. Sections 47 and 56 of the 1911 Act are extracted hereinbelow:-

“47. Mode of executing contracts and transfer of property.—

(1) Every contract made by or on behalf of the committee of any municipality of the first class whereof the value or amount exceeds one hundred rupees, and every contract made by or on behalf of the committee of any municipality of the second [and third] class whereof the value or amount exceeds fifty rupees, shall be in writing, and must be signed by two members, of whom the president or a vice-president shall be one, and countersigned by the secretary:

Provided that, when the power of entering into any contract on behalf of the committee has been delegated under the last foregoing section, the signature or signatures of the member or members to whom the power has been delegated shall be sufficient.

(2) Every transfer of immovable property belonging to any committee must be made by an instrument in writing, executed by the president or vice-president, and by at least two other members of committee, whose execution thereof shall be attested by the secretary.

(3) No contract or transfer of the description mentioned in this section executed otherwise than in conformity with the provisions of this section shall be binding on the committee.

56. Property vested in committee.—(1) Subject to any special reservation made or to any special conditions imposed by the [State] Government, all property of the nature hereinafter in this

⁸ 1911 Act



section specified and situated within the municipality, shall vest in and be under the control of the committee, and with all other property which has already vested, or may hereafter vest in the committee, shall be held and applied by it for the purposes of this Act, that is to say:—

- (a) all public town-walls, gates, markets, [stalls], slaughter-houses, manure and night-soil depots and public buildings of every description which have been constructed or are maintained out of the municipal fund;
- (b) all public streams, springs and works for the supply, storage and distribution of water for public purposes, and all bridges, buildings, engines, materials and things connected therewith or appertaining thereto, and also any adjacent land (not being private property) appertaining, to any public tank or well;
- [(c) all public sewers and drains, and all sewers, drains, culverts and water- courses in or under any public street, or constructed by or for the committee alongside any public street, and all works, materials and things appertaining thereto];
- (d) all dust, dirt, dung, ashes, refuse, animal matter or filth or rubbish of any kind or dead bodies of animals, collected by the committee from the streets, houses, privies, sewers, cesspools or elsewhere or deposited in places fixed by the committee under Section 154;
- (e) all public lamps, lamp-posts, and apparatus connected therewith or appertaining thereto;
- (f) all land or other property transferred to the committee by the [Government] or acquired by gift, purchase or otherwise for local public purposes;
- [(g) all public streets, not being land owned by [Government] and the pavements, stones and other materials thereof, and also trees growing on and erections, materials, implements and things provided for such streets.]

(2) Where any immovable property is transferred otherwise than by the sale by the [State] Government to a municipal committee for public purposes, it shall be deemed to be a condition of such transfer, unless specially provided to the contrary, that should the property be at any time resumed by [Government], the compensation payable therefor shall, notwithstanding anything to the contrary in the Land Acquisition Act, 1894, in no case exceed the amount if any, paid to the Government for the transfer, together



with the cost or the present value, whichever shall be less, or any buildings erected or other works executed on the land by the municipal committee.

[(3) The committee shall maintain a register and a map of all immovable property of which it is the proprietor, or which vests in it; or which it holds in trust for the [State] Government.]”

30. Quite apart from the License Agreement not being contrary to any provision of the 1994 Act, Mr. Kaul submitted that the execution of the license deed could also not be described as being inconsistent with the enactment. Mr. Kaul urged that even Section 141(2) of the 1994 Act cannot possibly be read as casting a cloud of invalidity on the License Agreement. Learned senior counsel submitted that Section 141(2) of the 1994 Act quite apart from not even existing on the statute book when the License Agreement had been executed, only proscribes the settlement of any immovable property vesting in the Council at a price below that which may be fetched in *normal and fair competition*. The aspects of fair value and the settlement process being consistent with the requirements of Article 14 of the Constitution, according to Mr. Kaul, stood conclusively settled by the judgment rendered by the Court in *S.S. Sobti*. According to learned senior counsel, it was, therefore, clearly not open for the respondents to take a position contrary to what had been found and conclusively laid to rest by this Court.

31. Mr. Kaul also assailed the correctness of the view taken by the respondent and which was founded on Section 416(2) of the 1994 Act and submitted that the arguments advanced on the basis of the aforementioned two provisions is wholly untenable. According to Mr. Kaul, Section 416(2) of 1994 Act, is in essence a saving clause and



thus cannot possibly be construed as aimed at annulling actions validly taken under the repealed statute. It was his submission that the execution of the License Agreement in any case cannot possibly be viewed as being contrary to any provision of the Act or any order, Rule or Bylaw made by the Council for reasons noticed hereinabove. Mr. Kaul submitted that Section 416 of the 1994 Act thus cannot possibly be read as empowering the respondents to either annul or vary the terms of an existing license or lease.

32. According to learned senior counsel, the act of termination was clearly founded on the mala fide intent of the respondent seeking an amendment to the terms of the License Agreement itself and an attempt to wriggle out of stipulations which bound parties. Proceeding further, it was urged that no provision engrafted in the 1994 Act can possibly be read as conferring an authority on the respondents to vary the terms of the License Agreement.

33. Mr. Kaul also assailed the termination of the license and which was founded on a proposed sale executed by a sub-licensee in favour of M/s Indian Wind Power Association on the following lines. Our attention was firstly drawn to Clause 11 of the License Agreement and in terms of which the petitioner stood restrained from subletting, underletting, encumbering, assigning or transferring any rights and interests in the subject property without the previous written consent of the Council. Mr. Kaul laid emphasis on Clause 11 while placing those restrictions duly recognizing the right of the petitioner to create sub-licenses in accordance with Clause 29 thereof. It becomes pertinent to note that the right to sub-license a part of the premises in question was not subject to the previous written consent of the



Council. Mr. Kaul also drew our attention to previous sub-licenses having been duly recognized by the Council itself right from the time of inception of the License Agreement and specifically referred to communications dated 13 January 1984, 07 April 1984, 10 September 1985 and 04 April 1989 to submit that all sub-licenses were made by the petitioner strictly in accordance with Clause 29 and under due intimation to the Council.

34. It was also his submission that the sub-license agreement initially with M/s Sonia Farms Pvt. Ltd., the substitution of the nominees was a fact which was specifically brought to the attention of the Council. Taking us through the record, Mr. Kaul drew our attention to page 143 and which recorded the creation of the sub-license in favour of M/s Sonia Farms Pvt. Ltd. and the nomination of Mr. Amresh Bahadur. The subsequent nominations in favour of Mrs. Ghazala Shameem and Mr. Owais Usmani stand evidenced from page 144 while the sub-license created in favour of M/s Indian Wind Power Association appears at page 145 of our record. It was the submission of Mr. Kaul that all three aforementioned actions were taken with the petitioner scrupulously following the procedure as prescribed in Clause 29 of the License Agreement.

35. It was also his submission that the transfer which was proposed to be affected by Mrs. Ghazala Shameem and Mr. Owais Usmani in favour of M/s Indian Wind Power Association was neither with the consent nor with the approval of the petitioner. Mr. Kaul laid emphasis on the fact that the petitioner was not even a party to the proposed transaction. It was further submitted that even though the sale deed came to be presented for registration, it was ultimately



withdrawn by M/s Indian Wind Power Association and never registered. The sale, therefore, according to Mr. Kaul never fructified.

36. Mr. Kaul also underlined the fact that immediately upon coming to know of the proposed transaction, the petitioner had directly written to M/s Indian Wind Power Association to withdraw the instrument and had also apprised the Council of the steps taken in this respect. It was further pointed out that the sale transaction itself had occurred more than two years prior to the Notice of Termination which ultimately came to be issued.

37. Taking us through the Notice of Termination itself, it was pointed out that the Council proceeded on the evidently incorrect premise that a sale had come to be concluded. It was also urged that the Notice of Termination when it records that the aforesaid transfer took place with the active participation, knowledge and consent of the petitioner is wholly arbitrary and perverse. It was his submission further that the said recital as appearing in the Notice of Termination was, in any case, not supported by any evidence which could have even remotely been read as being suggestive of participation or consent of the petitioner in respect of the aforementioned transaction.

38. Mr. Kaul submitted that the termination was based solely on the presumption of an ownership right having been created in favour of M/s Indian Wind Power Association when in fact the record would reveal that the sale was never completed and the instrument itself not acted upon. In view of the above, learned senior counsel submitted that the respondent have acted arbitrarily in holding the petitioner to be guilty of a fundamental breach of the License Agreement.

39. Turning then to the Notice of Demand, Mr. Kaul addressed the



following submissions. Drawing our attention to the terms of the License Agreement and more particularly Clause 48 thereof, it was submitted that the Council was entitled to enhance the license fee every 33 years subject to the overriding condition of that increase not exceeding 100% of that which prevailed immediately before the enhancement became due. Mr. Kaul submitted that the facet of market value and which is spoken of in Clause 48 can only be read as being relevant and determinative of the percentage by which the license fee could have been enhanced. In any case, Mr. Kaul would submit that the enhancement could not have breached the 100% limit as factored in Clause 48.

40. Mr. Kaul further contended that the Notice of Demand, apart from seeking to draw sustenance from Sections 141 and 416 of the 1994 Act, and which aspects have been duly met and explained in the previous parts of his submissions, purports to proceed on the basis of various valuation reports and assessment studies which were independently obtained by the Council. It was submitted that those valuation reports could not have possibly been factored into consideration for the license fee being enhanced in contravention of Clause 48. The submission in essence was that those valuation reports could not have formed the basis for enhancement in violation of the restrictions embodied in Clause 48.

41. Mr. Kaul also sought to assail the action of the respondents in seeking to terminate the License Agreement submitting that the aforesaid action was taken in clear breach of the principles of natural justice with the petitioner having been afforded no opportunity of hearing or even the right to represent against the proposed action.



Learned senior counsel also alluded to Clause 43 of the License Agreement and which embodied provisions for breaches being remedied during the cure period. Mr. Kaul submitted that even this opportunity of enabling the petitioner to cure the breach was violated.

42. Appearing for the Council, Ms. Luthra, learned senior counsel submitted that the license deed would not meet the tests of Section 141 and 416 of the 1994 Act, since both those provisions introduce concepts of market value as opposed to the license fee which came to be adopted in the License Agreement on the basis of a negotiated settlement. It was her submission that once the Council had found that the License Agreement would not meet the tests as embodied in Section 141(2) of the 1994 Act, it would clearly not survive being rendered inconsistent with the provisions of the said Act and thus not saved under Section 416.

43. Ms. Luthra also took us through the various disclosures made in the counter affidavit by the Council as well as the valuation reports to contend that the said material would clearly establish that the entire transaction had not only been rendered unviable, it was also causing huge losses to the Council. Our attention was invited to the material placed on the record along with the counter affidavit and which had referred to the increase in the ground rent by the Union Government from 2.5% to 5% effectively resulting in a loss being caused to the Council as per the details set forth in paragraph 21 of the counter affidavit filed in W.P. (C) No. 2496 of 2020.

44. This aspect was also dealt with in some detail in the Brief Note of Submissions which were tendered on behalf of the respondents and relevant parts whereof are extracted hereinbelow:-



“5. The crux of the case put forth on behalf of the Respondent is that the Government of India vide its letter dated 23.05.1984 informed the Respondent that the annual ground rent was raised from 2.5% to 5% w.e.f. 15.07.1983 for the subject land. This increase in ground rent resulted in a net loss situation for Respondent/NDMC, as the license fee of Rs.1.45 cr per annum consisted of three components viz., a) Approx. Rs. 104 Lakhs of interest on premium deposit of Rs. 8,78,24,220/- b) Approx. Rs. 22 Lakhs as 2.5% of ground rent on premium deposit of Rs.8,78,24,220 & c) Rs. 19 Lakh as net return to NDMC. Resultantly, due to the above revision in ground rent, the Respondent/NDMC was compelled to pay around Rs. 3 lakh per annum from its fund, as opposed to getting any revenue from the project. This position has been summarized in the table below:

NET PROFIT TO NDMC AT 2.5% NET LOSS TO NDMC AT 5%
GROUND RENT GROUND RENT

Particular	Amount	Particular	Amount
Total Licence Fee	1,45,00,000	Total Licence Fee	1,45,00,000
Less: Interest on premium deposit of Rs. 8,78,24,220/-	104,00,000	Less: Interest on premium deposit of Rs. 8,78,24,220/-	-
Less: 2.5% of ground rent on premium deposit of Rs. 8,78,24,220/-	-22,00,000	Less: 5% of ground rent on premium deposit of Rs. 8,78,24,220/-	44,00,000

6. The Respondent/ NDMC, thereafter, in 2016 passed a resolution No. 15 (L-01) dated 26.04.2016 to have the market value of the subject property in occupation of Petitioners be determined through SBI CAPS and it was also decided in the same resolution to fix and recover an enhanced license fee as an interim/ provisional measure at the rate which was calculated by taking market value of land as on 11.03.2014. Accordingly, a provisional demand was raised at rate of Rs. 4.4 crores per annum w.e.f. 11.03.2014 in month of December, 2016, which resulted in the filing of two writ petitions by the Petitioner which were disposed of directing the Respondent/ NDMC to raise/issue appropriate/final bill within four weeks from date of order.

7. SBI CAPS submitted its report in April, 2019 based upon the assessment along with two international consultants i.e. CBRE, South Asia & Knight Frank India Pvt. Ltd., concluding the range of annual market value of subject property as 92.5- 96.5 crores [CBRE figures] and 86.5-98 crores [Knight Frank figures]



(excluding unauthorized area) and 92.70-96.70 crores and 87-98.50 crores, respectively when including unauthorised area.

8. In line with the figures suggested in the report, the Respondent/ NDMC issued the impugned demand notice dated 13.02.2020 demanding arrears of License Fee calculated at the rate of Rs. 98 Crores per annum with effect from 11.03.2014 with interest, arrear of outstanding license fee with interest, arrear of interest and arrear of statutory payments with interest.”

45. Mr. Jain, learned senior counsel, who also appeared for the Council, addressed the following submissions for our consideration. It was pointed out by Mr. Jain that a sub-licensee in terms of the provisions contained in the License Agreement could not have been permitted to create any further licenses or interests in the subject property without the prior consent of the Council. Learned senior counsel submitted that the License Agreement clearly restrained the petitioner from transferring or creating any rights over the subject property except within the limited confines of Clause 29.

46. According to Mr. Jain, the sale transaction was one which was in fundamental breach of the License Agreement and could have neither been rectified nor cured. It was his submission that a cure notice would have thus been an empty formality. Mr. Jain submitted that the argument of violation of principles of natural justice is also liable to be rejected since the factum of the proposed transfer was an undisputed fact.

47. It was his submission further that Section 141(2) of the 1994 Act speaks of all transfers of property by the Council being imbued with the objective of generation of maximum revenue and the disposal of a public asset at a price which would be at par with what may be garnered in *normal and fair competition*. According to Mr. Jain, the settlement of the subject plot in favour of the petitioner would clearly



not meet the test of *normal and fair competition*. According to Mr. Jain, since the fixation of the license fee was clearly contrary to Section 141(2) of the 1994 Act, the respondent was justified in terminating the License Agreement.

48. Mr. Jain further submitted that the conduct of the petitioner and more particularly it having permitted the sale transaction, eroded the very basis of the License Agreement and this too would constitute a valid ground for the termination of the license.

49. Mr. Jain also alluded to the provisions of Section 39 of the **Indian Contract Act, 1872⁹** to submit that the sale transaction would clearly place the petitioner in the position of being disabled from performing his part of the bargain and thus conferring a right on the Council to repudiate the License Agreement itself. In cases of fundamental breach, according to Mr. Jain, the Council was not even bound to follow the procedure for termination of the License Agreement.

50. Mr. Jain referred to the decision in *Air India Ltd. v. Gati Ltd¹⁰* in support of the aforementioned contentions and to the following observations as appearing therein:-

“56. The Court has already upheld the findings of the AT on the failures of the Air India to fulfill its obligations under the WLA. The AT has discussed Section 39 of the Indian Contract Act, 1872. It gives the right to the promisee to put an end to the contract if the promisor, in this case Air India, “has refused to perform, or disabled itself from performing, its promise in its entirety.” In these circumstances the conclusion of the AT that Section 39 permits GATI to terminate the contract without having to comply with the requirement of Clause 12.1, which was not attracted to a case of repudiatory breach of contract is a perfectly plausible conclusion and cannot be faulted with.”

⁹ 1872 Act

¹⁰ 2015 SCC OnLine Del 10220



51. Mr. Jain further submitted that Clause 48 of the License Agreement must be read as being subject to Section 141 of the 1994 Act, failing which it would not be saved by Section 416 of the 1994 Act. It was his submission that unless the License Agreement and its terms were found to be in conformity with the mandate of Section 141(2) of the 1994 Act, the License Agreement would not survive and was clearly liable to be brought to an end.

52. It is the aforementioned rivals submissions which fall for consideration.

53. The Court firstly takes up the challenge as laid to the Notice of Demand dated 13 February 2020. The order passed by the Council proceeds along the following lines. The respondents firstly refer to Sections 141 and 416 of the 1994 Act to conclude that the cap of 100% on the enhancement of license fee as embodied in Clause 48 is contrary to law, public policy and thus *non est* and unenforceable.

54. The Council in the impugned order construing the principles laid down by the Supreme Court in *Presidential Reference* judgment take the position that as a public body, it is obliged to ensure that an asset is not an “*under yielding asset*” but one which proffers maximum returns which can be fetched in the open market. They thus proceed to hold that Clause 48 would be contrary to the mandate of Section 141(2) of the 1994 Act and inconsistent with the provisions of the 1994 Act.

55. The order records that in light of the above, the Council was advised that its claim to enhance the license fee could not be restricted to a mere 100% of INR 1.45 crores and that such a restriction would



in any case be lower than the prevalent market value. The Council thereafter rests its quantification of enhanced license fee on valuation reports obtained from property consultancy firms and ultimately proceeded to accept the report submitted by SBI CAP and fixed the license fee consequently at INR 98 crores per annum with effect from 11 March 2014 till the remainder period of the License. It was on the aforesaid basis that the Notice of Demand came to ultimately call upon the petitioners to pay an amount of INR 1063,74,59,852/- as representing arrears of license fee when computed at the rate of INR 98 crores per annum from 11 March 2014 along with interest, arrears of outstanding license fee with interest.

56. As would be evident from the aforesaid recital of facts, the Council firstly takes the position of Clause 48 of the License Agreement being violative of the mandate of Section 141(2) of the 1994 Act. Undisputedly, the said provision came into force only in 1994 when the said enactment came to be promulgated and thus nearly a decade after the License Agreement had come to be executed in favour of the petitioner. It was perhaps this facet which weighed upon the Council to also rest its case on Section 416 of the 1994 Act. The submission addressed on the basis of Section 416 of the 1994 Act essentially proceeds on the premise that Clause 48 would be inconsistent with the provisions of the 1994 Act and more particularly Section 141 thereof and thus would not be saved.

57. Section 141 of the 1994 Act encompasses the powers of the Council to lease, sell or otherwise transfer any immovable property belonging to it. In terms of Section 141(2) of the 1994 Act, the Council is obliged to ensure that the consideration at which any



immovable property is sold, leased or otherwise transferred is not less than the value at which the property would be sold or transferred in *normal and fair competition*. Section 141(2) of the 1994 Act thus places the Council under a duty to ensure that any transfer of an immovable asset is not at a value less than what it would have fetched otherwise in *normal and fair competition*. The phrase *normal and fair competition* is sought to be construed by the Council as being consideration that it would have received if the property had been disposed of by way of a tendering or an auction process.

58. The aforesaid submission, however, proceeds on a wholly untenable basis since it loses sight of the fact that the property in question had come to be settled by virtue of the License Agreement executed in favour of the petitioner way back in 1982. On a plain and textual reading of Section 141(2) of the 1994 Act, it is evident that the said provision could only apply to a disposal of immovable property which would have occurred after its enforcement. The provisions of Section 141(2) of the 1994 Act on foundational principles cannot be construed as either annulling or intended to set at naught transactions which had come to be validly entered into by the Council prior to 1994.

59. That then takes the Court to consider the argument based on Section 416 of the 1994 Act. The respondents proceeded on the basis that since the license executed in favour of the petitioner was not at a consideration that could have otherwise been obtained in *normal and fair competition*, the License Agreement would stand invalidated. The entire foundation of this submission is based on the assumption that the execution of the License Agreement was for a consideration which



was unfair or detrimental to public interest. This contention, however, cannot possibly sustain bearing in mind the decision of the Court in *S.S. Sobti*.

60. It becomes pertinent to recollect that the License Agreement executed by the Council and the validity thereof was the central issue in *S.S. Sobti*. It would therefore be appropriate to notice that decision in some detail. From the facts which are noticed in that judgment, we find that the subject property formed part of a larger area of about 30 acres and which was intended to be used for construction of a Five Star Hotel. It appears that initially the aforesaid plot was resolved to be licensed to M/s. Delhi Automobiles at a license fee of INR 37.78 lakhs per annum. However, the aforesaid transaction was not completed and the allotment ultimately cancelled in March 1978. The amount which had been received by the Council from M/s. Delhi Automobiles was refunded. It was only thereafter that the subject plot came to be licensed in favour of the petitioners albeit at a revised license fee of INR 1.45 crores per annum.

61. Apart from the petitioner having questioned the validity of the transaction on the ground of the same being founded on an arbitrary and politically motivated decision, *S.S. Sobti* also assailed the procedure adopted by the Council leading up to the execution of the License Agreement, as well as the fixation of license fee. As would be evident from a reading of *S.S. Sobti*, the transaction was also assailed on grounds of violation of Article 14 of the Constitution and of the Council having failed to adopt standards expected of a public body while granting largesse.

62. Negating the challenge on the ground of the petitioner being



the recipient of political patronage, the Court firstly held that whatever steps may have been taken in the past, the cancellation of the allotment terminated all proceedings that had been initiated for settlement of the subject plot initially in favour of M/s. Delhi Automobiles. The Court also took cognizance of the fact that the establishment of a Five Star Hotel would itself entail a large investment and would have to be awarded to an entity which had the necessary and requisite experience of establishing and running such an establishment. It further bore in consideration the undisputed fact that while the initial allotment was proposed at a license fee of INR 37.78 lakhs, the settlement in favour of the petitioner was at a revised license fee of INR 1.45 crores per annum. The Court while negating the challenge raised in *S.S. Sobti* also weighed in consideration the imperatives of setting up of a Five Star Hotel considering the impending 1982 Asian Games.

63. It further pertinently observed that bearing in mind the nature of the project namely the establishment of a Five Star Hotel, the Council could not have been faulted merely because it chose not to settle the subject plot by invitation of tenders. It was in this regard observed that the Council had an extremely restricted field from out of which an appropriate entity could have been selected bearing in mind the financial commitments required for the purposes of investment in construction of a hotel building coupled with the obligation to run the same.

64. It also pertinently observed that the entire project was initially cancelled in 1977 and came to be revitalized bearing in mind the proximity of the Asian Games and the lack of accommodation in the



capital city. The Court further held that the Council had ensured that the license fee was significantly enhanced and the amount of INR 1.45 crores as computed could not be possibly said to be either low or inadequate. In *S.S. Sobti*, the Court also appears to have weighed in consideration the fact that the license fee was to be paid out of the earnings of the hotel itself. It also took into consideration the fact that a large investment would have to be made for the construction and development of the allotted plot. On an overall conspectus of the aforesaid, it proceeded to uphold the grant of license and held that the procedure as adopted by the Council could not be said to be violative of Article 14 of the Constitution.

65. *S.S. Sobti* is thus an emphatic and conclusive answer to the contention addressed by the respondent of the transaction being violative of Section 141(2) of the 1994 Act. Once the aforesaid decision had upheld the transaction and found it to have been concluded by following a fair and transparent procedure, there would be no justification to review the same. It becomes pertinent to note that the aforesaid decision negated the various challenges raised including the failure of the Council to have explored the possibility of receiving a higher consideration. Ultimately and upon a due analysis of the entire record and the events leading up to the grant of the license, the Court found no ground to interfere. *S.S. Sobti* reviewed the grant of the license both from a statutory standpoint as well as the constitutional perspective. It ultimately came to hold that the transaction warranted no interference.

66. Regard must also be had to the fact that the Council at that stage had vehemently opposed the challenge raised to the grant of license. It



becomes relevant to observe that before the Court in *S.S. Sobti*, the Council had never questioned the validity of either the License Agreement or for that matter Clause 48. In fact, its stand to the contrary was that the license was valid and in accord with constitutional principles. The Court thus finds itself unable to appreciate or countenance the contrary position which is sought to be advocated in these proceedings. Till such time as the License Agreement subsists and is not annulled in accordance with law, it would continue to bind the Council.

67. The stand which is taken in these proceedings, not only represents a complete reversal of what was contended in *S.S. Sobti*, it amounts to an attempt by the Council to resile from solemn terms which formed part of the bargain between the parties and stand embodied in the License Agreement. In the considered opinion of this Court, it would clearly not be open for the Council to contend today that the License Agreement is rendered invalid by virtue of Section 141(2) of the 1994 Act. Public authorities and those whom we recognise to be instrumentalities of the State cannot be permitted in law to take such contradictory and vacillating stands and which would be contrary to the principles of fairness and probity that is expected of such bodies in our constitutional scheme.

68. The Court further notes that the respondents appear to have proceeded on the assumption that the disposal of public assets must necessarily be by way of an auction or tender. That auction is not the only mode by which public assets may be settled is an issue which stands answered against the Council by the Supreme Court in the *Presidential Reference* judgment itself. It becomes pertinent to recall



that the Constitution Bench in the *Presidential Reference* judgment had itself categorically held that the disposal of public assets by way of an auction alone cannot be elevated to a constitutional principle. The Supreme Court held that as long as the procedure adopted by the authority is in accord with the mandate of Article 14 of the Constitution and is found to subserve the public good, the same would be sufficient to answer the test of fairness. We deem it apposite to extract the following paragraphs from the *Presidential Reference* judgment:-

“81. Our reading of these paragraphs suggests that the Court was not considering the case of auction in general, but specifically evaluating the validity of those methods adopted in the distribution of spectrum from September 2007 to March 2008. It is also pertinent to note that reference to auction is made in the subsequent para 96 with the rider “perhaps”. It has been observed that “a duly publicised auction conducted fairly and impartially is *perhaps* the best method for discharging this burden”. We are conscious that a judgment is not to be read as a statute, but at the same time, we cannot be oblivious to the fact that when it is argued with vehemence that the judgment lays down auction as a constitutional principle, the word “perhaps” gains significance. This suggests that the recommendation of auction for alienation of natural resources was never intended to be taken as an absolute or blanket statement applicable across all natural resources, but simply a conclusion made at first blush over the attractiveness of a method like auction in disposal of natural resources. The choice of the word “perhaps” suggests that the learned Judges considered situations requiring a method other than auction as conceivable and desirable.

82. Further, the final conclusions summarised in para 102 of the judgment (SCC) in 2G case [(2012) 3 SCC 1] make no mention about auction being the only permissible and intra vires method for disposal of natural resources; the findings are limited to the case of spectrum. In case the Court had actually enunciated, as a proposition of law, that auction is the only permissible method or mode for alienation/allotment of natural resources, the same would have found a mention in the summary at the end of the judgment.

XXX

XXX

XXX



120. Therefore, in conclusion, the submission that the mandate of Article 14 is that any disposal of a natural resource for commercial use must be for revenue maximisation, and thus by auction, is based neither on law nor on logic. There is no constitutional imperative in the matter of economic policies—Article 14 does not predefine any economic policy as a constitutional mandate. Even the mandate of Article 39(b) imposes no restrictions on the means adopted to subserve the public good and uses the broad term “distribution”, suggesting that the methodology of distribution is not fixed. Economic logic establishes that alienation/allocation of natural resources to the highest bidder may not necessarily be the only way to subserve the common good, and at times, may run counter to public good. Hence, it needs little emphasis that disposal of all natural resources through auctions is clearly not a constitutional mandate.”

69. The Supreme Court then proceeded to review the decisions rendered in the past and which had dealt with issues of grant of largesse by the State and the principles of fairness and non-arbitrariness which must inform those acts. Tracing the principles laid down in a long line of precedents, the Supreme Court held as follows:-

“**101.** *Ramana Dayaram Shetty v. International Airport Authority of India* [(1979) 3 SCC 489 : AIR 1979 SC 1628] explained the limitations of Article 14 on the functioning of the Government as follows: (SCC p. 506, para 12)

“12. ... It must, therefore, be taken to be the law that where the Government is dealing with the public, whether by way of giving jobs or entering into contracts or issuing quotas or licences or granting other forms of largesse, the Government cannot act arbitrarily at its sweet will and, like a private individual, deal with any person it pleases, but its action must be in conformity with standard or norms which is not arbitrary, irrational or irrelevant. The power or discretion of the Government in the matter of grant of largesse including award of jobs, contracts, quotas, licences, etc. must be confined and structured by rational, relevant and non-discriminatory standard or norm and if the Government departs from such standard or norm in any particular case or cases, the action of the Government would be liable to be struck down, unless it can be shown by the Government that



the departure was not arbitrary, but was based on some valid principle which in itself was not irrational, unreasonable or discriminatory.”

XXX

XXX

XXX

103. As is evident from the above, the expressions “arbitrariness” and “unreasonableness” have been used interchangeably and in fact, one has been defined in terms of the other. More recently, in *Sharma Transport v. Govt. of A.P.* [(2002) 2 SCC 188] , this Court has observed thus: (SCC pp. 203-04, para 25)

“25. ... In order to be described as arbitrary, it must be shown that it was not reasonable and manifestly arbitrary. The expression ‘arbitrarily’ means: in an unreasonable manner, as fixed or done capriciously or at pleasure, without adequate determining principle, not founded in the nature of things, non-rational, not done or acting according to reason or judgment, depending on the will alone.”

XXX

XXX

XXX

107. From a scrutiny of the trend of decisions it is clearly perceivable that the action of the State, whether it relates to distribution of largesse, grant of contracts or allotment of land, is to be tested on the touchstone of Article 14 of the Constitution. A law may not be struck down for being arbitrary without the pointing out of a constitutional infirmity as *McDowell case* [(1996) 3 SCC 709] has said. Therefore, a State action has to be tested for constitutional infirmities qua Article 14 of the Constitution. The action has to be fair, reasonable, non-discriminatory, transparent, non-capricious, unbiased, without favouritism or nepotism, in pursuit of promotion of healthy competition and equitable treatment. It should conform to the norms which are rational, informed with reasons and guided by public interest, etc. All these principles are inherent in the fundamental conception of Article 14. This is the mandate of Article 14 of the Constitution of India.

Whether “auction” a constitutional mandate

108. Such being the constitutional intent and effect of Article 14, the question arises — Can auction as a method of disposal of natural resources be declared a constitutional mandate under Article 14 of the Constitution of India? We would unhesitatingly answer it in the negative since any other answer would be completely contrary to the scheme of Article 14. Firstly, Article 14 may imply positive and negative rights for an individual, but with respect to the State, it is only couched in negative terms: like an



admonition against the State which prohibits the State from taking up actions that may be arbitrary, unreasonable, capricious or discriminatory. Article 14, therefore, is an injunction to the State against taking certain type of actions rather than commanding it to take particular steps. Reading the mandate of auction into its scheme would thus, be completely contrary to the intent of the article apparent from its plain language.

XXX

XXX

XXX

112. Equality, therefore, cannot be limited to mean only auction, without testing it in every scenario. In *State of W.B. v. Anwar Ali Sarkar* [(1952) 1 SCC 1 : AIR 1952 SC 75 : 1952 Cri LJ 510 : 1952 SCR 284 at p. 297] , this Court, quoting from *Kotch v. River Port Pilot Commissioners* [91 L Ed 1093 : 330 US 552 (1947)] , had held that: (*Anwar Ali Sarkar case* [(1952) 1 SCC 1 : AIR 1952 SC 75 : 1952 Cri LJ 510 : 1952 SCR 284 at p. 297] , AIR p. 80, para 10)

“10. ... ‘The constitutional command for a State to afford equal protection of the laws sets a goal not attainable by the invention and application of a precise formula. This Court has never attempted that impossible task.’”

One cannot test the validity of a law with reference to the essential elements of ideal democracy, actually incorporated in the Constitution. (See *Indira Nehru Gandhi v. Raj Narain* [1975 Supp SCC 1] .) The courts are not at liberty to declare a statute void, because in their opinion it is opposed to the spirit of the Constitution. The courts cannot declare a limitation or constitutional requirement under the notion of having discovered some ideal norm. Further, a constitutional principle must not be limited to a precise formula but ought to be an abstract principle applied to precise situations. The repercussion of holding auction as a constitutional mandate would be the voiding of every action that deviates from it, including social endeavours, welfare schemes and promotional policies, even though CPIL itself has argued against the same, and asked for making auction mandatory only in the alienation of scarce natural resources meant for private and commercial business ventures. It would be odd to derive auction as a constitutional principle only for a limited set of situations from the wide and generic declaration of Article 14. The strength of constitutional adjudication lies in case to case adjudication and therefore auction cannot be elevated to a constitutional mandate.

XXX

XXX

XXX



122. In *Kasturi Lal Lakshmi Reddy v. State of J&K* [(1980) 4 SCC 1] , while comparing the efficacy of auction in promoting a domestic industry, P.N. Bhagwati, J. observed: (SCC p. 20, para 22)

“22. ... If the State were giving a tapping contract simpliciter there can be no doubt that the State would have to auction or invite tenders for securing the highest price, subject, of course, to any other relevant overriding considerations of public weal or interest, but in a case like this where the State is allocating resources such as water, power, raw materials, etc. for the purpose of encouraging setting up of industries within the State, we do not think the State is bound to advertise and tell the people that it wants a particular industry to be set up within the State and invite those interested to come up with proposals for the purpose. The State may choose to do so, if it thinks fit and in a given situation, it may even turn out to be advantageous for the State to do so, but if any private party comes before the State and offers to set up an industry, the State would not be committing breach of any constitutional or legal obligation if it negotiates with such party and agrees to provide resources and other facilities for the purpose of setting up the industry. The State is not obliged to tell such party: ‘Please wait I will first advertise, see whether any other offers are forthcoming and then after considering all offers, decide whether I should let you set up the industry.’ ... The State must be free in such a case to negotiate with a private entrepreneur with a view to inducing him to set up an industry within the State and if the State enters into a contract with such entrepreneur for providing resources and other facilities for setting up an industry, the contract cannot be assailed as invalid so long as the State has acted bona fide, reasonably and in public interest. If the terms and conditions of the contract or the surrounding circumstances show that the State has acted mala fide or out of improper or corrupt motive or in order to promote the private interests of someone at the cost of the State, the court will undoubtedly interfere and strike down State action as arbitrary, unreasonable or contrary to public interest. But so long as the State action is bona fide and reasonable, the court will not interfere merely



on the ground that no advertisement was given or publicity made or tenders invited.”

123. In *Sachidanand Pandey* [(1987) 2 SCC 295] after noticing *Kasturi Lal case* [(1980) 4 SCC 1] it was concluded as under: (*Sachidanand Pandey case* [(1987) 2 SCC 295] , SCC p. 330, para 40)

“40. On a consideration of the relevant cases cited at the Bar the following propositions may be taken as well established: State-owned or public-owned property is not to be dealt with at the absolute discretion of the executive. Certain precepts and principles have to be observed. Public interest is the paramount consideration. One of the methods of securing the public interest, when it is considered necessary to dispose of a property, is to sell the property by public auction or by inviting tenders. Though that is the ordinary rule, it is not an invariable rule. There may be situations where there are compelling reasons necessitating departure from the rule but then the reasons for the departure must be rational and should not be suggestive of discrimination. Appearance of public justice is as important as doing justice. Nothing should be done which gives an appearance of bias, jobbery or nepotism.”

124. In *Haji T.M. Hassan Rawther v. Kerala Financial Corpn.* [(1988) 1 SCC 166] , after an exhaustive review of the law including the decisions in *Kasturi Lal* [(1980) 4 SCC 1] and *Sachidanand Pandey* [(1987) 2 SCC 295] , it was held that public disposal of State-owned properties is not the only rule. It was, inter alia, observed that: (*Haji T.M. Hassan case* [(1988) 1 SCC 166] , SCC p. 173, para 14)

“14. The public property owned by the State or by any instrumentality of the State should be generally sold by public auction or by inviting tenders. This Court has been insisting upon that rule, not only to get the highest price for the property but also to ensure fairness in the activities of the State and public authorities. They should undoubtedly act fairly. Their actions should be legitimate. Their dealings should be aboveboard. Their transactions should be without aversion or affection. Nothing should be suggestive of discrimination. Nothing should be done by them which gives an impression of bias, favouritism or nepotism. Ordinarily these



factors would be absent if the matter is brought to public auction or sale by tenders. That is why the Court repeatedly stated and reiterated that the State-owned properties are required to be disposed of publicly. But that is not the only rule. As O. Chinnappa Reddy, J. observed ‘that though that is the ordinary rule, it is not an invariable rule’. There may be situations necessitating departure from the rule, but then such instances must be justified by compulsions and not by compromise. It must be justified by compelling reasons and not by just convenience.”

Here, the Court added to the previous decisions and said that a blithe deviation from public disposal of resources would not be tolerable; such a deviation must be justified by compelling reasons and not by just convenience.

125. In *M.P. Oil Extraction v. State of M.P.* [(1997) 7 SCC 592] this Court held as follows: (SCC pp. 612-13, para 45)

“45. Although to ensure fair play and transparency in State action, distribution of largesse by inviting open tenders or by public auction is desirable, it cannot be held that in no case distribution of such largesse by negotiation is permissible. In the instant case, as a policy decision protective measure by entering into agreements with selected industrial units for assured supply of sal seeds at concessional rate has been taken by the Government. The rate of royalty has also been fixed on some accepted principle of pricing formula as will be indicated hereafter. Hence, distribution or allotment of sal seeds at the determined royalty to the respondents and other units covered by the agreements cannot be assailed. It is to be appreciated that in this case, distribution by public auction or by open tender may not achieve the purpose of the policy of protective measure by way of supply of sal seeds at concessional rate of royalty to the industrial units covered by the agreements on being selected on valid and objective considerations.”

XXX

XXX

XXX

128. In *Villianur Iyarkkai Padukappu Maiyam v. Union of India* [(2009) 7 SCC 561], a three-Judge Bench of this Court was concerned with the development of the port of Pondicherry where a contractor had been selected without floating a tender or holding



public auction. It was held as under: (SCC pp. 604-05, paras 164 & 171)

“164. The plea raised by the learned counsel for the appellants that the Government of Pondicherry was arbitrary and unreasonable in switching the whole public tender process into a system of personal selection and, therefore, the appeals should be accepted, is devoid of merits. It is well settled that non-floating of tenders or not holding of public auction would not in all cases be deemed to be the result of the exercise of the executive power in an arbitrary manner.

171. In a case like this where the State is allocating resources such as water, power, raw materials, etc. for the purpose of encouraging development of the port, this Court does not think that the State is bound to advertise and tell the people that it wants development of the port in a particular manner and invite those interested to come up with proposals for the purpose. The State may choose to do so if it thinks fit and in a given situation it may turn out to be advantageous for the State to do so, but if any private party comes before the State and offers to develop the port, the State would not be committing breach of any constitutional obligation if it negotiates with such a party and agrees to provide resources and other facilities for the purpose of development of the port.”

70. It ultimately enunciated the following legal principles:-

“129. Hence, it is manifest that there is no constitutional mandate in favour of auction under Article 14. The Government has repeatedly deviated from the course of auction and this Court has repeatedly upheld such actions. The judiciary tests such deviations on the limited scope of arbitrariness and fairness under Article 14 and its role is limited to that extent. Essentially, whenever the object of policy is anything but revenue maximisation, the executive is seen to adopt methods other than auction.

130. *A fortiori*, besides legal logic, mandatory auction may be contrary to economic logic as well. Different resources may require different treatment. Very often, exploration and exploitation



contracts are bundled together due to the requirement of heavy capital in the discovery of natural resources. A concern would risk undertaking such exploration and incur heavy costs only if it was assured utilisation of the resource discovered: a prudent business venture would not like to incur the high costs involved in exploration activities and then compete for that resource in an open auction. The logic is similar to that applied in patents. Firms are given incentives to invest in research and development with the promise of exclusive access to the market for the sale of that invention. Such an approach is economically and legally sound and sometimes necessary to spur research and development. Similarly, bundling exploration and exploitation contracts may be necessary to spur growth in a specific industry.

131. Similar deviation from auction cannot be ruled out when the object of a State policy is to promote domestic development of an industry, like in *Kasturi Lal case* [(1980) 4 SCC 1] , discussed above. However, these examples are purely illustrative in order to demonstrate that auction cannot be the sole criterion for alienation of all natural resources.

XXX

XXX

XXX

146. To summarise in the context of the present Reference, it needs to be emphasised that this Court cannot conduct a comparative study of the various methods of distribution of natural resources and suggest the most efficacious mode, if there is one universal efficacious method in the first place. It respects the mandate and wisdom of the executive for such matters. The methodology pertaining to disposal of natural resources is clearly an economic policy. It entails intricate economic choices and the Court lacks the necessary expertise to make them. As has been repeatedly said, it cannot, and shall not, be the endeavour of this Court to evaluate the efficacy of auction vis-à-vis other methods of disposal of natural resources. The Court cannot mandate one method to be followed in all facts and circumstances. Therefore, auction, an economic choice of disposal of natural resources, is not a constitutional mandate. We may, however, hasten to add that the Court can test the legality and constitutionality of these methods. When questioned, the courts are entitled to analyse the legal validity of different means of distribution and give a constitutional answer as to which methods are ultra vires and intra vires the provisions of the Constitution. Nevertheless, it cannot and will not compare which policy is fairer than the other, but, if a policy or law is patently unfair to the extent that it falls foul of the fairness requirement of Article 14 of the Constitution, the Court would not hesitate in striking it down.



147. Finally, market price, in economics, is an index of the value that a market prescribes to a good. However, this valuation is a function of several dynamic variables: it is a science and not a law. Auction is just one of the several price discovery mechanisms. Since multiple variables are involved in such valuations, auction or any other form of competitive bidding, cannot constitute even an economic mandate, much less a constitutional mandate.

148. In our opinion, auction despite being a more preferable method of alienation/allotment of natural resources, cannot be held to be a constitutional requirement or limitation for alienation of all natural resources and therefore, every method other than auction cannot be struck down as ultra vires the constitutional mandate.”

71. As would be manifest from the aforesaid passages, the Constitution Bench held that in various instances, the State had deviated from the auction mode where circumstances so warranted and all such actions had been consistently upheld. It was observed that where the object of policy was not revenue maximization alone, it would be open for the State to adopt a mode other than that of auction. It was pertinently observed that where a project entails a heavy capital expenditure, the Executive may be compelled to incentivize parties to undertake the requisite development and thus placing the objective of revenue maximization in the background. The Constitution Bench also spoke of objectives such as promotion of industry and development as being circumstances in which the auction method may not coalesce with State policy and thus justifying the said route being departed from. It ultimately observed that auction could not be recognized as being the solitary economic choice of disposal nor could it be described to be the constitutional mandate. It held that ultimately it would be for the Executive to consider and formulate the methodology bearing in mind the policy imperatives and the objectives sought to be achieved.



72. The decision of the Constitution Bench thus clearly runs contrary to what the respondents assumed the law to be. As is manifest from the principles enunciated in that decision, the primary test is whether the procedure as adopted for disposal of a public asset meets the requirements of Article 14 of the Constitution and whether the instrumentality followed a fair and transparent procedure for grant of largesse. Courts would be equally concerned with policy objectives and the exigencies which informed the course adopted by the Executive. We have also by way of a series of precedents also recognised the limits of judicial review in such matters with courts being primarily concerned with the fairness of the process of allotment and disposal of public assets and accepting the imperatives of the Executive being accorded a fair play in the joints to identify and formulate the appropriate measure. It was these precepts which clearly appear to constitute the foundation of the decision in *S.S. Sobti*.

73. The Court notes that the license ultimately came to be granted at a value far greater than what the Council had identified in the course of its initial attempt to award the development project. The Council while entering into the license in question was faced with the eminent requirement of a Five Star facility being established before the commencement of the Asian Games. The project was envisaged to cater to the hospitality requirements of the capital city and also lead to the creation of a commercial hub of international standards. It was on a due consideration and a balancing of the aforesaid policy imperatives which ultimately prevailed upon the Council and lead to the execution of the License Agreement. Once *S.S. Sobti* had upheld the transaction in question and negatived the challenge raised both on



the anvil of Article 14 of the Constitution or of the license fee being contrary to the interests of the public body, there exists no justification to hold that the License Agreement would violate either the mandate of Section 141(2) of the 1994 Act or the constitutional principles which must imbue such actions of public authorities.

74. Once we come to the conclusion that the grant of license cannot be said to be contrary to the underlying objectives of Section 141(2) of the 1994 Act, the question of the agreement being inconsistent with the provisions of the 1994 Act would not survive. The argument resting on Section 416(2) of the 1994 Act consequently also disintegrates and falls to the ground.

75. The Court then finds that Clause 48 clearly bound the Council when it came to the subject of enhancement of license fee. Undisputedly, Clause 48 restricts the Council from enhancing the license fee beyond the cap of 100%. The said enhancement is further restricted by that provision when it stipulates that revision can be effected only at the end of each 33 year term. The enhancement of license fee would thus be regulated strictly in accordance with Clause 48. The said provision which constitutes an integral component of the License Agreement also cannot be effaced or annulled based on market value assessments that may have been obtained by the Council subsequently. Those assessments cannot be read as empowering the Council to revise, efface or amend Clause 48 unilaterally. The License Agreement undoubtedly confers a power of termination on the Council. Merely because, in the estimation of the Council, the bargain has become unprofitable or uneconomical, the same would not constitute a ground enabling them to depart from the rigors of Clause



48. Ultimately, the parties would be bound by the contractual stipulations. Consequently the Court is of the firm opinion that the enhancement of license would be governed solely by the provisions of Clause 48 and the subsequent valuation reports would not override the prescriptions contained therein. Those valuation reports, at best, can only act as a measure enabling the Council to ascertain the percentage by which the fee may be increased subject of course to the overarching restriction of that percentage increase not exceeding 100% of the previously prevailing license fee.

76. Turning then to the action of termination, the Court notes that undisputedly the transfer which led to the drawl of proceedings under the 1899 Act was one to which the petitioner was not a party. The said creation of interest was a unilateral act taken by one of the sub-licenses. The respondents have woefully failed to establish that the proposed transfer in favour of M/s Indian Wind Power Association was with the approval, tacit or otherwise, of the petitioner.

77. Of equal significance is the conduct of the petitioner when the aforesaid transaction came to light. As the record bears out, it not only commanded M/s Indian Wind Power Association to withdraw the instrument which had been submitted for registration, the pre-emptive steps taken by it in this regard were also duly communicated to the Council. This is therefore not a case where the Council was kept in the dark and the actions taken by Mrs. Ghazala Shameem and Mr. Owais Usmani suppressed.

78. The Court further notes that the proposed sale transaction never achieved fruition since the instrument was not registered. Undisputedly, a conveyance of immovable property can only be by



way of an instrument which is duly registered in accordance with law. The sale thus remained a dead letter by the time the Notice of Termination came to be issued. The Court also finds merit in the contention of the petitioner that the aforesaid transaction which had occurred more than two years prior to the issuance of the Notice of Termination could not have constituted a valid or justifiable ground to terminate the license. The action of the Council in this regard is found to be wholly arbitrary and illegal.

79. This Court also deems it relevant to observe that the prior approval of the Council was envisaged only in cases covered under Clause 11. The aforesaid article in the License Agreement in unambiguous terms excluded from its ambit the right of the petitioner to create sub-licenses in accordance with Clause 29. Clause 29 did not mandate that sub-licenses be created only with the prior approval or consent of the Council. Notwithstanding the above, a perusal of the material placed on the record would indicate that all sub-licenses including the requisite facts relating to the sub-licenses created by the petitioner originally in favor of M/s. Sonia Farms Private Ltd, thereafter in favour of Mrs. Ghazala Shameem and Mr. Owais Usmani and right up to the creation of the sub-license in favour of M/s India Wind Power Association were duly intimated to the Council. There was thus neither a fundamental breach of the License Agreement nor could the petitioner be said to have acted in violation of the terms thereof. The Court thus finds itself unable to either sustain the Notice of Demand or the termination of the License Agreement.

80. Accordingly, and for all the aforesaid reasons, the writ petitions are allowed. The impugned communications dated 13 February 2020



are hereby quashed and set aside. The Council is however accorded the liberty to recompute and revise the license fee in accordance with the provisions of the License Agreement and bearing in mind the observations made hereinabove.

81. Consequently, the writ petitions along with pending applications shall stand disposed of on the aforesaid terms.

YASHWANT VARMA, J.

DECEMBER 06, 2023/neha/rw