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ITC LTD.

v.

STATE OF UTTAR PRADESH & ORS.

(Civil Appeal No. 4561 of 2008)

B

JULY 5, 2011

[R. V. RAVEENDRAN AND B. SUDERSHAN REDDY, JJ.]

Uttar Pradesh Urban Planning and Development Act, C *1973:*

s.41(3) r/w ss.12 and 14 – Allotment of commercial plots in commercial area for construction of 5 star, 4 star and 3 star hotels on 90 years lease – Plots allotted at industrial rates – D *Later on, allotments cancelled as the same were made without following the procedure of auction, and the allotment on fixed industrial rates caused loss to government exchequer – HELD: Under private law, a lease governed exclusively by the provisions of Transfer of Property Act could* E *be cancelled only by filing a civil suit for its cancellation or for a declaration that it is illegal, null and void and for the consequential relief of delivery back of possession – Where the grant of lease is governed by a statute or statutory regulations, and if such statute expressly reserves the power of cancellation or revocation to the lessor, it will be* F *permissible for an Authority, as the lessor, to cancel a duly executed and registered lease deed, even if possession has been delivered, on the specific grounds of cancellation provided in the statute – In the instant case, NOIDA is a statutory authority and it has not alleged or made out any* G *default in payment or breach of conditions of the lease or breach of rules and regulations – Nor is it the case of NOIDA that any of the allottees is guilty of any suppression or misstatement of fact, misrepresentation or fraud – Therefore, the allotment of commercial plots by NOIDA to the allottees*

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for setting up hotels is valid –There is no violation of the regulations or policies of NOIDA in allotting commercial plots for hotels – Therefore, cancellation of allotment is unsustainable. A

ss. 41(3) – Allotment of plots – Cancellation of – HELD: When valuable rights had vested in the allottees, by reason of the allotments and grant of leases, such rights could not be interfered with or adversely affected, without a hearing to the affected parties – Natural justice – Opportunity of hearing. B

Administrative Law: C

Allotment of commercial plots for hotels – Cancellation order – Judicial review of – HELD: In the instant case, the allotments of plots for hotel projects were challenged in writ petitions and in compliance with the direction of the High Court, the state government had a relook at the matter and found some irregularities in allotment – The decision of the state government in revision, is not based on any different policy, but based on its finding that the existing regulations and policies of NOIDA were violated – The policy of the state government cannot override the NOIDA Regulations – If any policy is made, intending to give different meaning to the words 'commercial use' and 'industrial use', that can be given effect only if the regulations are suitably amended – The fact that the tourism or hotels have been given the status of 'industry' will not convert them into industries, for the purpose of allotment of plots, nor will the use of land by such tourism or hotel industry, will be an industrial use – Allotment of plots for hotels in a commercial area is wholly in consonance with the NOIDA Regulations and Master plan which earmarks areas for specific land uses like industrial, residential, commercial, institutional, public, semi-public, etc – Therefore, the allotment of plots situated in commercial areas earmarked for commercial use, to hotels did not violate any provisions of the Act or the NOIDA Regulations – NOIDA (Preparation D E F G H

A *and Finalisation of Plan) 1991 Regulations, 1991 – Policy dated 22.5.2006 of Government of Uttar Pradesh – Uttar Pradesh Urban Planning and Development Act, 1973.*

Public law – Breach of statutory provisions or procedural
B *irregularities – Allotment of plots for hotels on 90 years lease – Cancellation of – Remedial action – Explained.*

TOURISM:

Running a hotel/boarding house/restaurant – HELD: Is
C *a commercial activity – By no stretch of imagination, use of a plot for a hotel can be considered as use of such land for an industrial purpose – It was not necessary for NOIDA to change the land use of plots to be allotted to hotels, from commercial to industrial use.*

D *Urban Development:*

Allotment of commercial plots for 5 star, 4 star and 3 star hotels – Requirement of inviting tenders – Commercial plots in commercial area allotted at fixed industrial rate without
E *inviting tenders – HELD: Allotment of commercial plots is governed by the NOIDA Policies and Procedures for Commercial Property Management, 2004 – Under the said policy, commercial properties of NOIDA can be allotted only on sealed tender basis or by way of public auction – The*
F *allotment of commercial plots at fixed rate was, therefore, clearly contrary to the said regulations of NOIDA – The failure to follow the procedure prescribed in the NOIDA Commercial Property Management Policy is a violation of the policy and such violation has resulted in loss to the public exchequer –*
G *Therefore, the state government can certainly interfere under its revisional jurisdiction – As the allotment is of commercial plots governed by NOIDA Commercial Property Management Policy, and as the reserve rate itself was Rs.30000/- per sq.m., allotment at Rs.7,400 per sq.m. caused loss and violated the*
H *regulations and policy of NOIDA – However, the violation*

occurred on account of a mistake on the part of the officers of NOIDA in misinterpreting the government policy dated 22.5.2006 – The allottees are given the option to continue their respective leases by paying the premium (allotment rate) at Rs.70,000/- per sq.m. (with corresponding increase in yearly rent/one time lease rent), without any location benefit charges – NOIDA Policies and Procedures for Commercial Property Management, 2004 – Uttar Pradesh Urban Planning and Development Act, 1973 – s.41.

Words and Phrases:

Expression 'industry' used in the context of tourism/hotel – Connotation of.

Keeping in view the Common Wealth Games 2010 and pursuant to a meeting with the Secretary, Sports and Youth Affairs, Government of India, the NOIDA, on 17.10.2006, invited applications for allotment of plots of industrial land at industrial rates of Rs. 7,400/- per sq. mts. plus location charges for 5 star, 4 star and 3 star hotels on 90 years lease basis. Allotments of 9 plots for 5 star hotels 2 plots for 4 star hotel and 3 plots for 3 star hotels were made on 12.01.2007. The Government scheme dated 22.05.2006 was approved on 05.06.2006 and the lease deeds were registered in two cases and in other cases, the registration was kept pending on the ground of under valuation stating that as against circle rate of Rs.70,000/- per sq. mt., the premium for the sale was only Rs. 7,400 per sq. mts. Writ petitions were filed in the High Court on the ground that the allotment of the said plots was at a very low price. Pursuant to the direction of the High Court to the State Government to exercise its power of revision u/s.41(3) read with s.12 of the U. P. Urban Planning and Development Act, 1973, the Government concluded that the allotments made were irregular for (i) allotments of commercial plots had been made for

A industrial purposes at industrial rates without getting the land use changed from commercial to industrial in accordance with the regulations and without obtaining the consent of the state government; and (ii) the plots earmarked for commercial use in a commercial area were B allotted at rates applicable to industrial plots, without calling for competitive bids/tenders and without the permission of the state government. It, therefore, directed on 01.08.2007 NOIDA to cancel the allotments and initiate action against the officers of NOIDA responsible for the C irregularities. Consequently, the NOIDA issued cancellation letters dated 3.8.2007 canceling the allotments and consequential leases granted in favour of the appellants; and the said writ petitions were dismissed as withdrawn.

D The allottees filed writ petitions before the High Court challenging the cancellation of allotment of plots and the leases by communications dated 3.8.2007. A Division Bench of the High Court allowed the writ petitions. It quashed the order dated 1.8.2007 of the State E Government and the cancellation orders dated 3.8.2007 passed by NOIDA on the ground that they were opposed to principles of natural justice for want of opportunity of hearing as required under proviso to s.41(3) of 1973 Act. The High Court, therefore, remanded the matters to the F State Government for taking decision afresh.

In the instant appeals filed by the allottees, it was contended for the appellants that the High Court, having quashed the order of the State Government dated G 1.8.2007 and the consequential orders of cancellation dated 3.8.2007 passed by NOIDA, ought to have upheld the allotments and the leases and should not have remanded the matter to the state government for consideration.

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On 9.7.2008 the Court directed status quo regarding possession. On 18.7.2008 the Court, while granting stay of dispossession of the appellants from the respective sites allotted to them, directed the State Government to give a hearing to the appellants and pass a reasoned order in accordance with law. The state government accordingly passed individual orders dated 8.9.2008 in the case of each of the appellants, holding that the allotment of plots to them was bad. It cancelled the allotments and directed action to be taken against the erring officers of NOIDA.

The questions for consideration before the Court were: (1) "Where allotment has been followed by grant of a lease (which is duly executed) and delivery of possession in favour of the lessee, whether the leases could be unilaterally cancelled by the lessor?" (2) "Whether the cancellations were on account of change in policy as a consequence of change of government, or on account of new government's desire to nullify the actions of previous government?" (3) "Whether the allotments of plots to appellants suffer from any irregularity or illegality?"

Disposing of the appeals, the Court

HELD: 1. The High Court rightly set aside the orders dated 1.8.2007 of the State government, because no hearing was given to the appellants as required u/s 41(3) of the 1973 Act. Even otherwise, when valuable rights had vested in the allottees, by reason of the allotments and grant of leases, such rights could not be interfered with or adversely affected, without a hearing to the affected parties. The High rightly directed the state government to decide the matter afresh after hearing the appellants. This court reiterated the said direction in its interim order dated 18.7.2008. Therefore, there is no need to interfere with the final order of the High Court. [para

A 16] [107-C-D-F-G]

Whether completed lease can be cancelled:

2.1. Two lease deeds have been duly registered. In regard to other lease deeds, which were presented for B registration, though there is no objection for registration, registration formalities are kept pending in view of a demand by the registration authorities for deficit stamp duty and registration charges on the basis of circle rate and the issue is pending before the registration officer C concerned or in court. As far as NOIDA is concerned, execution and registration of the leases were completed, and, consequently, possession of the plots was delivered to the allottees/lessees in April and May, 2007. Each appellant has also incurred considerable amount for D preliminary expenditure for the hotel project (in addition to the premium, location benefit charges, rent, stamp duty and registration charges) as they were expected to execute the projects in a time bound manner. [para 19] [110-H; 111-A-D]

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2.2. Under private law, a lease governed exclusively by the provisions of Transfer of Property Act, 1882 could be cancelled only by filing a civil suit for its cancellation or for a declaration that it is illegal, null and void and for the consequential relief of delivery back of possession. F Unless and until a court of competent jurisdiction grants such a decree, the lease will continue to be effective and binding. Unilateral cancellation of a registered lease deed by the lessor will neither terminate the lease nor entitle a lessor to seek possession. This is the position under G private law. [para 21] [111-G-H; 112-A]

2.3. But, where the grant of lease is governed by a statute or statutory regulations, and if such statute expressly reserves the power of cancellation or H revocation to the lessor, it will be permissible for an

Authority, as the lessor, to cancel a duly executed and registered lease deed, even if possession has been delivered, on the specific grounds of cancellation provided in the statute. [para 22] [112-B] A

2.4. In the instant case, NOIDA is an authority constituted under the Uttar Pradesh Industrial Area Development Act, 1976, for development of an industrial and urban township (also known as Noida) in Uttar Pradesh under the provisions of the Act. Section 7 empowers the authority to sell, lease or otherwise transfer whether by auction, allotment or otherwise, any land or building belonging to it in the industrial development area, on such terms and conditions as it may think fit to impose, on such terms and conditions and subject to any rules that may be made. Section 14 empowers the Chief Executive Officer of the Authority to resume a site or building which had been transferred by the Authority and forfeit the whole or part of the money paid in regard to such transfer, in the following two circumstances : (a) non-payment by the lessee, of consideration money or any installment thereof due by the lessee on account of the transfer of any site or building by the Authority; or b) breach of any condition of such transfer or breach of any rules or regulations made under the Act by the lessee. Thus, if a lessee commits default in paying either the premium or the lease rent or other dues, or commits breach of any term of the lease deed or breach of any rules or regulations under the Act, the Chief Executive Officer of NOIDA can resume the leased plot or building in the manner provided in the statute, without filing a civil suit. The authority to resume implies and includes the authority to unilaterally cancel the lease. [para 23] [112-C-H; 113-A] B C D E F G

2.5. NOIDA has not alleged or made out any default in payment or breach of conditions of the lease or breach H

A of rules and regulations. Nor is it the case of NOIDA that any of the appellants is guilty of any suppression or misstatement of fact, misrepresentation or fraud. Neither the cancellation of the allotment and the lease by NOIDA by letter dated 3.8.2007, nor the orders dated 1.8.2007 or B 8.9.2008 made by the state government refer to any of these grounds. Therefore, the allotment of commercial plots by NOIDA to the appellants for setting up hotels is valid. There is no violation of the regulations or policies of NOIDA in allotting commercial plots for hotels. C Therefore, cancellation of allotment is unsustainable. The cancellation cannot be sustained with reference to the grounds mentioned in s. 14 of the Act. The grounds mentioned for cancellation are mistakes committed by NOIDA itself in making allotments and fixing the premium, D in violation of the Regulations and policies of NOIDA by officers of NOIDA. These are not grounds for cancellation u/s 14 of the Act. [para 25 and 58] [113-F-H; 114-A; 141-D]

2.6. Section 41(3) of the U.P. Urban Planning and E Development Act, 1973 shows that the State government, can examine the legality or propriety of any order of NOIDA and pass appropriate orders. If the state government in exercise of its revisional jurisdiction finds the allotments were irregular or contrary to the F regulations or policies of NOIDA and directs cancellation, the allotments become invalid and leases also become invalid. Consequently, NOIDA can resume possession, without intervention of a civil court in a civil suit. [para 27] [116-B-D]

G *State of Haryana vs. State of Punjab* – 2002 (1) SCR 227 = 2002 (2) SCC 507 and *State of Karnataka vs. All India Manufacturers Organisation* – 2006 (1) Suppl. SCR 86 = 2006 (4) SCC 683 – held inapplicable.

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Whether cancellation was on account of change in Government?: A

3.1. This is not a case where as a consequence of change in government, the new government has reviewed the decision relating to hotel site allotment, merely because it was a decision of the previous government. Nor is it a case of new policy of the new government being at variance with the policy of the previous government. In the instant case, the allotments of plots for hotel projects were challenged in two writ petitions and in compliance with the direction of the High Court, the state government had a relook at the matter, found some irregularities in allotment and, by letter dated 1.8.2007, directed NOIDA to take action to remedy the irregularities found in the allotments. The orders dated 8.9.2008 were made in view of the final order of the High Court and the interim order of this Court directing reconsideration. The decision of the state government in revision, is not based on any different policy, but based on its finding that the existing regulations and policies of NOIDA were violated. [para 29] [118-B-D-G-H] B C D E

Whether the allotments violate the regulations/policies of NOIDA?

4.1. In the instant case, no amendment was made changing the land use of the plots in question from commercial to industrial. The state government on examination of all the facts in its revisional jurisdiction found that the hotel plots allotted to appellants were part of Sectors 96, 97 and 98 (for five star plots) and other sectors (for plots for 4 star and 3 star hotels) which were earmarked for commercial use under the NOIDA Master Plan. It was of the view that in view of tourism/hotels being declared as an "industry" and the government policy requiring allotment of plots for tourism/hotels at industrial rates, if any plot had to be allotted for a hotel, F G H

A the land use of the said plot had to be changed to industrial use in the Master plan by adopting the prescribed procedure under the regulations, before making the allotment. It was also of the view that if the plots were allotted for hotel industry, then the B construction should be as per the NOIDA building regulations and directions applicable to industries in regard to FAR, ground coverage, height, setbacks, construction of building etc. It was also of the view that if plots in commercial areas are to be allotted it could be C only in accordance with the NOIDA Commercial Property Management Policy which required all commercial plots to be allotted on sealed tender or public auction basis. As NOIDA did not alter the land use of the plots in question from commercial use to industrial use in the D Master Plan nor did it amend the definitions of commercial use and industrial use in the 1991 Regulations so that hotels would no longer be a commercial use, but an industrial use, the state government held that statutory regulations and directives E of NOIDA had been violated in making the hotel plot allotments. [para 31] [120-D-H; 121-A]

Whether plots earmarked for commercial use in commercial area could be allotted for hotels?:

F 5.1. The NOIDA Building Regulations and Directions of 2006 make it clear that FAR and the permissible height of the building is far more advantageous in the case of commercial hotel buildings when compared to industrial buildings. It may be mentioned that even when the 1986 G Building Regulations were in force till 4.12.2006, the provisions for FAR and height of building were far more advantageous to commercial buildings, when compared to industrial buildings. [Para 36] [126-E-F]

5.2. Running a hotel or boarding house or a

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restaurant is a commercial activity and use of a land or building for hotel is commercial use. By no stretch of imagination, use of a plot for a hotel can be considered as use of such land for an industrial purpose. An industrial building is defined in Regulation 3.12(e) of the 2006 Building Regulations as a building in which products or materials of all kinds and properties are manufacture, fabricated, assembled or processed. As per the 1991 Regulations, use for a hotel is a commercial use. [para 37] [126-F-H]

5.3. Having regard to the provisions of the NOIDA (Preparation and Finalisation of Plan) 1991 Regulations, 1991 use of land for hotel cannot be considered as an industrial use, but will continue to remain a commercial use. The policy of the state government dated 22.5.2006 cannot override the NOIDA Regulations. If any policy is made, intending to give different meaning to the words 'commercial use' and 'industrial use', that can be given effect only if the regulations are suitably amended. [para 38] [127-F-G]

5.4. When tourism is given the status of an industry, it does not mean tourism involves manufacturing, fabrication, processing or assembling, but it refers to a service industry. By giving the status of 'industry', the policy enabled a particular service activity (in the instant case tourism and hotels) to secure certain benefits in allotment of land at concessional prices and certain tax exemptions. Therefore, the fact that the tourism or hotels have been given the status of 'industry' will not convert them into industries, for the purpose of allotment of plots, nor will the use of land by such tourism or hotel industry, will be an industrial use. It does not also mean that all the hotels and tourist offices should be shifted from commercial areas to industrial areas or that hotels or tourist offices cannot operate in commercial areas, or that

A they cannot get allotment of land or building earmarked for commercial use. Allotment of plots for hotels in a commercial area is wholly in consonance with the NOIDA Regulations and Master plan which earmarks areas for specific land uses like industrial, residential, commercial,
B institutional, public, semi-public, etc. Therefore, the allotment of plots situated in commercial areas earmarked for commercial use, to hotels did not violate any provisions of the Act or the NOIDA Regulations. It was not necessary for NOIDA to change the land use of
C plots to be allotted to hotels, from commercial to industrial use. [para 39-40] [127-H; 128-B-H]

Whether allotment of hotel sites by NOIDA should have been by inviting tenders/holding auctions?

D 6.1. Allotment of commercial plots is governed by the NOIDA Policies and Procedures for Commercial Property Management, 2004. Under the said policy, commercial properties of NOIDA can be allotted only on sealed tender basis or by way of public auction. For this purpose NOIDA
E has to fix a reserve rate and the person who gives the highest bid/offer above the reserve rate, who is otherwise eligible, is allotted the plot. The said policy in regard to the procedure for allotment of commercial properties was not amended or modified to provide for allotment of
F commercial properties for hotels at fixed prices. The allotment of commercial plots at fixed rate was, therefore, clearly contrary to the said regulations of NOIDA. [para 44] [131-F-H; 132-A]

Home Secretary v. Darshjit Singh Grewal 1993 (4) SCC
G 25 – relied on

Brij Bhusan vs. State of Jammu & Kashmir – 1986 (2) SCC 354, *Sachidanand Pandey vs. State of West Bengal* 1987 (2) SCR 223 =1987 (2) SCC 295, and *MP Oil Extraction*

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vs. State of MP **1997 (1) Suppl. SCR 671 = 1997 (7) SCC 592 – distinguihsed** A

6.2. The state government policy dated 22.5.2006 or its adoption by NOIDA on 5.6.2006 did not amend to the regulations, instructions, policies and procedures of NOIDA. If the said Tourism/Hotels development policy dated 22.5.2006 contained any procedure which was at variance with the existing regulations or procedures of NOIDA, such procedures in the policy dated 22.5.2006 could come into effect only by NOIDA amending its regulations and Property Management Policies. As per the 1991 Regulations and 2006 Building Regulations, hotel buildings are commercial buildings and use of land for hotels is commercial use and any plot allotted for hotels is a commercial property. Therefore, any allotment of a plot for hotels should comply with the NOIDA Commercial Property Management Policy, 2004. Unless the said Policy was amended, providing for allotment at fixed rates, in regard to any sub-category of commercial plots, allotment of a commercial property belonging to NOIDA otherwise than by sealed tender basis or auction basis will be an allotment in violation of and contrary to, the regulations directives and policies of NOIDA. [para 48] [134-D-G] B C D E

6.3. The failure to follow the procedure prescribed in the NOIDA Commercial Property Management Policy is a violation of the policy and such violation has resulted in loss to the public exchequer. The violation of the regulations and policies of NOIDA may be unintentional and a bonafide mistake on account of a mis-reading of the requirement of the policy dated 22.5.2006. Nevertheless it is a violation. If there is a violation of the regulations and policies of NOIDA in making allotments, the state government can certainly interfere under its revisional jurisdiction. [para 49-50] [135-A-F-G] F G H

A (c) Whether the rate charged was erroneous and has led to any loss?

7.Mere earmarking of particular land for allotment to hotels which is a commercial activity at industrial plot prices, does not mean there is a loss in respect of an amount equal to the difference between the rate of commercial plots and rate of industrial plots. Any decision to allot plots to hotels at industrial rates, by itself, did not cause any loss, as such a decision was intended to be an incentive to attract investment. But there will be a 'loss', if a plot which is earmarked for commercial use, allotted for a commercial purpose, which is required to be allotted at commercial rates by tender or auction, is erroneously charged either at a residential plot rate or an industrial plot rate. The regulations and policies of NOIDA require the allotment of commercial plots to be by sealed tender or by public auction. As the allotment is of commercial plots governed by NOIDA Commercial Property Management Policy, and as the reserve rate itself was Rs.30000/- per sq.m. it has to be held that allotment at Rs.7,400 per sq.m. caused loss and violated the regulations and policy of NOIDA. [para 53 and 55] [138-D-F; 139-C-E-F]

IV. What should be the consequence of the violation?

8.1. The violation occurred on account of a mistake on the part of the officers of NOIDA in misinterpreting the government policy dated 22.5.2006, which has resulted in lesser allotment price. The allottees were in no way to be blamed for the mistake. Nor were the allottees guilty of any suppression, misstatement or misrepresentation of facts, fraud, collusion or undue influence in obtaining the allotments at Rs.7,400/- per sq.m. According to respondents, the rate of premium ought to have been Rs.70,000/- per sq.m. being the market rate, even though the reserve rate was only Rs.30,000/- per sq.m. The

mistake was found out by the state government, in exercise of revisional jurisdiction. But by then the allotment was followed by payment of premium, execution of the lease deed, and delivery of possession. By the time the state government decided that the allotment should be cancelled the transaction was complete in all respects. The fact that the registration of some of the leases was kept 'pending' in view of a dispute relating to valuation would not be relevant for this purpose. [para 58] [141-E-G]

8.2. In public law, breach of statutory provisions, procedural irregularities, arbitrariness and mala fides on the part of the Authority (transferor) will furnish grounds to cancel or annul the transfer. But before a completed transfer is interfered on the ground of violation of the regulations, it will be necessary to consider: whether the transferee had any role to play (fraud, misrepresentation, undue influence etc.) in such violation of the regulations, in which event cancellation of the transfer is inevitable. If the transferee had acted bona fide and was blameless, it may be possible to save the transfer but that again would depend upon the answer to the further question as to whether public interest has suffered or will suffer as a consequence of the violation of the regulations:

(i) If public interest has neither suffered, nor likely to suffer, on account of the violation, then the transfer may be allowed to stand as then the violation will be a mere technical procedural irregularity without adverse effects.

(ii) On the other hand, if the violation of the regulations leaves or likely to leave an everlasting adverse effect or impact on public interest (as for example when it results in environmental degradation or results in a loss which is not reimbursable), public interest should prevail and the

A transfer should be rescinded or cancelled.

(iii) But where the consequence of the violation is merely a short-recovery of the consideration, the transfer may be saved by giving the transferee an B opportunity to make good the short-fall in consideration. [para 63.1] [145-F-H; 146-A-D]

8.3. If the government or its instrumentalities are seen to be frequently resiling from duly concluded solemn transfers, the confidence of the public and C international community in the functioning of the government will be shaken. To save the credibility of the government and its instrumentalities, an effort should always be made to save the concluded transactions/ transfers wherever possible, provided (i) that it will not D prejudice the public interest, or cause loss to public exchequer or lead to public mischief, and (ii) that the transferee is blameless and had no part to play in the violation of the regulation. [para 63.2] [146-E-G]

E 8.4. If the concluded transfer cannot be saved and has to be cancelled, the innocent and blameless transferee should be reimbursed all the payments made by him and all expenditure incurred by him in regard to the transfer with appropriate interest. If some other relief can be granted on grounds of equity without harming F public interest and public exchequer, grant of such equitable relief should also be considered. [para 63.3] [146-H; 147-A-B]

Syed Abdul Qadir vs. State of Bihar 2008 (17) SCR 917 G = 2009 (3) SCC 475 – relied on.

8.5. In the instant case, the allotment of commercial plots to appellants is valid and legal. The violation is in making such allotment on fixed allotment rate which is less than the rate the plots would have fetched by calling H

for tenders or by holding auctions. The violation of the guidelines in regard to disposal of commercial plots has resulted only in a loss of revenue by way of premium and if this could be made up, there is no reason why the leases should not be continued. According to the State Government, the commercial plots would have fetched a premium at rate of Rs.70,000 per sq.m at the relevant time (October 2006 to January 2007) and NOIDA had been denied the benefit of that allotment rate, by reason of allotment of the plots at Rs.7400/- per sq.m. Therefore, the equitable solution is to give an opportunity to the lessees to pay the difference thereby in consideration which arose on account of wrong interpretation instead of cancelling the leases and if the appellants are wiling to pay the balance of premium as claimed by respondents, the leases need not be interfered. [para 65-66] [148-B-G]

8.6. Therefore, if the appellants (2006-2007 allottees) are to be extended the benefits offered to allottees under the 2008 scheme, the rate of Rs.70,000/- per sq.m. (the rate of 2008 scheme was 10% more than Rs.70,000/- per sq.m.) claimed by the respondents becomes logical and reasonable. Therefore, there is no reason to reject the claim of respondents that the allotment rate should be Rs.70,000/- per sq.m. The appellants are granted an opportunity to save the leases by paying the difference in premium at Rs.62600/- per sq.m. to make it upto Rs.70,000/- per sq.m. [para 69] [151-D-F]

(i) The order of the High Court setting aside the revisional order dated 1.8.2007 of the State Government and the consequential orders of cancellation of allotment of plots dated 3.8.2007 by NOIDA, is affirmed.

(ii) The revisional orders dated 8.9.2008 passed by the State Government cancelling the allotments of plots to appellants, are set aside.

A (iii) The appellants are given the option to continue their respective leases by paying the premium (allotment rate) at Rs.70000/- per sq.m. (with corresponding increase in yearly rent/one time lease rent), without any location benefit charges. The B appellants shall exercise such option by 30.9.2011. Such of those appellants exercising the option will be entitled to the benefits which has been extended in regard to the allottees under 2008 allotment scheme of NOIDA:

C On exercise of such option, the lease shall continue and the period between 1.8.2007 to 31.7.2011 shall be excluded for calculating the lease period of 90 years. Consequently, the period of lease mentioned in the lease deed shall stand extended by D a corresponding four years period, so that the lessee has the benefit of the lease for 90 years. An amendment to the lease deed shall be executed between NOIDA and the lessee incorporating the aforesaid changes.

E (iv) If any appellant is unwilling to continue the lease by paying the higher premium as aforesaid, or fails to exercise the option as per para (iii) above by 30.9.2011, the allotment and consequential lease in F its favour shall stand cancelled. In that event, NOIDA shall return all amounts paid by such appellant to NOIDA towards the allotment and the lease, and also reimburse the stamp duty and registration charges incurred by it, with interest at 18% per annum from the date of payment/incurring of such amounts to G date of reimbursement by NOIDA. If NOIDA returns the amount to the appellant within 31.12.2011, the rate of interest payable by NOIDA shall be only 11% per annum instead of 18% per annum. [para 70] [151-G-H; 152-A-C-E-H; 153-A-C]

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Case Law Reference:

2002 (1) SCR 227	**held inapplicable**	**para 28**
2006 (1) Suppl.SCR 86	**held inapplicable**	**para 28**
1986 (2) SCC 354	**distinguished**	**para 42**
1987 (2) SCR 223	**distinguished**	**para 42**
1993 (4) SCC 25	**distinguished**	**para 47**
1997 (1) Suppl. SCR 671	**distinguished**	**para 52**
2008 (17) SCR 917	**distinguished**	**para 64**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4561 of 2008.

From the Judgment & Order dated 13.5.2008 of the High Court of Judicature at Allahabad in SLP No. 15375 of 2008.

WITH

C.A. Nos. 4562, 4563, 4564, 4565, 4566, 4567, 4568, 4569, 4570, 4571, 4572 & 4968 of 2008.

Gopal Subramanium, SG, T.R. Andhyarujina, Harish N. Salve, Ranjit Kumar, Maninder Singh, P.P. Rao, S.K. Agarwal, K.K. Venugopal, Satish Chandra Mishra, Ratnakar Dash, Ravinder Srivastava, Fakhruddin, Harish Malhotra, Shail Kumar Dwivedi, AAG, L.K. Bhushan, Swaty Malik (for Dua Associates), Ruby Singh Ahuja, Meenakshi Grover, Manu Aggarwal, Abeer Kumar, R.N. Karanjawala, Manik Karanjawala, Simran Brar, Vedanta Verma (for Karanjawala & Co.), Abhinav Mukerji , Gaurav Sharma, Surbhi Mehta, Bindu Saxena, Aparajita Swarup, Shailendra Swarup, Neha Khattar, D. Bhadra, Hashmi, Ravinder Agarwal, Arun K. Sinha, Rakesh Singh, Sumit Sinha, Dheeraj Malhotra, Aslam Ahmed, Babit Singh Jamwal, Gagan Gupta, D. Bhattacharya, M.K. Singh, Pramod B. Agarwala, Rajul Shrivastav, Abhishek Baid, Antara, Ameet Singh,

A Pareena Swarup, Praveen Swarup D. Mehta, Ameet Singh, Nikhil Majithia, Anuvrat Sharma, M.K. Choudhary, Tanuj Khurana, S.K. Verma, R.K. Yadav, Ashutosh Srivastava for the appearing parties.

The Judgment of the Court was delivered by

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R.V.RAVEENDRAN, J. 1. The appellants in these appeals are the lessees of plots allotted by the New Okhla Industrial Development Authority (for short 'the Authority' or 'NOIDA') for construction of 5 star, 4 star and 3 star hotels in C Noida, District Gautam Budh Nagar, Uttar Pradesh. The said Authority was constituted under the provisions of the U.P.Industrial Area Development Act, 1976 ('Act' for short) for development of an Industrial and Urban Township of Noida in Uttar Pradesh, neighbouring Delhi.

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2. Tourism was granted the status of an "industry" by the state government during 1997-98, by extending certain concessions and facilities available to industries. However as tourism, in particular hotel industry, had not received the required encouragement, the state government with the intention E of attracting capital investment in tourism industry came up with a policy, as per its communication dated 22.5.2006 addressed to the Director General of Tourism, Uttar Pradesh. Relevant portions of the said policy are extracted below :

F (1) Land should be earmarked for hotels by the concerned Development Authorities while preparing the Master Plan with the cooperation of the Tourism Department and such land should be provided for hotels. Where the Master-Plan stands finalized, the G said procedure has to be followed in respect of surplus land. In regard to Development Authorities which have not finalised the Master Plan, steps may be taken for reserving land for hotels to the extent possible, near tourist spots/places of tourism with H the assistance of the Tourism Department.

Whenever the Master Plans of Authorities are revised, the land should be earmarked for hotels with the assistance of the Tourism Department. The lands earmarked will be kept reserved for tourism/ hotels for five years from the date of publicizing the scheme. If no hotel entrepreneur comes forward in five years, the authority shall be free to alter its land use.

(2) If change in land use by the Authority is necessary for giving the earmarked plot to hotel industry, such change in land use shall be done by the Authority in accordance with the rules and the prescribed procedures on a 'case to case' basis by the competent authority.

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(5) Since Tourism including Hotels, has been given the status of Industry, in regard to hotels also plots shall be earmarked as in the case of industries, and shall be allotted **at industrial rates** as in the case of industrial plots. This policy shall be implemented in every district of the State.

(6) xxxxx

(7) They shall be given cent-percent rebate in Sukh Sadhan Tax for five years from the date of starting of new hotels. Other concessions shall be admissible as per industrial policy.

(8) The earmarked land for Hotel industry, shall be allotted only to Tourism entrepreneurs.

A (10) Land shall be made available to hotel entrepreneurs by all Authorities including the Housing and Industrial Development Departments, at industrial rates. To ensure that hotel entrepreneurs may get the benefit of this provision, all the above Authorities
B shall ensure the necessary arrangements/ amendment in their rules so that it may be possible to make available the land to hotel entrepreneurs on industrial rates.

C (11) Only in areas where there are Authorities, the estimation of category wise requirement, determination of number of plots and star category wise determination of hotels will be made by the concerned Authorities. In other areas the Tourism Department shall assist in this exercise.

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(15) After earmarking the land for hotels, applications will have to be invited for allotment to hotel/tourist
E entrepreneurs **on industrial rates**. The condition of eligibility for applicant shall be as follows:- x x x

(16) Where there is **industrial lands**, and more than one applicant, the Development Authorities shall allot the **industrial land** on the basis of suitability
F of the applicants, in accordance with the current procedure."

(emphasis supplied)

3. At the 135th meeting of the Board of Directors/Members
G of NOIDA (for short 'NOIDA Board') held on 5.6.2006, the said State Policy dated 22.5.2006 to attract more capital investment in tourism/hotel industry was considered. The NOIDA Board resolved to implement the said policy in the areas falling within its jurisdiction and apply the rates applicable to its Industrial
H area (Phase I) to the plots to be allotted to the hotel industry.

The rate referred was the reserve rate of Rs.7400/- per sq.m. applicable to Industrial Area (Phase I) plots, fixed by the NOIDA Board at its meeting held on 20.3.2006. The resolution also mentioned that the implementation of the said policy should ensure construction of sufficient hotels before the Commonwealth Games to be held in Delhi, which were scheduled to commence in October, 2010. Having regard to the importance of the matter, the Principal Secretary, Tourism, the Commissioner, Meerut Circle and the Director of Industries of the U.P. Government, attended the said meeting as special invitees.

4. At a meeting held by the Circle Commissioner, Meerut on 2.7.2006 with officials of NOIDA, he communicated the direction that construction of Hotels should be completed before the commencement of the Commonwealth Games. At the said meeting the following 14 plots were identified as being suitable for allotment as hotels/plots: (a) six plots each measuring 40000 sq.m. for 5 star hotels in Sectors 96, 97 and 98; (b) five plots each measuring 20000 sq.m. for 4 star hotels in Sectors 72, 101, 105, 124 and 135; and (c) three plots for 3 star hotels (measuring 20000, 20000 & 10000 sq.m.) in Sectors 62, 63, and 142. In view of the Government's Policy dated 22.5.2006 and the decisions taken at the meeting chaired by the Commissioner, Meerut Circle on 6.7.2006, the NOIDA Board took the following decisions at its 136th meeting held on 14.7.2006 : (i) It approved the proposal for making provision for hotels in reserved commercial area – Zone C 3 (as hotels had not been permitted in commercial areas C-1 and C-2 of the master plan reserved for wholesale and retail activities and as there was demand for hotels due to Commonwealth Games 2010) and directed inclusion thereof in the approved proposed NOIDA Master Plan 2021 and reference to the State Government for its approval. (ii) It decided to launch the Hotel Plot Allotment Scheme and authorized the CEO to finalise the terms and conditions for

A allotment, so as to ensure construction of hotels by the allottees before the commencement of the Commonwealth Games. In pursuance of the said decision, NOIDA sent a communication dated 20.7.2006 to the State Government seeking approval of its decision to make a provision for hotels in commercial B areas under Zone 3 and inclusion of it in NOIDA Master Plan, 2021.

5. The Secretary, Sports & Youth Affairs, Government of India, held meetings with NOIDA officials on 28.7.2006 and 22.8.2006 in connection with preparations for Commonwealth C Games scheduled in October, 2010. At those meetings, the Secretary, Sports & Youth Affairs stressed the Government of India's request for earmarking 25 hotel plots in NOIDA. Therefore it was decided to reduce the area of 5 star hotels to 24000 sq.m. (instead of 40,000 sq.m. earlier proposed), the D area of 4 star hotels to 12500 sq.m. (instead of 20000 sq.m.) and the area of 3 star Hotels to 7500 sq.m. (instead of 10000 sq.m.) and thereby convert the 14 plots into 25 plots made up of 10 plots for 5 star hotels, 5 plots for 4 star hotels and 10 plots for 3 star hotels. At the meeting held on 28.8.2006 under E the chairmanship of the Circle Commissioner, Meerut, the said decision to increase the number of plots for hotels from 14 to 25 by reducing the plot measurements, in the following manner:

(i) *Ten plots for 3 star hotels – (area 7500 sq.m. each)*

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Plot Nos. SDC/H1 and SDC/H2 in sector 62, plot Nos.A-155/B and A-155/C in sector 63, plot No. SDC/H 2 in sector 72, plot No.124A/2 in sector 124, plot No.SDC/H-2 in sector 103, plot No.SDC/ G H-2 in sector 105, SDC/H-2 in sector 135 and plot No.14 in sector 142.

(ii) *Five plots for 4 star hotels : (area : 12,500 sq.m. each)*

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Plot No.SDC/H-1 in sectors 72, 103, 105 and 135 and plot No.124A/1 in sector 124.

(iii) *Ten plots for 5 star hotels : (area 24,000 sq.m.)*

Plot Nos.H-1 to H-10 in sectors 96, 97 and 98.

The proposal for approving the increase in number of plots and reductions in their size was placed before the NOIDA Board at the 137th meeting on 1.9.2006. The NOIDA Board approved the proposal. The terms and conditions for allotment drawn by the CEO were also approved with a modification that they should provide for obtaining Hotel Completion Certificate by December 2009 (with authority to CEO to grant extension of time).

6. In pursuance of the said decision, NOIDA published the Hotel Site Allotment Scheme on 17.10.2006, by advertisements in newspapers and by issue of information brochures containing detailed terms and conditions, inviting applications for allotment of plots for 5 star, 4 star and 3 star hotels in NOIDA on 90 years lease basis. Applications were made available between 17.10.2006 and 1.11.2006 (extended till 10.11.2006). We extract below the relevant information from the Brochures. The following eligibility criteria were prescribed:

Eligibility criterion for selection (extracted from clauses 8 to 11 of Brochures)

Minimum experience in Hotel business	10 years for 5 star and 4 star; 5 years for 3 star
Average turnover during the last three years	Rs.100 crores, Rs. 75 crores & Rs.50 crores respectively for five star, four star and three star,
Net worth	Positive

Allotment of hotel sites among the eligible applicants shall

A be done on the basis of their experience, turnover and net worth. Allotment of hotel site to the eligible applicants shall be made in descending order, of the plot applied for, on the basis of their evaluation. In case same marks are obtained by more than one applicant, then allotment
B amongst them shall be made on the basis of draw of lots.

For each hotel that has a tie up/collaboration with international chain of hotels or in case the applicant company/institution is itself an international chain, then three additional marks shall be awarded for each hotel in
C the 3/4/5 star and above/equivalent rating category owned/ managed by the applicant.

"**Rate of Allotment, that is premium payable** (Clause 13 of the Brochure)

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(a) The current rate of allotment is Rs.7,400/- (Rupees Seven Thousand Four Hundred Only) per square metre.

(b) Besides, Location benefit charges as stated below
E shall be charged in addition to above allotment rate at the following rates :-

(i). 2.5% of above rate if plot is on 18 mtr. but less than 30 mtr. wide road.

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(ii) 5% of above rate if plot is on a road having width of 30 mtr. or above.

(iii) 2.5% of above rate if plot is facing/abutting green belt or park.

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(iv) 2.5% of above rate if plot is a corner plot.

The maximum location charges would not exceed 10% of the total allotment amount of the plot.

H (c) The land rate stated above is subject to change

without giving any notice. The rate prevailing on the date of issue of allotment letter would be applicable."

Payment of annual rent : (extracted from clause E in the Brochures)

In addition to the amount paid/payable for the allotment of plot, allottee shall have to pay yearly lease rent in the manner given below :

(a) The lease rent will be 2.5% of the total amount paid for the plot and will be payable annually.

(b) On expiry of every ten years from the date of execution of the lease deed, lease rent would be enhanced by 50% of the annual rent payable at the time of such enhancement.

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(e) Allottee has the option to pay lease rent equivalent to 11 years of the current lease rent as "One Time Lease Rent" unless the Authority decides to withdraw this facility. On payment of One Time Lease Rent, no further annual lease rent would be required to be paid for the balance lease period. This option may be exercised at any time during the lease period, provided the allottee has paid the earlier lease rent due and lease rent already paid will not be considered in One Time Lease Rent option."

Norms of development (extracted from Clause (I) in the Brochures):

(a) Ground coverage and floor area ratio is as under :
Maximum ground coverage : 25% [for 5/4 star]
30% [for 3 star]

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Maximum FAR	:	2 [for 5/4 star] 1.5 [for 3 star]
Maximum height & set backs	:	as per building bye-laws

(b) Other norms:

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i. 5% of the FAR can be used for Commercial space.

ii. Basement below the ground floor to the maximum extent of ground coverage shall be allowed and if use for parking and services would not be counted in the FAR. Basement used for parking will be permitted upto the setback line of the plot."

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"*Transfer* (Clause J of the Brochures)

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1. The allotted plot shall not be transferred before the allotted premises is declared functional by the Authority. In case the allottee wants to transfer the plot after the hotel is declared functional, the allottee will have to seek prior permission from the Authority. Authority may refuse to allow transfer without giving any reason. However, in case the transfer is permitted, transfer charges shall be payable as per policy of the Authority and all terms and conditions of transfer memorandum shall be binding jointly and severally on the transferee and transferor.

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2. No change in shareholding pattern of the members in the Consortium shall be permitted till the project is completed and functionality certificate is obtained from the Authority.

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3. In no circumstances, the sub-division of plot will be allowed by the Authority.

4. The allottee shall not be allowed to use any land other than allotted premises and shall also ensure

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to keep the allotted premises, environment neat & clean.

Cancellation (Clause (o) of the Brochures)

(i) If it is discovered that the allotment of the plot has been obtained by suppression of any fact or misstatement or misrepresentation or fraud the allotment of the plot shall be cancelled and the entire deposited amount shall be forfeited to the Authority.

(ii) If there is any breach in the terms of allotment, or if the allottee does not abide the terms and conditions of the building rules or any rules framed by NOIDA, the allotment may be cancelled by the Authority and the possession of the demised premises shall be taken over by the Authority from the allottee. In such an event, allottee will not be entitled for any compensation whatsoever and refund of any amount credited or is in arrears/ overdue as Revenue Receipt(s) if any, may be refunded after forfeiting the amount as per rules. However, total forfeited amount would not exceed the total deposits.

7. The number of applications received under the said scheme published on 17.10.2006 and the allotments made after processing and evaluation, are as under :

Category of Hotel Plots	No. of plots offered for allotment	No. of applications received	Number of allotments made
5 star	10	15	9
4 star	5	5	2
3 star	10	11	3
Total	25	31	14

A It is stated by NOIDA that the evaluation of applications and recommendations for allotment were made by an independent Screening Committee (U.P.Industrial Consultants Ltd.) and the recommendations for allotments were approved by the CEO of NOIDA. The allotments were made on 12.1.2007 and the B allottees were required to pay the premium for the leases at the rate of Rs.7400/- per sq.m. plus location charges. At the 142nd meeting held on 9.2.2007, the Board of Directors of NOIDA approved the CEO's acceptance of the recommendations of the Screening Committee relating to C allotment and directed that the remaining 11 unallotted plots (7 plots in 3 star category, 3 plots in 4 star category and 1 plot in 5 star category) be re-advertised.

8. At the 143rd meeting held on 9.3.2007, the Board of NOIDA perused the relevant agenda and noted the allotments D made to the allottees, the payments received by way of premium from the allottees and the proposals for execution of lease deeds in favour of the allottees of the hotel plots, under the government scheme dated 22.5.2006 approved on 5.6.2006. In pursuance of the above, lease deeds have been E executed and presented for registration in March, April and May, 2007. In two cases the lease deeds have been registered. In other cases, it is stated that the registration is pending in view of proceedings for under-valuation on the ground that as against the circle rate of Rs.70,000 per sq.m., the premium for the lease F was only Rs.7,400 per sq.m.

9. At that stage, two writ petitions (Civil Misc. W.P. No.24917/2007 and PIL W.P. No.29252/2007) were filed in the High Court of Allahabad, challenging the allotment of the hotel G sites by NOIDA on the ground that the allotment was at a very low price. The first writ petition was filed on 22.5.2007, hardly within one month from date of execution of the lease deeds. In the said writ petition, a division bench of the High Court made a reasoned interim order on 22.5.2007 directing the state government to exercise its power of revision under section H

41(3) of the U.P. Urban Planning & Development Act, 1973 (for short '1973 Act') read with section 12 of the Act and take a relook in regard to the allotments made in favour of the appellants by NOIDA and take an independent decision. In pursuance of the said application, the state government examined the matter and concluded that the allotments made to the appellants were irregular on two grounds. Firstly allotments of commercial plots had been made for industrial purposes at industrial rates without getting the land use changed from commercial to industrial in accordance with the regulations and without obtaining the consent of the state government. Secondly, the plots earmarked for commercial use in a commercial area were allotted at rates applicable to industrial plots, without calling for competitive bids/tenders and without the permission of the state government. It therefore directed NOIDA to cancel the allotments and initiate action against the officers of NOIDA responsible for the irregularities.

10. NOIDA implemented the said direction dated 1.8.2007 issued by the State Government by issuing cancellation letters dated 3.8.2007 cancelling the allotments and consequential leases granted in favour of the appellants. NOIDA informed the allottees that action was being taken as per rules to refund the money being paid by them and called upon them to return the possession of the plots. Letters of cancellation stated that as per the NOIDA Development Area Building Regulations and Directions, 1986 and 2006 (published in the Gazettes dated 01.12.1986 and 05.12.2006 respectively), hotels fall under commercial category and therefore the Government Policy dated 22.05.2006 was null and void; and that even if the government policy dated 22.5.2006 was valid, the following mistakes in the allotment could not be legally rectified and therefore the allotments were being cancelled:

(i) F.A.R. of the plots is fixed at 2.00 in the Brochure whereas F.A.R. of industrial plots is 0.60.

(ii) The Government Order dated 22.05.06 issued by

A the Tourism department does not refer to 5% of F.A.R. being used for commercial activities. But NOIDA's hotel scheme contained in the Brochures shows that 5% of F.A.R. is fixed for commercial activities,

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(iii) According to the Building byelaws of the Authority published in the Gazette dated 16.12.2006, 'hotel' is kept in commercial category. All the allotted plots are shown for commercial use in NOIDA Master Plan. According to the current policy of the C Authority, the disposal of commercial plots has to be done by inviting bids/tenders. But the said procedure was not adopted.

(iv) The allotment of plots is made at industrial rates. D The then prevailing reserved rates in Industrial Area Phase-I was Rs.7,400/- per sq.mt. And its allotment should be made on the basis of bids/tenders. But in the allotment of hotel, the bids/tender procedure along with the above rates were not followed.

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(v) All the plots allotted in the cases in question are shown for commercial purpose. Before including these plots in hotel scheme, according to Para 2 of the Government Order dated 22.05.06 it was necessary to change the use of the land from F commercial to industrial, for which permission from N.C.R. Planning Board was necessary which was not complied with in the case at hand."

11. The state government also filed an affidavit before the G High Court on 2.8.2007, in the writ petitions challenging the allotments, referring to its aforesaid decision and the consequential direction issued to the NOIDA on 1.8.2007. The relevant portions of the said affidavit are extracted below :

H "3. That after receipt of the orders of this Hon'ble Court the

matter was examined by the infrastructure and Development committee in consultation with concerned Officers including chairman & CEO, NOIDA and found that without changing the land use of land in question, the commercial land was given for industrial purpose and opined that the allotment of land by NOIDA does not appear to be justified and seems liable for cancellation in accordance with law."

"4. That the recommendations of Infrastructure and Industrial Development Commissioner was considered by the State Government and a decision was taken in exercise of the power vested under section 41(1) of the U.P.Urban Planning and Development Act, 1973 to direct NOIDA Authority to take action in accordance with law. It was also decided to direct the NOIDA Authority to identify the guilty officials and send the recommendation to the Government."

In view of the affidavit filed by the State Government, and the cancellation of allotments by NOIDA, the writ petitioners sought leave to withdraw the writ petitions. The High Court by a detailed order dated 10.8.2007, dismissed the writ petitions as withdrawn, as the reliefs sought had been granted.

12. Thereafter the appellants filed writ petitions before the High Court challenging the cancellation of allotment of plots and the leases by communications dated 3.8.2007. The said writ petitions were allowed by a Division Bench of the Allahabad High Court by a common order dated 13.5.2008. The High Court quashed the order dated 1.8.2007 of the State Government and the cancellation orders dated 3.8.2007 passed by NOIDA on the ground that they were opposed to principles of natural justice for want of opportunity of hearing as required under proviso to section 41(3) of 1973 Act. The High Court therefore remanded the matters to the State Government for taking a fresh decision, after affording an opportunity of hearing

A to the writ petitioners, keeping in view the following observations of the High Court:

> "The question as to whether the rates were fixed in the advertisement whereas the same were meant to be only a reserved price, would lead to the conclusion that a minimum price had been fixed and that offers for higher amount could be made but at the same time, it is to be noted that in spite of this price which was indicated in the advertisement, only 14 plots could be settled as against the 25 plots which had been advertised. This clearly indicates that in spite of adequate advertisement having been made, the authority was unable to fetch investors for almost half of the plots. This clearly reflects that the stringent conditions which had been imposed in the advertisement, detracted prospective investors to a great extent. Even before this Court, there is no challenge by way of any such prospective investor to the said advertisement or the procedure adopted by the authority except for two petitions filed as a PIL which were also ultimately withdrawn by the petitioners therein. *Thus, in these circumstances, it cannot be readily inferred that the deal was a mala fide deal or was some sort of underhand dealing merely because plots had been sold at much higher rates in the nearly commercial area.* This, in our opinion, would be comparing uncomparables inasmuch as the terms and conditions in the present allotment are far more stringent and curtail much of the rights as against those plots which have been settled by NOIDA at higher rates on different terms and conditions. *In the instant case, the authority has come up with the plea that there was a mistake in the implementation of the policy on account of an incorrect interpretation with regard to the industrial rates to be applied at the time of allotment.* It is surprising as to how the authority has termed it as a mistake when extensive deliberations had taken place and conscious decisions had been implemented followed by execution of

lease deeds and registration thereof. A

Admittedly no misrepresentation had been made by petitioners, on the contrary, it is a clear case of misrepresentation by the NOIDA that land would be allotted at fixed price of Rs.7,400/- per sq. mtr. Not a single person has come forward to offer any higher price for either of the plots. No doubt, statutory rules have been violated but such violations appear to be more technical than contrary to public interest. B

It is not in dispute that once the NOIDA had adopted the policy decision dated 22nd May, 2006 in toto, regulations could be amended and if same had not been done, the State Government could have asked the NOIDA to make the amendments for giving effect to the policy decision dated 22nd May, 2006. C D

The question as to whether the rules and regulations require amendment for the purposes of justifying the advertisement, has not all been considered by the State Government or NOIDA while passing the impugned order. This has vitally affected the rights which accrued in favour of the petitioners on account of the action of the parties in altering their position after the allotment was made. Whether the implementation of the policy without bringing an amendment in the rules and regulations would be fatal, should have been the subject matter of deliberations by the State Government while passing the impugned order inasmuch as we do not find any such reason reflected therein. Even otherwise, if this irregularity did exist, then it was still open to the State Government to have considered the implementation of any such amendment looking to the fact that the hotels were very much urgently required and the work was required to be finished by 2009. It is nobody's case that there was no fair advertisement indicating the terms and conditions on which the allotment was to be made. The policy to invoke the industrial rates E F G H

A for allotment was only to promote the hotel business in view of the forthcoming Commonwealth Games and, in the long run, to promote tourism. *It is for the State Government to decide as to whether the rates prescribed were reasonable vis-à-vis the object sought to be achieved.* It B cannot be lost sight of that there are many allotments made by the Government even free of cost to exclusively charitable institutions or institutions which provide services on 'no profit no loss' basis to the public at large. Can it be said that the allotment of such plots have also to be tuned C keeping in view the high rate of revenue that can be collected from the land? Thus, the purpose which has to be seen and the object which is sought to be achieved, in our opinion, is in the realm of policy decision to be taken by the State Government founded on a reasonable basis and which has a rational nexus with the object to be D achieved. *The consideration for fixing appropriate rates may also be one of the factors but the same has to be concluded by taking an appropriate decision.* Thus, the decision in this case was required to take after giving opportunity of hearing to the petitioners as the petitioners E had acquired valuable rights due to intervening events. This is we are saying again keeping in view the undiluted facts that out of 25 plots that were offered, only 14 prospective allottees have applied and were allotted plots.....

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In the absence of any kind of allegation of fraud or misrepresentation or impression of bias or favouritism or nepotism or corruption, the decision to cancel the allotment needs a fresh look by the State Government in the back G ground of the observations made.

In our opinion the law laid down by the Hon'ble Supreme Court in the case of *Sachidanand Pandey.* (Supra) is appropriately applicable in the facts of the present case and should have been noticed by the State Government

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along with other aspect of the matter before taking a decision in the matter. A

The State Government has failed to take note of the fact that the price fetched in respect of plots settled with the petitioners was considered again by the Board of NOIDA in its 137th meeting dated 4th September, 2006 and after noticing the settlement made, at a price of Rs.7,400/- per sq. mtr. with the petitioners, the Board approved the same. Meaning thereby that even if, there may have been some irregularity in the settlement of plots, vis-à-vis policy guidelines stood condoned by the NOIDA itself. The *State Government should have also kept in mind that the petitioners had already been put in actual possession over the land in question, the lease-deeds had already been executed and 11 cases also registered.* B C D

The issue so formulated by us need examination by the State Government afresh in the background that public interest must prevail in all circumstances and all statutory provisions and the power conferred upon the State Government under Section 41 of Act, 1973 must have at its heart larger public good." E

(emphasis supplied)

13. The appellants being aggrieved by the said common order of the High Court, to the extent it remanded the matters to the State Government for fresh consideration, have filed these appeals by special leave. The appellants contended that the High Court, having quashed the order of the State Government dated 1.8.2007 and the consequential orders of cancellation dated 3.8.2007 passed by NOIDA, ought to have upheld the allotments and leases and should not have remanded the matter to the state government for fresh consideration. On 9.7.2008 this court directed status quo regarding possession. On 18.7.2008 this court granted leave and issued the following directions : F G H

A "Interim stay of dispossession of the petitioners from the respective sites allotted to them. The petitioners shall maintain status quo and shall not put up any construction on the sites and shall not create any third party rights.

B The High Court while setting aside the cancellation of letters of allotment has directed the State Government to give a hearing to the petitioners individually and therefore pass a reasoned order, in the light of its observations, in regard to its proposal to cancel the allotment of sites.

C We direct that the State Government (Principal Secretary, Industrial Development Department, Uttar Pradesh Government) shall accordingly give a hearing and pass a reasoned order in accordance with law uninfluenced by the observations made by the High Court in the impugned D judgment dated 13.5.2008.

All the petitioners agree to appear before the concerned Authority without further notice on 11.08.2008 for such hearing. We make it clear that the participation in such hearing by the petitioners and passing of orders by Uttar E Pradesh Government will be without prejudice to the respective contentions of parties.

List on 09.09.2008. The concerned Authority shall take its decision by that date and submit its decision to this Court."

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(emphasis supplied)

14. In pursuance of it, the state government (Principal Secretary, Infrastructure and Industrial Development) gave a hearing to the appellants and passed individual orders dated G 8.9.2008 in the case of each of the appellants, without reference to the observations or directions of the High Court. The state government has held that the allotment of plots to the appellants was bad and cancelled the allotment and directed action to be taken against the erring officers of NOIDA. In the said orders

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dated 8.9.2008 made under section 41(3) of the 1973 Act, the state government has held :

(i) The object of the government policy dated 22.5.2006 was to treat hotels as 'industry', and make allotment of land in favour of hotel entrepreneurs on industrial terms, subject to the statutory Regulations, 1996 and Building Regulations, 2006 on land earmarked for industrial use. Therefore all conditions applicable to industrial buildings will apply to construction of hotels. NOIDA Master Plan had to be amended demarcating Sectors 96, 97, 98 (where five star Hotel Plots H-1 to H-10 are situated) and other commercial areas allotted for hotels, for industrial use.

(ii) Though NOIDA at its 135th meeting on 5.6.2006 while adopting the government policy dated 22.5.2006 resolved to change its rules, regulations and policy, it did not do so and consequently the allotments of plots were in violation of the statutory provisions, in particular Regulations 3(1)(b) and 4(1)(b)(iii) read with Regulation 2(d) and (e) of the 1991 Regulations. The adoption of government policy dated 22.5.2006, did not result in automatic amendment or modification of the regulations of NOIDA.

(iii) The allotments were made at the industrial rate of Rs.7400 per sq.m. The plots allotted were commercial plots, of which the prevailing circle rate was Rs.70,000 per sq.m. As a result, there was a loss of Rs.1643.77 crores to NOIDA in the premium charged for the 14 plots. If the rental income for 90 years, with reference to a premium of Rs.70000/- per sq.m. is calculated, the loss on account of annual rent would be Rs.3077.37 crores. Thus the total loss of revenue by not inviting tenders was Rs.4721.14 crores.

(iv) NOIDA could not have allotted commercial plots at fixed rates, in favour of the appellants without public auction or inviting tenders. If it wanted to allot commercial

A plot at a fixed rate, it ought to have amended its regulations and policies, and that was not done.

(v) The allotment of plots at Rs.7400 per sq.m. was illegal as the said price was not approved by the Board of
B NOIDA. The Board of Directors had directed at the 135th meeting on 5.6.2006 while deciding to implement the Government policy dated 22.5.2006, 'to apply the rate of Industrial Area Phase I' for hotel industry. This meant that the reserve rate was to be fixed at Rs.7400/- per sq.m. for
C the plots and applications ought to have been invited by sealed tenders. But the CEO of NOIDA had shown in the Brochures, a fixed allotment rate of Rs.7400/- per sq.m. contrary to the decision of the NOIDA Board. Secondly the reserve rate had to be fixed after ascertaining the market value which was also not done. The policy of NOIDA both
D in regard to allotment of both commercial plots and Industrial area – Phase I plots was on the basis of sealed tenders. That was violated by allotting plots at a fixed rate.

(vi) The policy of the government dated 22.5.2006 adopted
E by NOIDA by resolution dated 5.6.2006 contemplated change of land use, amendment of regulations and policies of NOIDA, and following the prescribed procedure for allotment of commercial and industrial plots. But neither the amendments were carried out, nor the prescribed
F procedures followed.

(vii) The following violations make the allotments invalid : (a) reserved price being treated as fixed price; (b) procedure for allotment of plots in commercial areas and industrial areas (Phase I) which was by auction or by bids
G not being followed; (c) change of land use not being effected; and (d) regulations not being amended to give effect to the policy dated 22.5.2006.

15. As these revisional orders dated 8.9.2008 were
H passed by the state government, during the pendency of these

appeals, in pursuance of the directions of this court issued on 18.7.2008, this court permitted the appellants to challenge the said orders of cancellation dated 8.9.2008 by filing additional grounds in order to avoid duplication of proceedings. The respondents were also permitted to file their additional counter affidavits. These appeals were therefore heard with reference to the challenge to the orders of cancellation dated 8.9.2008, in addition to the challenge to the order of remand of the High Court dated 13.5.2008.

16. We may first briefly deal with the challenge to the order of the High Court dated 13.5.2008. The High Court rightly set aside the orders dated 1.8.2007 of the state government, because no hearing was given to the appellants as required under section 41(3) of the 1973 Act. Even otherwise, when valuable rights had vested in the appellants, by reason of the allotments and grant of leases, such rights could not be interfered with or adversely affected, without a hearing to the affected parties. Violation of principles of natural justice was a ground to set aside the order dated 1.8.2007 and the consequential orders dated 3.8.2007. Several objections were raised by appellants to the cancellation. These objections had not been considered by the state government. As the High Court was setting aside the orders dated 1.8.2007 and the consequential order dated 3.8.2007, on the ground of violation of principles of natural justice, necessarily it had to direct the state government to reconsider the entire matter. The High Court therefore referred to the several issues which required to be considered and several admitted facts which will have a bearing thereon, and directed the state government to decide the matter afresh after hearing the appellants. This court reiterated the said direction in its interim order dated 18.7.2008. Therefore there is no need to interfere with the final order of the High Court.

17. Therefore what in effect remains for our consideration is the validity of the orders of cancellation dated 8.9.2008

A passed by the state government in exercise of its revisional jurisdiction. On the facts and circumstances and on the contentions urged, the questions that arise for consideration in these appeals broadly are :

B I. Where allotment has been followed by grant of a lease (which is duly executed) and delivery of possession in favour of the lessee, whether the leases could be unilaterally cancelled by the lessor?

II. Whether the cancellations were on account of change C in policy as a consequence of change of government, or on account of new government's desire to nullify the actions of previous government?

III. Whether the allotments of plots to appellants suffer from any irregularity or illegality? D

(a) Whether allotment of commercial plots for hotels, is contrary to the government policy dated 22.5.2006, adopted by NOIDA on 5.6.2006, or the regulations and policies of NOIDA?

E

(b) Whether allotment of hotel sites by NOIDA should have been only on the basis of sealed tenders/public action?

(c) Whether the allotment rate is erroneous resulting in any loss to NOIDA? F

IV. If there is any violation of the regulations/policies of NOIDA in making the allotments, what is the consequence?

(i) Who is responsible for the same?

G (ii) Whether there is any suppression, misstatement or misrepresentation of facts, or fraud, collusion or undue influence on the part of any of the appellants in obtaining the allotment/lease?

H

(iii) What should be the remedial action? A

I. Whether a completed lease can be cancelled?

18. The particulars of the lease deeds executed by NOIDA with regard to the hotel buildings allotted on 12.1.2007 to various allottees are as under: B

CA No.	Name of the allottee/lessee	Cate-gory	Plot Number	Date of execution of lease deed	Date of delivery of possess-ion
4561/08	ITC Ltd.	5 star	Plot No.H-5 Sector 97	11.4.2007 (pending registration)	11.4.2007
4562/08	Indian Hotels Ltd.	5 star	Plot No.H-2 Sector 96	4.4.2007 (pending registration)	9.4.2007
4563/08	Bharat Hotels Ltd.	5 star	Plot No.H-1 Sector 96	28.3.2007 (registered)	29.3.2007
4564/08	Hampshire Hotels & Resorts Pvt.Ltd.	5 star	Plot No.H-3 Sector 96	28.3.2007 (registered)	28.3.2007
4565/08	Arora Holdings Ltd. (consortium)	5 star	Plot No.H-6 Sector 97	18.4.2007 (pending registration)	27.4.2007
4566/08	Crimson Hotels Ltd. through Clarkston Hotels (P) Ltd.	5 star	Plot No.H-7 Sector 97	11.7.2007 (pending registration)	18.4.2007
4567/08	Mariada Holdings Ltd. (consortium)	3 star	Plot SDC-H -1 Sector 62	18.4.2007 (pending registration)	26.4.2007
4568/08	M/s Mast Craft Ltd. (consortium) through M/s. NOIDA Luxury Hotels & Resorts (P) Ltd.	3 star	Plot SDC-H-2 Sector 105	18.4.2007 pending registration)	27.4.2007
4569/08	Swiss-Bell Hotels International Ltd. (consortium)	5 star	H-9 Sector 98	18.4.2007 (pending registration)	24.4.2007
4570/08	Rendezvous	5 star	H - 8	20.4.2007	

C D E F G H

	Hotels International Pvt.Ltd. (Consortium) through Somap Hotels (P) Ltd.		Sector 98	(pending registration)	24.4.2007
4571/08	Royal Orchid Hotels Ltd. (consortium)	3 star	124 A/2 Sector 124	20.4.2007 (pending registration)	26.4.2007
4572/08	Orchid Infrastructure Developers Pvt. Ltd.	4 star	124 A/1 Sector 124	—	—
4968/08	Metrovino Management Ltd. (Consortium)	4 star	SDC/H-1 Sector 105	3.5.2007 (pending registration)	4.5.2007
—	Elbrus Builders (P) Ltd. (Consortium)	5 star	H-4 Sector 96	—	—

19. The appellants applied for allotment in pursuance of advertisements/brochures issued in October 1996 by NOIDA inviting applications from hotel entrepreneurs for allotment of plots for hotels. Each of the appellants fulfilled the elaborate eligibility criteria for allotment of respective category of plot. After detailed comparative evaluation of the applications through an independent agency NOIDA found them fit and eligible for allotment. Out of 25 plots, allotments were made only in respect of 14 plots. NOIDA issued them letters of allotment on 12.1.2007. Each appellant paid the lease premium ranging between Rs.17.76 crores (five star plots) to Rs.5.55 crores (three star plots) as premium plus location benefit charges. Many also exercised the option to pay 27.5% of the premium plus location benefit charges, as eleven years rent in advance in lump sum as 'one time lease rent' instead of paying yearly rent for 90 years. On payment of premium and other dues by the allottes, in terms of the relevant regulations, lease deeds were executed in favour of the appellants, in the standard lease format of NOIDA in the months of March, April and May, 2007 and they were duly presented for registration. The appellants have also incurred stamp duty and registration charges ranging from about Rs.2 crores to Rs.62 lakhs. Two lease deeds (in

favour of Bharat Hotels Ltd. and Hampshire Hotels & Resorts Ltd.) have been duly registered. In regard to other lease deeds, though presented for registration, though there is no objection for registration, registration formalities are kept pending in view of a demand by the registration authorities for deficit stamp duty and registration charges on the basis of circle rate and the issue is pending before the concerned registration officer or in court. As far as NOIDA is concerned, execution and registration of the leases were completed and consequently possession of the plots were delivered to the respective allottee/lessee in April and May, 2007. Each appellant has also incurred considerable amount for preliminary expenditure for the hotel project (in addition to the premium, location benefit charges, rent, stamp duty and registration charges) as they were expected to execute the projects in a time bound manner.

20. In the aforesaid factual background, the first contention of the appellants is that when the leases have been granted, executed and registered, when entire premium and other dues have been paid and possession has been delivered, the lessor (NOIDA) cannot unilaterally cancel the leases. The appellants do not challenge the power of NOIDA as lessor, to terminate the lease on the ground of fraud and misrepresentation under clause XIII(1) of the lease deed or on the ground of breach of the terms of the lease under clause XIV of the lease deed. What is challenged is the right to cancel a concluded lease itself, on the ground that allotment was not valid.

21. A lease governed exclusively by the provisions of Transfer of Property Act, 1882 ('TP Act' for short) could be cancelled only by filing a civil suit for its cancellation or for a declaration that it is illegal, null and void and for the consequential relief of delivery back of possession. Unless and until a court of competent jurisdiction grants such a decree, the lease will continue to be effective and binding. Unilateral cancellation of a registered lease deed by the lessor will neither terminate the lease nor entitle a lessor to seek

A possession. This is the position under private law.

22. But where the grant of lease is governed by a statute or statutory regulations, and if such statute expressly reserves the power of cancellation or revocation to the lessor, it will be B permissible for an Authority, as the lessor, to cancel a duly executed and registered lease deed, even if possession has been delivered, on the specific grounds of cancellation provided in the statute.

23. NOIDA is an authority constituted for development of C an industrial and urban township (also known as Noida) in Uttar Pradesh under the provisions of the Act. Section 7 empowers the authority to sell, lease or otherwise transfer whether by auction, allotment or otherwise, any land or building belonging to it in the industrial development area, on such terms and D conditions as it may think fit to impose, on such terms and conditions and subject to any rules that may be made. Section 14 provides for forfeiture for breach of conditions of transfer. The said section empowers the Chief Executive Officer of the Authority to resume a site or building which had been E transferred by the Authority and forfeit the whole or part of the money paid in regard to such transfer, in the following two circumstances : a) non-payment by the lessee, of consideration money or any installment thereof due by the lessee on account of the transfer of any site or building by the Authority; or b) F breach of any condition of such transfer or breach of any rules or regulations made under the Act by the lessee. Sub-section (2) provides that where the Chief Executive Officer of the Authority resumes any site or building under sub-section (1) of section 14, on his requisition, the Collector may cause the G possession thereof to be taken from the transferee by use of such force as may be necessary and deliver the same to the Authority. This makes it clear that if a lessee commits default in paying either the premium or the lease rent or other dues, or commits breach of any term of the lease deed or breach of H any rules or regulations under the Act, the Chief Executive

Officer of NOIDA can resume the leased plot or building in the manner provided in the statute, without filing a civil suit. The authority to resume implies and includes the authority to unilaterally cancel the lease.

24. Clause XIV of the lease deeds executed by the NOIDA in favour of the appellants provides that "notwithstanding anything to the contrary contained herein, in the event of breach of terms of lease, or if the lessee does not abide by the terms and conditions of the building regulations and directions or any rules framed by the lessor from time to time", the lease may be cancelled by the lessor and the possession of the demised premises can be taken over by the lessor from the lessee. Clause XIII (i) provides that "if it is discovered that the allotment/ lease of the demised premises has been obtained by suppression of any fact or misstatement or misrepresentation or fraud on the part of the lessee", then the lease shall be cancelled and the entire deposit amount shall stand forfeited. Therefore NOIDA has the authority, having been empowered by the statute, to cancel the lease and resume possession, without recourse to a civil court by a suit, in two circumstances (i) non-payment of the premium/rent/other dues; (ii) breach of conditions of transfer or breach of rules or regulations under the Act (the conditions referred would include any suppression of fact or misstatement or misrepresentation or fraud on the part of the lessee in obtaining the lease).

25. NOIDA has not alleged or made out any default in payment or breach of conditions of the lease or breach of rules and regulations. Nor is it the case of NOIDA that any of the appellants is guilty of any suppression or misstatement of fact, misrepresentation or fraud. Neither the cancellation of the allotment and the lease by NOIDA by letter dated 3.8.2007, nor the orders dated 1.8.2007 or 8.9.2008 made by the state government refer to any of these grounds. Therefore the cancellation cannot be sustained with reference to the grounds mentioned in section 14 of the Act. The grounds mentioned for

A cancellation are mistakes committed by NOIDA itself in making allotments and fixing the premium, in violation of the Regulations and policies of NOIDA by officers of NOIDA. These are not grounds for cancellation under section 14 of the Act.

B 26. The learned counsel for the respondents submitted that the lease was terminated by the state government, in exercise of revisional jurisdiction under section 41 of the UP Urban Planning and Development Act, 1973 read with section 12 of the Act on the ground that there were irregularities and violations of regulations and policies of NOIDA in allotting the C hotel plots to the appellants. It is submitted that the state government has such power to cancel the allotment and as a consequence the lease. Let us examine whether the state government has such power. Section 12 of the Act provides that the provisions of Chapter VII and sections 30, 32, 40, 41, D 43, 44, 45, 46, 47, 49, 50, 51, 53 and 58 of the Uttar Pradesh Urban Planning and Development Act, 1973 as re-enacted and modified by Uttar Pradesh President's Acts (Re-enactment with Modifications) Act, 1974 shall *mutatis mutandis* apply to the Authority with the adaptations mentioned in the said section. E Section 41 of the 1973 Act, relating to control by State Government, is thus applicable to NOIDA. The said section with the adaptations mentioned in section 12 of the Act, reads as under:

F *"41. Control by State Government* – (1) The Authority, the Chairman or the Chief Executive Officer shall carry out such directions as may be issued to it form time to time by the State Government for the efficient administration of this Act.

G (2) If in, or in connection with the exercise of its power and discharge of its functions by the Authority, the Chairman or the Chief Executive Officer under this Act, any dispute arises between the Authority, the Chairman or the Chief Executive Officer and the State Government the decision

H

of the State Government on such dispute shall be final. A

(3) The State Government may, at any time, either on its own motion or an application made to it in this behalf, call for the records of any case disposed of or order passed by the Authority or the Chairman for the purpose of B satisfying itself as to the legality or propriety of any order passed or direction issued and may pass such order or issue such direction in relation thereto as it may think fit.

Provided that the State Government shall not pass on order prejudicial to any person without affording such person a C reasonable opportunity of being heard.

(4) Every order of the State Government made in exercise of the powers conferred by this Act shall be final and shall not be called in question in any court." D

27. Sub-section (3) enables the state government, either on its own motion or on an application made to it in this behalf, to call for the records of any case disposed of or order passed by the Authority for the purpose of satisfying itself as to the legality or propriety of any order passed or direction issued and E may pass *such order or issue such direction in relation thereto as it may think fit.* The allotments were challenged in two writ litigations before the Allahabad High Court (Civil Misc.WP 24917/2007 and PIL WP No. 29252/2007). A division bench of the High Court directed the state government to exercise its F power of revision and have a relook in regard to the allotments made in favour of the appellants by NOIDA in exercise of its power under section 41(3) of the 1973 Act (read with section 12 of the Act). The order dated 1.8.2007 passed by the state government in pursuance of the said direction of the High Court G was set aside by the High Court on the ground that the order violated section 41(3) of the 1973 Act and directed fresh consideration after hearing the parties. This Court also directed the state government to pass a fresh order. Accordingly the state government examined the matter and passed the impugned H

A orders dated 8.9.2008. The state government has concluded that the allotments by NOIDA were in violation of the regulations and policies of NOIDA and therefore cancelled the allotments and consequential leases. The State Government is empowered to issue such direction. (Whether the order of the B State Government is valid on merits is a separate issue). The limited question under consideration is whether the state government can cancel the allotments and consequently the leases. Section 41(3) shows that the state government, can examine the legality or propriety of any order of NOIDA and C pass appropriate orders. If the state government in exercise of its revisional jurisdiction finds the allotments were irregular or contrary to the regulations or policies of NOIDA and directs cancellation, the allotments become invalid and leases also become invalid. Consequently NOIDA can resume possession, D without intervention of a civil court in a civil suit.

II. Whether the cancellation was on account of the change in government

28. The appellants submitted that the Hotel plot scheme E was introduced and allotments were made in pursuance of a policy of the government that was in power in 2006; and that immediately after the allotment and execution of the lease deeds, there were changes in government on 15.5.2007. The appellants contend that the direction to cancel the allotments F (issued on 1.8.2007) and the orders of cancellation (issued on 8.9.2008) was apparently a consequence of the new government reviewing and changing the policies by the previous government or as a consequence of the new government's intention to upset the decisions of the previous government. It is submitted that the successor government cannot reopen G concluded transactions of the previous government on the ground of change in policy or by merely reconsidering them. Reliance is placed upon two decisions of this Court in support of their contention - *State of Haryana vs. State of Punjab* – 2002 (2) SCC 507 and *State of Karnataka vs. All India* H

Manufacturers Organisation – 2006 (4) SCC 683. In *State of Haryana,* this Court observed :

> ".....What really bothers us most is the functioning of the political parties, who assume power to do whatever that suits and whatever would catch the vote-bank. They forget for a moment that the constitution conceives of a Government to be manned by the representatives of the people, who get themselves elected in an election. *The decisions taken at the governmental level should not be so easily nullified by a change of government and by some other political party assuming power,* particularly when such a decision affects some other State and the interest of the nation as a whole. It cannot be disputed that so far as policy is concerned, a political party assuming power is entitled to engraft the political philosophy behind the party, since that must be held to be the will of the people. *But in the matter of governance of a State or in the matter of execution of a decision taken by a previous government, on the basis of a consensus arrived at, which does not involve any political philosophy, the succeeding government must be held duty bound to continue and carry on the unfinished job rather than putting a stop to the same.*"
>
> (emphasis supplied)

In *State of Karnataka,* (supra) this Court while reiterating the above principle laid down in *State of Haryana*, added :

> Taking an overall view of the matter, it appears that there could hardly be a dispute that the project is a mega project which is in the larger public interest of the State of Karnataka and merely because there was a change in the Government, there was no necessity for reviewing all decisions taken by the previous Government, which is what appears to have happened. That such an action cannot be

A taken every time there is a change of Government has been clearly laid down ..... "

29. On a careful consideration, we find that the contention has no merit. This is not a case where as a consequence of change in government, the new government has reviewed the B decision relating to hotel site allotment, merely because it was a decision of the previous government. Nor is it a case where any new policy of the new government, being at variance with the policy of the previous government. The principles stated in the said two decisions will be relevant in such cases. In this C case, the allotments of plots for hotel projects were challenged in two writ petitions – the first of which was filed on 22.5.2007. In the said writ petition, the High Court made an interim order dated 25.5.2007, directing the state government to have a re-look of the entire matter in view of the serious allegations made D in the writ petitions about allotment at throw away prices. In fact, the High Court specifically directed the state government to exercise its power of revision under section 41(3) of 1973 Act and take an independent decision. It is in compliance with the said direction that the state government had a relook at the E matter, found some irregularities in allotment and directed NOIDA to take action to remedy the irregularities found in the allotments, vide letter dated 1.8.2007. This was confirmed in the affidavit dated 2.8.2007 filed by the state government before the High Court. Therefore, the decision dated 1.8.2007 was not F a decision taken by a subsequent government in an attempt to find fault with the policies or actions of the previous government, but a decision taken in exercise of a power under section 41 of the 1973 Act in the normal course of governmental business, in pursuance of specific directions of the High Court. The G orders dated 8.9.2008 were made in view of the final order of the High Court and the interim order of this court directing reconsideration. We therefore, reject the contention that the decisions dated 1.8.2007 and 8.9.2008 of the state government were the result of any ulterior motive to interfere with the policies H or decisions of the earlier government. The decision of the

state government in revision, is not based on any different policy, but based on its finding that the existing regulations and policies of NOIDA were violated.

III. Whether the allotments violate the regulations/policies of NOIDA?

30. The Central Government requested the governments of Uttar Pradesh and Haryana to encourage the high segment hotel industry and add to the available room capacity in areas adjoining Delhi, in time to meet the increased demand expected during the Commonwealth Games scheduled to be held in October, 2010. The Uttar Pradesh government had declared 'tourism' to be an industry as far back as 1997-98 to encourage tourism in the State. It however found that the said incentive did not have any marked effect, as far as increasing the number of quality hotels, an integral part of tourism. To attract the twin objects, that is to comply with the request of the central government for creation of more star hotels, and also to attract capital investment in the hotel segment of tourism industry throughout the state, the state government came out with a policy on 22.5.2006 with the following two new hotel-specific incentives, in addition to the standard incentives available to tourism industry : (i) allotment of plots for hotels at industrial plot prices; and (ii) 100% rebate in *Sukh Sadan Tax* for five years from start-up. When the policy dated 22.5.2006 is read as a whole, the scheme that emerges is this: The development authorities were expected to earmark specific areas for setting up hotels while preparing the Master Plan, with the assistance of tourism department. Where the development authorities had already finalized the master plan, they were required to earmark surplus lands (that is, areas not reserved for any identified or specific use) for allotment to hotels. If suitable surplus land was not available and it becomes necessary to allot plots earmarked for other use, for purposes of hotels, the development authorities were required to follow the rules and change the land use so that the land could be legitimately used for hotel industry.

A In areas where there were no development authorities, suitable lands near tourist spots were to be acquired/transferred to tourism department which would allot the land to Hotels/tourism industry. The plots earmarked for hotels had to be allotted to hotels/tourism entrepreneurs at industrial plot rates, as was B done in the case of allotments for industries. The policy was a general policy intended to apply for the entire state. It proceeded on the assumption that earmarking areas for hotels and tourism for allotment at industrial rates, would be under a separate and distinct categorization of land use. It apparently C did not contemplate high value commercial plots in NOIDA being earmarked for hotel industry and being allotted at industrial rates.

31. The state government on examination of all the facts in its revisional jurisdiction found that the hotel plots allotted to D appellants were part of Sectors 96, 97 and 98 (for five star plots) and other sectors (for plots for 4 star and 3 star hotels) which were earmarked for commercial use under the NOIDA Master Plan. It was of the view that in view of tourism/hotels being declared as an "industry" and the government policy E requiring allotment of plots for tourism/hotels at industrial rates, if any plot had to be allotted for a hotel, the land use of the said plot had to be changed to industrial use in the Master plan by adopting the prescribed procedure under the regulations, before making the allotment. It was also of the view that if the plots were F allotted for hotel industry, then the construction should be as per the NOIDA building regulations and directions applicable to industries in regard to FAR, ground coverage, height, setbacks, construction of building etc. It was also of the view that if plots in commercial areas are to be allotted it could be only in G accordance with the NOIDA Commercial Property Management Policy which required all commercial plots to be allotted on sealed tender or public auction basis. As NOIDA did not alter the land use of the plots in question from commercial use to industrial use in the Master Plan nor amend H the definitions of commercial use and industrial use in the 1991

Regulations so that hotels would no longer be a commercial use, but a industrial use, the state government held that statutory regulations and directives of NOIDA had been violated in making the hotel plot allotments.

32. The state government contends that the allotment of commercial plots to appellants for establishing hotels without converting them to industrial use violated the NOIDA Regulations and therefore impermissible and illegal. The state government further contends that when hotels were given the status of 'industry', the use of land for hotels would be an industrial use and therefore, the allotment of plots by NOIDA for constructing hotels should have been in areas earmarked as industrial area, and that if any area earmarked for commercial use is to be allotted to hotels, such allotment can be only after change of such land from commercial use to industrial use. Alternatively, it is submitted that even if the plots in area earmarked for commercial use are allotted to hotels such allotment could be only by adopting the procedure applicable to allotments of commercial plots that is by inviting tenders or bids and not by allotment at any fixed rate that too a fixed rate which is a reserved rate for an industrial plot. Lastly, it is contended that if a commercial plot could be allotted to a hotel, it cannot be charged the industrial plot rate, but should have been charged as a commercial plot. It is submitted that charging 14 commercial plots at industrial rates has resulted in a loss of Rs.4721.14 crores.

33. On the other hand, the appellants contend that the policy dated 22.5.2006 did not direct or require that allotment of plots for hotels should be in areas earmarked for industrial use. They point out that the hotel business is a commercial activity and under the 1991 Regulations, commercial use includes use of land or building for a hotel, and use of land or building for locating an industry is an industrial use. It is submitted that allotment of plots in commercial areas to hotels was justified as it is a commercial use. It is next submitted that the policy required only the rates applicable to industrial plots,

A to be applied to the plots allotted to hotels wherever they are situated, as an incentive for hotel and tourism industry, and that did not mean that the building regulations should be applied to hotel buildings. The allotment of hotel plots having been done at legitimately fixed allotment rates, there is no question of loss
B to NOIDA.

These contentions give rise to three sub-issues and we will deal them separately.

(a) Whether plots earmarked for commercial use in
C **commercial area, could be allotted for hotels?**

34. We will first examine the question whether commercial plots could not be allotted to hotels, without changing the earmarked land use from 'commercial' to 'industrial' and
D whether the FAR, maximum height, set backs, ground coverage etc. applicable to hotel plots should be as per the regulations applicable to industrial buildings and not as applicable to commercial buildings.

(34.1) Section 6 of the Act relates to the functions of the
E Authority. Sub-section (1) specifies the object of the Authority is to secure planned development of industrial development area. Sub-section (2) provides that the functions of the authority include preparation of a plan for the development of the 'industrial development area' to demarcate and develop sites
F for industrial, commercial and residential purposes, to lay down the purpose for which a particular plot shall be used (that is industrial, commercial, residential or other specified purpose) in the development area. In exercise of its power under section 19 read with section 6 of the Act, the Authority made the NOIDA
G (Preparation and Finalisation of Plan) Regulations, 1991 ('1991 Regulations' for short).

(34.2) Clauses (d), (e) and (f) of Regulation 2 of the said Regulations define commercial use, industrial use and
H institutional use as under:

"(d) 'Commercial Use' means the use of any land or building or part thereof for carrying on any trade, business or profession, sale of goods of any type, whatsoever and includes private hospitals, nursing homes, hostels, **hotels**, restaurants, boarding houses not attached to any educational institution, consultant offices in any field, cottage and service industries;

(e) 'Industrial Use' means the use of any land or building or part thereof mainly for **location of industries and other uses incidental to industrial use** such as offices, eatable establishment etc.;

(f) 'Institutional Use' means the use of any land/building or part thereof for carrying on activities like testing, research, demonstration etc. for the betterment of the society and it includes educational institutions;"

(emphasis supplied)

(34.3) Regulation 4 provides that the NOIDA Master Plan may include Sector Plans showing various sectors into which the development area or part thereof may be divided for the purpose of development. It requires the said Plan to show the various existing and proposed land uses indicating the most desirable utilization of land for (i) industrial use by allocating the area of land for various scales or types of industries or both; (ii) residential use by allocating the area of land for housing; (iii) commercial use by allocating the area of land for wholesale or retail markets, specialized markets, town level shops, show-rooms and commercial offices and such allied commercial activities; (iv) public use by allocating the area of land for Government offices, hospitals, telephone exchanges, police lines etc; (v) organized recreational open spaces by allocating area of land for parks, stadium etc.; (vi) agricultural use by allocating the area of land for farming, horticulture, sericulture; (vii) such other purposes as the Authority may deem fit, in the

course of proper development of the development area. The said 1991 Regulations also requires the Plan to include the systematic regulation of each land use area, allocation of heights, number of storeys, size and number of buildings, size of yards and other open spaces and the use of land and buildings.

(34.4) Regulation 9 provides that the plan finalized and approved by the Authority shall be effective for such period as may be specified by the Authority, but not less than five years. Regulation 11 authorises the Authority to make amendment to the Plan and requires the Authority, before making any amendment to the Plan to publish a notice at least in one newspaper having circulation in the area inviting objections and suggestions and further requires every amendment made to the plan to be published. It provides that the amendment shall come into operation either on the date of the first publication or on such other date as the authority may fix. It is of relevance to note that in this case no amendment was made changing the land use of the plots in question from commercial to industrial.

35. The Authority made the NOIDA Building Regulations and Directions, 2006 (for short "2006 Building Regulations"), with prior approval of the state government and in exercise of its powers under sections 9(2) and 19 of the Act. The said Building Regulations replaced the NOIDA Building Regulations and Directions 1986, with effect from 5.12.2006.

(35.1) Regulation 3.12 defines building as any structure or erection or part of a structure or erection which is intended to be used for residential, commercial, industrial or other purposes. Clause (e) thereof defines 'industrial building' as referring to a building in which products or materials of all kinds and properties are fabricated, assembled or processed, such as assembly plants laboratories, power plants, smoke houses, refineries, gas plants, mills, diaries or factories.

(35.2) Regulation 33.3 prescribes the maximum ground

coverage, maximum FAR in percentage and maximum height for industrial building. The same is extracted below :

S. No.	Plot Area	Max. Ground Coverage	Max. FAR in %	Max. height (in mt.)
1.	**Upto 100**	60	120	15
2.	**Above 100 upto 450**			15
a.	First 100	Same as (1) above		
b.	Next 350 or part thereof	60	100	
3.	**Above 450 upto 2000**			15
a.	First 450	Same as (2) above		
b.	Next 1550 or part thereof	55	80	
4.	**Above 2000 upto 12000**			15
a.	First 2000	Same as (3) above		
b.	Next 10000 or part thereof	55	70	
5.	**Above 12000 upto 20000**			15
a.	First 12000	Same as (4) above		
b.	Next 8000 or of part thereof	50	65	
6.	**Above 20000**			15
a.	First 20000	Same as (5) above		
b.	Above 20000	50	60	

The said regulation shows that no industrial building put up in an industrial plot can exceed a height of 15 mtrs. The permissible FAR for industrial use ranges between 1.2 to 0.6 depending upon the size of the plot. The FAR as per the above table would be 0.679 for a plot measuring 24000 sq.m., 0.72 for a plot measuring 12500 sq.m. and 0.74 for a plot measuring 7500 sq.m.

(35.3) Regulation 33.4 divides the commercial buildings into two categories that is hotel buildings and buildings for other

commercial activities and prescribes the maximum ground coverage, FAR and maximum height for both types of commercial buildings. As we are concerned with hotel buildings, the relevant portion of said regulation dealing with hotel building is extracted below :

Sl. No.	Use	Maximum ground coverage %	FAR	Max. height
1.	Hotel Building			
	(a) Below three star category	30%	1.25	24.0 m
	(b) Three star category	30%	1.5	No limit
	(c) Above three star category	25%	2.0	No limit

The said regulation shows that for hotel buildings there is no height restriction at all and the FAR is 2 (for 4 star and 5 star categories) and 1.5 (for 3 star category hotels).

36. The 2006 Building Regulations make it clear that FAR and the permissible height of the building is far more advantageous in the case of commercial hotel buildings when compared to industrial buildings. It may be mentioned that even when the 1986 Building Regulations were in force till 4.12.2006, the provisions for FAR and height of building were far more advantageous to commercial buildings, when compared to industrial buildings.

37. Running a hotel or boarding house or a restaurant is a commercial activity. By no stretch of imagination, use of a plot for a hotel can be considered as use of such land for an industrial purpose. An industrial building is defined in Regulation 3.12(e) of the NOIDA Building Regulations and Directions of 2006 as a building in which products or materials of all kinds and properties are fabricated, assembled or processed. As per the 1991 Regulations, use for a hotel is a commercial use; and 'industrial use' refers to manufacturing,

fabrication, assembling and processing activities. If the land allotted to a hotel is to be considered as an allotment for an industrial use and the building constructed in such plot is to be considered as an industrial building, the consequence will be that no five star, four star or three star hotel can be constructed in such plots. Further the restrictions for industrial buildings, relating to permissible FAR (less than 0.75 as against 2 for hotels) and height (maximum of 15 M as against absence of any height restriction for hotels) make industrial plots useless and unviable for a hotel. We note below the comparative table of FAR and the permissible height for industrial and commercial buildings, worked out from Regulations 33.3 and 33.4 of the 2006 Regulations :

S. No.	Plot Size	Under permissible FAR		Permissible Height	
		Industrial	Commercial	Industrial	Commercial
1.	7500 sq.m Three Star	0.74	1.5	15 mtr.	No height restriction
2.	12500 sq.m Four Star	0.72	2	15 mtr.	No height restriction
3.	24000 sq.m Five Star	0.679	2	15 mtr.	No height restriction

38. Having regard to the provisions of 1991 Regulations, use of land for hotel cannot be considered as an industrial use, but will continue to remain a commercial use. The policy of the state government dated 22.5.2006 cannot override the NOIDA Regulations. If any policy is made, intending to give different meaning to the words 'commercial use' and 'industrial use', that can be given effect only if the regulations are suitably amended. Be that as it may.

39. When tourism is given the status of an industry, it does not mean tourism involves manufacturing, fabrication, processing or assembling. The term 'industry' has different

A nuances. The traditional meaning of 'industry' may be manufacture or production of goods. When used in the context of an 'industrial area' or 'a land for industrial use' the word 'industry' will refer to use for manufacture, production and allied activities. On the other hand, when the word 'industry' is used B in the context of tourism/hotels, hospitals/nursing homes or banking, it refers to a service industry, that is groups engaged in that particular organized activity, and does not refer to any manufacturing, processing, assembling etc. When the government policy gave tourism and hotels, the status of an C industry, it did not require hotels to undertake manufacturing or production activities. By giving the status of 'industry', the policy enabled a particular service activity (in this case tourism and hotels) to secure certain benefits in allotment of land at concessional prices and certain tax exemptions. Therefore, the D fact that the tourism or hotels have been given the status of 'industry' will not convert them into industries, for the purpose of allotment of plots, nor will the use of land by such tourism or hotel industry, will be an industrial use. It does not also mean that all the hotels and tourist offices should be shifted from commercial areas to industrial areas or that hotels or tourist E offices cannot operate in commercial areas, or that they cannot get allotment of land or building earmarked for commercial use. Running hotels, to repeat, is a commercial activity and the use of a land or building for a hotel is commercial use and therefore, allotment of plots for hotels in a commercial area is F wholly in consonance with the NOIDA Regulations and Master plan which earmarks areas for specific land uses like industrial, residential, commercial, institutional, public, semi-public, etc.

40. We are therefore of the view that the allotment of plots G situated in commercial areas earmarked for commercial use, to hotels did not violate any provisions of the Act or the NOIDA Regulations. We are also of the view that it was not necessary for NOIDA to change the land use of plots to be allotted to hotels, from commercial to industrial use. The contentions of H the respondents to the contrary are therefore, rejected.

(b) Whether allotment of hotel sites by NOIDA should have been by inviting tenders/holding auctions?

41. The learned counsel for appellants contended that whenever the State or its authorities decide to dispose of their properties, it need not always be by public auction or by inviting sealed tenders, involving competitive bidding. It is submitted that if the object of a policy relating to allotment of plots is to promote hotel industry and not to earn revenue, it would be open to the state government and its authorities to dispose of their properties by other recognized methods, that is by allotment at fixed rates after inviting applications from eligible applicants, or by allotment after specific invitation and negotiations, depending upon the facts and circumstances. It is pointed out that in pursuing socio-economic goals, as for example when plots are allotted by development authorities to persons belonging to economically weaker sections or persons belonging to middle classes, allotments are always made at fixed rate by drawing lots and not by inviting tenders or by auctions. It is submitted that only a few plots as for example, the corner plots or plots of some special category are normally disposed of by either public auction or by inviting tenders. According to appellants, whether allotment should be by public auction or by inviting tenders or by inviting applications for allotment at fixed rate is a decision to be taken by the authority concerned, on the facts and circumstances of each case; and therefore NOIDA did not commit any irregularity, by adopting the method of allotment of hotel plots at fixed rate applicable to industrial plots, to give a boost to tourism industry in the state, in pursuance of government policy dated 22.5.2006.

42. In support of their contention, the appellants relied upon the decisions of this Court in *Brij Bhusan vs. State of Jammu & Kashmir* – 1986 (2) SCC 354, *Sachidanand Pandey vs. State of West Bengal* – 1987 (2) SCC 295, and *MP Oil Extraction vs. State of MP* – 1997 (7) SCC 592. In *Brij Bhusan* (supra), this Court was considering a case where certain

A entrepreneurs had on their own had offered to set up the factories for manufacturing of resin and turpentine derivatives. After negotiations the state government gave licences to them to set up factories and assured supply of the required raw materials (Oleo Resin). No advertisements were issued by the B state government inviting tenders for setting up such factories. Other entrepreneurs who were interested in setting up factories, challenged the grant of licences on the ground that due opportunity was not given to all the entrepreneurs to make their applications. This Court rejected the writ petitions holding that C in the absence of material to show that the State had acted mala fide or out of improper or corrupt motive or in order to promote the private interest of someone at the cost of the State, the decision to grant licences was not open to interference. It reiterated where State is allocating resources for the purpose D of encouraging setting up of industries within the State, the State is not bound to advertise and tell the people that it wants a particular industry to be set up in the State or invite those interested to come up with proposals.

In *Sachidanand Pandey*, this Court held :

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"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 F 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 G 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."

H To the same effect is the decision in *MP Oil Extraction*. The

appellants point out that their cases are much stronger than those considered in those cases, as their allotments were not made on any private negotiations, but after wide advertisement in newspapers inviting applications from all persons who fulfilled the eligibility criteria; and that all applications received were evaluated through an independent agency and allotments were made as per their recommendation. They submit that the process of allotment was fair and normal. They contend that failure to invite tenders or hold public auction would not vitiate the allotments.

43. But the issue in these cases is different. The principle laid down in the cases relied on by the appellants would be of some assistance in a situation where there are no specific rules, regulations or policy guidelines governing the procedure as to how allotments are to be made, or contracts are to be awarded, or licences are to be issued. Those decisions may also be of some assistance while dealing with a grievance that all persons interested or all eligible persons were not given an opportunity to apply. The state government has found that the NOIDA Commercial Property Management Policy required allotment of commercial properties only on sealed tenders or public auction basis; and if the said requirement was ignored and allotment is made at a fixed rate, contrary to the specific terms of the policies of NOIDA; and that allotment at fixed rate basis had resulted in a huge financial loss to NOIDA.

44. Allotment of commercial plots is governed by the NOIDA Policies and Procedures for Commercial Property Management, 2004. Under the said policy, commercial properties of NOIDA can be allotted only on sealed tender basis or by way of public auction. For this purpose NOIDA has to fix a reserve rate and the person who gives the highest bid/offer above the reserve rate, who is otherwise eligible, is allotted the plot. The said policy in regard to the procedure for allotment of commercial properties was not amended or modified to provide for allotment of commercial properties for hotels at

A fixed prices. The allotment of commercial plots at fixed rate was therefore clearly contrary to the said regulations of NOIDA.

45. We may also refer to the NOIDA Policies and Procedures for Industrial Property Management, 2006 as amended on 20.3.2006 ("Industrial Property Management B Policy", for short) in this connection. It divides the industrial sectors in NOIDA into three industrial Phases as under :

(1)	Phase I	Sectors from 1 to 11 and 16
C (2)	Phase II	Includes Phase-II, Phase-II Extension/ Hosiery Complex, Sector-80, 81 and 83
(3)	Phase III	Includes Sector-57, 58, 59, 60, 63, 64 and 65.

D It provided that allotments of industrial plots in Phase I should be made on the basis of sealed tenders, the reserved rate being Rs.7400/- per sq.m. It further provided that allotments of plots in Phases II and III should be made at fixed prices of Rs.2100 and Rs.4000 per sq.m.

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46. The appellants submitted that the said NOIDA Commercial Management Policy and NOIDA Industrial Management Policy are not statutory rules made by the state government under section 18 of the Act, nor are they statutory F regulations made by NOIDA under section 19 of the Act. It is submitted that the NOIDA Commercial Management Policy is merely a set of guidelines and directives prepared by NOIDA in regard to the terms and conditions for transfer of commercial properties of NOIDA and such guidelines could be altered by NOIDA at any point of time. It is pointed out that the said NOIDA G Commercial Management Policy itself stated that it could be amended/modified/altered without any notice. It was submitted that when NOIDA adopted the state government policy dated 22.5.2006 for allotment of plots for hotels at industrial plot rates, the NOIDA Commercial Property Management Policy stood

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modified by incorporating an exception to the directive requiring allotment of commercial plots only by sealed tenders/auction, that allotment for hotel plots could be at fixed rate basis instead of tender basis or auction basis. It was further submitted that at all events, when brochures were issued on 17.10.2006 containing the "special terms and conditions for allotment of hotel plots" providing for allotment at the fixed rate of Rs.7400 per sq.m., it amounted to declaration of a separate policy for plots allotted or hotels and the guidelines contained in the NOIDA Commercial Property Policy ceased to apply to hotel plots.

47. In *Sachidanand Pandey* (supra), the legal position as to the need obeying orders/instructions/procedures was succinctly stated by Chinappa Reddy, J.

> "statutes and statutory orders have, no doubt, to be obeyed. *It does not mean that other orders, instructions etc. may be departed from in an individual case, if applicable to the facts. They are not to be ignored until amended. The government or the Board may have the power to amend these orders and instructions, but nonetheless they must be obeyed so long as they are in force and are applicable"*
>
> (emphasis supplied)

In *Home Secretary v. Darshjit Singh Grewal* – 1993 (4) SCC 25, the need to adhere to policy guidelines was emphasized:

> "It may be relevant to emphasize at this juncture that while the rules and regulations referred to above are statutory, the policy guidelines are relatable to the executive powers of the Chandigarh Administration. It is axiomatic that having enunciated a policy of general application and having communicated it to all concerned including the Chandigarh Engineering College, the Administration is

A bound by it. *It can, of course, change the policy but until that is cone, it is bound to adhere to it."*

(emphasis supplied)

B It is thus clear that where an Authority makes regulations and issues polices and procedures, they are intended to be followed and complied with. They cannot be ignored or avoided unless superseded or amended. The fact that Authority has the power to amend the regulations, policies and procedures, does not mean that they can be ignored. As long as they are in force, C they are required to be obeyed by the Authority.

48. The state government policy dated 22.5.2006 or its adoption by NOIDA on 5.6.2006 did not amend to the regulations, instructions, policies and procedures of NOIDA. If D the said Tourism/Hotels development policy dated 22.5.2006 contained any procedure which was at variance with the existing regulations or procedures of NOIDA, such procedures in the policy dated 22.5.2006 could come into effect only by NOIDA amending its regulations and Property Management Policies. E As per the 1991 Regulations and 2006 Building Regulations, hotel buildings are commercial buildings and use of land for hotels is commercial use and any plot allotted for hotels is a commercial property. Therefore any allotment of a plot for hotels should comply with the NOIDA Commercial Property Management Policy, 2004. Unless the NOIDA Commercial F Property Management Policy was amended, providing for allotment at fixed rates, in regard to any sub-category of commercial plots, allotment of a commercial property belonging to NOIDA otherwise than by sealed tender basis or auction basis will be an allotment in violation of and contrary to, the G regulations directives and policies of NOIDA. The fact that NOIDA was acting in pursuance of the government policy dated 22.5.2006 would make no difference. The government policy itself very clearly stated that if the implementation of the policy required amendment of the rules, regulations and procedures H of the development authorities, the same had to be carried out.

49. The failure to follow the procedure prescribed in the NOIDA Commercial Property Management Policy is a violation of the policy and such violation has resulted in loss to the public exchequer. The allotment on sealed tender basis/auction basis is provided, only in regard to commercial properties and not in regard to properties earmarked for residential or institutional uses. It is also not provided for properties earmarked for industrial use (except in regard to plots situated in industrial areas in Phase I which because of their very advantageous locations are apparently considered to be very valuable). The properties are sold by tender/auction basis with a reserve rate, so as to secure a higher price/rate on account of the healthy competition among the applicants. The higher revenue would enable NOIDA to subsidize the price of plots for allotment to weaker sections of the society for residential use or for allotment of plots for institutional use or for various developmental activities. Therefore once a policy is made in regard to commercial properties, it has to be complied with.

50. There is no doubt that the scheme of allotment contained in the NOIDA Commercial Property Policy could be altered or amended by carving out a different procedure for hotel plots. But that should have been by placing the said Commercial Property Policy before the NOIDA Board for consideration and amendment with reference to hotel plots to be allotted as per government policy dated 22.5.2006. The policy was neither before the NOIDA Board for amendment, nor was it amended. The violation of the regulations and policies of NOIDA may be unintentional and a bonafide mistake on account of a mis-reading of the requirement of the policy dated 22.5.2006. Nevertheless it is a violation. If there is a violation of the regulations and policies of NOIDA in making allotments, the state government can certainly interfere under its revisional jurisdiction.

(c) Whether the rate charged was erroneous and has led to any loss?

A 51. The next question is whether the violation has resulted in any loss of revenue to NOIDA. This requires consideration of the question whether the allotment rate is correct. We have already held that allotment of commercial plots by NOIDA was possible only by inviting sealed tenders or by holding auction. B That means that any allotment at a fixed rate (equivalent to the reserved rate for industrial plots) is irregular and in violation of the regulations and policies of NOIDA.

52. But the appellants contend that there was no irregularity in the allotment rate nor any 'loss' to NOIDA by allotting plots C at the rate of Rs.7400/- per sq.m. and that it was validly fixed. We may briefly refer to the reasons given in support of their contention : The standard methods of attracting capital investment or to encourage a particular industry is to allot land at attractive terms or at concessional prices and give D exemptions and rebates in regard to certain state taxes. Therefore, if the government took a conscious policy decision to allot plots for hotels at industrial plot rates, which is considerably lesser than the commercial plots rates, it is not to be considered as a loss to the exchequer, but should be E viewed as a part of its strategy to secure investment in hotel industry in the state. Allotment prices fixed by the Authority mainly depends upon the earmarked use of the land and incidentally upon the situation, proximity or physical advantages of a land. The same land may be allotted at different rates, F depending upon its earmarked use. The policy of the government required allotment of plots to hotels at a fixed rate, that is, the rates chargeable to industrial plots. The government policy did not contemplate allotment of plots for hotels by sealed tenders or by auction. NOIDA adopted the government policy G and fixed the allotment rate equal to the reserve rate applicable to industrial plots in phase-I which was Rs.7400/- per sq.m. The allotment rate by NOIDA primarily depends upon the earmarked use and secondarily the situation, as can be illustrated from the notified rates of NOIDA itself. The NOIDA Board resolution H dated 20.3.2006 shows that the allotment rate varied between

Rs.22100 to Rs.7500 in respect of residential plots depending upon the sector. If the same plots were to be allotted for group housing, the allotment rate varied from Rs.31,000 to Rs.12,000 per sq.m. In and around the same area, if the allotment was for institutional use, the rate could vary between Rs.5000 to Rs.12700 per sq.m and if the allotment was for industrial use depending upon whether the plots were situated in Phase-II and Phase-III, the rate would be either Rs.2100 or Rs.4000 per sq.m, The industrial plots situated in Phase-I, were to be allotted by inviting sealed tenders with the reserve rate being Rs.7400 per sq.m. Thus though the sector in which the property was situated had a bearing on the allotment rate, the main criterion for fixation of rate was the earmarked use, that is whether the land was earmarked for residential, institutional, industrial or commercial use. If the land is earmarked for commercial use, NOIDA resolution dated 20.3.2006 required the allotment to be by sealed tenders or by auction with the reserved rate being Rs.30000 per sq.m. If the very same plots were to be earmarked for institutional use (for research/software/ information technology services) the allotment rate would be only Rs.5000 per sq.m and if they were earmarked for industrial use, the allotment rate would be only Rs.2100 or Rs.4000 per sq.m. It is therefore contented that allotment at a fixed rate determined by NOIDA, does not involve any loss.

53. It is true that allotment of plots at different rates for different purposes may not give rise to a 'loss' to NOIDA. For example, NOIDA at its 141st meeting dated 8.1.2007 fixed different allotment rates for different land uses in a multi-product special economic zone: (a) Commercial land use: Rs.70000/- per sq.m. (b) Residential land use: Rs.12000/- per sq.m. (c) Institutional/recreational land use: Rs.5000 per sq.m. (d) Industrial land use: Rs.4000 per sq.m. All these lands are situated in a specific demarcated area (special economic zone). The above pricing by NOIDA did not depend upon the situational importance of the area or accessibility of the area or nearness to any landmarks or main roads nor on any physical

A advantages or disadvantages of the particular lands. The prices were purely dependent upon the earmarked land use. The same land if it was earmarked for commercial purpose would have fetched Rs.70,000 per sq.m. and if it was earmarked for residential use would have fetched Rs.12,000 per sq.m. and if
B earmarked for industrial use, would have fetched only Rs.4000 per sq.m. Therefore, when NOIDA allotted plots for residential use at Rs.12,000 per sq.m. it could not be said that it lost Rs.58,000 per sq.m. on the ground that the land would have fetched Rs.70,000 if it had been allotted for commercial use.
C Similarly it cannot be said that NOIDA suffered a loss of Rs.66,000 per sq.m. if the land was allotted for industrial use for Rs.4000/- per sq.m on the ground that it would have fetched Rs.70,000 per sq.m. if it had been allotted for commercial use. Therefore, there is no concept of "loss" to NOIDA, when it takes
D a decision to earmark different parcels of land for different uses and fixes different rates for them. Therefore mere earmarking of particular land for allotment to hotels which is a commercial activity at industrial plot prices, does not mean there is a loss in respect of an amount equal to the difference between the rate
E of commercial plots and rate of industrial plots. Any decision to allot plots to hotels at industrial rates, by itself, did not cause any loss, as such a decision was intended to be an incentive to attract investment. But there will be a 'loss', if a plot which is earmarked for commercial use, allotted for a commercial purpose, which is required to be allotted at commercial rates
F by tender or auction, is erroneously charged either at a residential plot rate or an industrial plot rate.

54. It is next submitted by the appellants that the state government being conscious of the fact that commercial plot
G prices was many time more than industrial plot prices, and that it will not be possible to attract capital investment in higher category hotels unless some substantive incentive was given, purposefully and deliberately directed that the plots for hotels even though for commercial use should be charged at industrial
H plot rates. The said policy was accepted and implemented by

NOIDA by fixing the allotment rate at Rs.7400 sq.m. Therefore, in respect of commercial plots allotted for hotels, the rates should be as applicable to industrial plots. In other words, among commercial plots, a sub-category of hotels was created entitling allotment at Rs.7400 in view of the policy of the government. It is pointed out that such sub-categorization with lesser rates is a standard practice with NOIDA with reference to allotment for different institutional uses.

55. The said submission no doubt, is persuasive and attractive. But they ignore the regulations and policies of NOIDA which require the allotment of commercial plots to be by sealed tender or by public auction. If any sub-categorisation was to be made in regard to hotels, it could be only by amendment of the concerned regulations and the Commercial Property Management Policy, to provide for allotment in regard to such sub-category at fixed industrial plot rates, instead of by inviting sealed tenders or holding auction. We have already noticed the scheme envisaged by the policy was to create a separate category of use in regard to hotels and allot surplus land which was not earmarked for any specific use, for the said purpose of hotels. As the allotment is of commercial plots governed by NOIDA Commercial Property Management Policy, and as the reserve rate itself was Rs.30000/- per sq.m. it has to be held that allotment at Rs.7,400 per sq.m. caused loss and violated the regulations and policy of NOIDA.

56. The respondents have worked out the loss on account of allotments being made at a fixed rate of Rs.7400/- per sq.m. instead of Rs.70,000/- per sq.m., as Rs.4,721/14 crores, as detailed below :

A.	The value of 14 plots (2,62,583 sq. m.) @ Rs.70,000/- per sq.m.	Rs.1838.08 crores
B.	Actual premium received from the appellants in regard to the 14 plots @ Rs. 7400/- per sq.m.	Rs.194.31 crores

C.	Loss of premium (B – A)	Rs.1643.77 crores
D.	Add: Loss of revenue by way of lease rent during the lease period of 90 years as a consequence of lesser premium	Rs.3077.37 crores
E.	Total loss to public exchequer (C + D)	Rs.4721.14 crores

57. We find that the calculational error in arriving at the total loss, even assuming that the commercial rate is Rs.70,000/- per sq.m. The loss of Rs.4721/14 crores arrived at by the state government includes Rs.3077/37 crores as loss of rental revenue during 90 years in future. If today's value of tomorrow's 'loss' income is to be calculated, that can not be done by simply taking the aggregate of the 'loss' over the future period as today's loss. There are well recognised actuarial methods to calculate the present value of a future loss. In fact, this is clearly recognized by NOIDA by giving the option to the lessee to pay by way of a lump sum, an one time lease rent equal to the lease rent of 11 years of the lease instead of paying the annual rent for 90 years. In other words, NOIDA has itself calculated the present value of the future rental income for 90 years as being equivalent to 11 years' current rent. As the rent per year is 2.5% of the total amount paid for the plot, the one time lease rent which is eleven times the present annual rental value, will be 27.5% of the amount paid as premium. On that basis the loss will be as under :

A.	The area of 14 plots	2,63,500 sq.m.
B.	Value of 263500 sq.m. at Rs.70,000/- per sq.m.	Rs.1844.50 crores
C.	Value of 2,63,500 sq.m. at	

	Rs.7400/- per sq.m.	Rs.194.99 crores
D.	Difference in premium (B – C)	Rs.1649.51 crores
E.	Add : One-time lease rent at 27.5% (equivalent to rental income over 90 years)	Rs.453.62 crores
	Total difference (D + E) (*Plus stamp duty & registration charges on the increased premium/rent)	Rs.2103.13 crores*

IV. What should be the consequence of the violation?

58. Let us sum up the position. The allotment of commercial plots by NOIDA to the appellants for setting up hotels is valid. There is no violation of the regulations or policies of NOIDA in allotting commercial plots for hotels. Therefore cancellation of allotment is unsustainable. There is however violation of the regulations and policies of NOIDA in making such allotment on fixed rate basis, instead of inviting sealed tenders or holding public auction. This violation occurred on account of a mistake on the part of the officers of NOIDA in misinterpreting the government policy dated *22.5.2006*. The allottees were in no way to be blamed for the mistake. Nor were the allottees guilty of any suppression, misstatement or misrepresentation of facts, fraud, collusion or undue influence in obtaining the allotments at Rs.7400 per sq.m. The mistake was found out by the state government, in exercise of revisional jurisdiction. But by then the allotment was followed by payment of premium, execution of the lease deed, and delivery of possession. By the time the state government decided that the allotment should be cancelled the transaction was complete in all respects. The fact that the registration of some of the leases was kept 'pending' in view of a dispute relating to valuation would not be relevant for this purpose. In the circumstances the High Court rightly felt that cancellation was unwarranted and the matter required reconsideration by the State Government. The

A High Court directed reconsideration in the light of its observations that the allotments of commercial plots for hotels were not in violation of any regulations and the allottees were not guilty of any objectionable conduct. The High Court therefore wanted to save the allotment but rectify the error committed in B regard to the valuation and remanded the matter for fresh consideration. However, the appellants challenged the judgment of the High Court and when this Court gave an opportunity to the State Government to pass fresh orders independent of the observations of the High Court, after hearing the parties, it has C reiterated the cancellation, holding that the mistake has resulted in a lesser allotment price. According to respondents, the rate of premium ought to have been Rs.70,000/- per sq.m. being the market rate, even though the reserve rate was only Rs.30,000/- per sq.m. The question is, on the facts and D circumstances, when the allotments are valid and only the fixation of premium is erroneous, whether cancellation of leases is warranted or whether charging the rate claimed by the respondents (Rs.70,000/- per sq.m.) would be the appropriate course.

E **(i) What is the cause for the violation?**

59. The NOIDA Board adopted the above policy dated 22.5.2006 at its meeting held on 5.6.2006 and directed implementation of the policy so as to ensure that construction F of hotels in the allotted plots could be completed before the commencement of Commonwealth Games in 2010. Thus NOIDA Board was conscious that the policy dated 22.5.2006 had something to do with the time bound need to have several 5/4/3 Star hotels in a functional condition by the year 2010. G Taking note of the direction in the government policy, that the allotment of plots for hotel industry should be at industrial rates, NOIDA decided to implement its scheme for allotment of hotel plots, by adopting the rates that were fixed by it as the reserve rate for plots in industrial area Phase I (Rs.7400/- per sq.m.) as the allotment rate. When the said allotment rate was fixed H for hotel plots on 5.6.2006, the plots had not been identified

for allotment of hotels. When NOIDA Board resolved to implement the policy dated 22.5.2006 and allot plots for hotels at 'industrial rates' that is rates applicable to its plots in industrial area (Phase I), apparently it interpreted the policy as directing that all plots allotted for hotels should be allotted at fixed industrial rate. It is also possible that when the rate was fixed, it assumed that some surplus land (not earmarked for any specific purpose) or land earmarked for industrial use, will be allotted to hotels; and when the plots for hotels were subsequently identified by a Committee headed by the Circle Commissioner, Meerut, in areas earmarked for commercial use in the Master Plan, it was assumed by NOIDA officials that in view of the policy of the state government and in view of the NOIDA Board resolution dated 5.6.2006, whatever or whichever plots were identified or earmarked as hotel plots should be charged at the industrial plot rate that had been already decided. The error was in assuming that any kind of plot (even commercial plots covered by a special policy requiring disposal by tenders/auctions) should be allotted at fixed industrial rate. The pressure from Central Government regarding need to have several star Hotels before the commencement of Commonwealth Games and the terms of the Government Policy dated 22.5.2006, made them to proceed on that basis, without further verification. That is how the Brochures (advertisements) showed Rs.7400/- per sq.m as the allotment rate for hotel plots. Thus the charging of premium at a rate of Rs.7400/- per sq.m. in regard to hotel plots, is purely on account of the mistake on the part of the officers of NOIDA misreading the government policy dated 22.5.2006 and assuming that it would override NOIDA's regulations and policy regarding commercial properties.

A B C D E F G

(Ii) Whether allottees were guilty of fraud/objectionable conduct

60. The next question that arises for our consideration is whether the charging of a lesser rate for the allotment of plots

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A or fixation of Rs.7400/- per sq.m. as the premium was a consequence of any misrepresentation, fraud or suppression of fact, or collusion on the part of the appellants. It has never been the case of respondents that any of the appellants had at any time misrepresented or suppressed any fact or had B committed any fraud or had colluded with any officer of the State government or NOIDA or in any way influenced the officers of the state government or NOIDA in either obtaining the allotment or in the fixation of the allotment rate. Neither the direction dated 1.8.2007 of the state government under section C 41 of the 1993 Act nor the letters of cancellation dated 3.8.2007 issued by NOIDA attribute any such improper motive or conduct to any of the appellants.

61. Before the High Court, the respondents clearly admitted that they were not attributing any misrepresentation D or fraud or other objectionable conduct, to the appellants. The stand of the respondents was that the allotments at the rate of Rs.7400/- per sq.m. was due to a mistake on the part of NOIDA officials. The High Court has also ruled out any underhand dealing or malafides in regard to fixation of rate of premium at E the rate of Rs.7400/- per sq.m. The said findings of High Court remain unchallenged. In fact the finding is sound and is not open to challenge. Further, when this Court directed the State Government to pass fresh reasoned revisional order, uninfluenced by the reasoning or findings of the High Court, the F State Government has passed detailed orders dated 8.9.2008 for cancellation of plots. Even in these orders dated 8.9.2008, the state government has not imputed any mala fides, misrepresentation, fraud or suppression of fact, collusion, undue influence or any other illegal act or improper conduct to any of G the appellants. The state government has passed the order of cancellation dated 8.9.2008 on the ground that NOIDA had itself violated the regulations and policies of NOIDA leading to loss to public exchequer.

H **(iii) What should be the remedial action?**

62. If after effecting a transfer, the transferor finds that he had stipulated a lesser consideration (sale price or lease premium) for the transfer, due to a mistake of fact or wrong understanding or misreading of any law (and such mistake was not caused on account of any fraud, coercion or misrepresentation by the transferee) what is the remedy of the transferor? In private law, the transferor may have no remedy, as completed transactions of transfers cannot be re-opened or cancelled. A 'transfer' of property is an executed contract. Section 4 of Transfer of Property Act, 1882 provides that the chapters and sections of that Act relating to contracts, shall be taken as part of the Indian Contract Act, 1872. Section 20 of Contract Act provides that where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void. But the explanation thereto provides that an erroneous opinion as to the value of the thing which forms the subject matter of the agreement is not to be deemed a mistake as to a matter of fact. Section 21 of Contract Act provides that a contract is not voidable because it was caused by a mistake as to any law in force in India. Therefore, having regard to the provisions of Transfer of Property Act and Contract Act, a transfer can not be cancelled on the ground that parties were mistaken about the consideration.

63. The position is however different in public law. Breach of statutory provisions, procedural irregularities, arbitrariness and mala fides on the part of the Authority (transferor) will furnish grounds to cancel or annul the transfer. But before a completed transfer is interfered on the ground of violation of the regulations, it will be necessary to consider two questions. The first question is whether the transferee had any role to play (fraud, misrepresentation, undue influence etc.) in such violation of the regulations, in which event cancellation of the transfer is inevitable.

(63.1) If the transferee had acted bona fide and was blameless, it may be possible to save the transfer but that again

A would depend upon the answer to the further question as to whether public interest has suffered or will suffer as a consequence of the violation of the regulations:

(i) If public interest has neither suffered, nor likely to suffer, on account of the violation, then the transfer may be allowed to stand as then the violation will be a mere technical procedural irregularity without adverse effects.

(ii) On the other hand, if the violation of the regulations leaves or likely to leave an everlasting adverse effect or impact on public interest (as for example when it results in environmental degradation or results in a loss which is not reimbursable), public interest should prevail and the transfer should be rescinded or cancelled.

(iii) But where the consequence of the violation is merely a short-recovery of the consideration, the transfer may be saved by giving the transferee an opportunity to make good the short-fall in consideration.

(63.2) The aforesaid exercise may seem to be cumbersome, but is absolutely necessary to protect the sanctity of contracts and transfers. If the government or its instrumentalities are seen to be frequently resiling from duly concluded solemn transfers, the confidence of the public and international community in the functioning of the government will be shaken. To save the credibility of the government and its instrumentalities, an effort should always be made to save the concluded transactions/transfers wherever possible, provided (i) that it will not prejudice the public interest, or cause loss to public exchequer or lead to public mischief, and (ii) that the transferee is blameless and had no part to play in the violation of the regulation.

(63.3) If the concluded transfer cannot be saved and has to be cancelled, the innocent and blameless transferee should be reimbursed all the payments made by him and all

expenditure incurred by him in regard to the transfer with appropriate interest. If some other relief can be granted on grounds of equity without harming public interest and public exchequer, grant of such equitable relief should also be considered.

64. We may give an example from service jurisprudence, where a principle of equity is frequently invoked to give relief to an employee in somewhat similar circumstances. Where the pay or other emoluments due to an employee is determined and paid by the employer, and subsequently the employer finds, (usually on audit verification) that on account of wrong understanding of the applicable rules by the officers implementing the rules, excess payment is made, courts have recognized the need to give limited relief in regard to recovery of past excess payments, to reduce hardship to the innocent employees, who benefited from such wrong interpretation. A three Judge bench of this Court in *Syed Abdul Qadir vs. State of Bihar* [2009 (3) SCC 475] stated the principle thus :

> "This Court, in a catena of decisions, has granted relief against recovery of excess payment of emoluments/ allowances if (a) *the excess amount was not paid on account of any misrepresentation or fraud on the part of the employee and (b) if such excess payment was made by the employer by applying a wrong principle for calculating the pay/allowance or on the basis of a particular interpretation of rule/order, which is subsequently found to be erroneous.*
>
> The relief against recovery is granted by courts not because of any right in the employees, but in equity, exercising judicial discretion to relieve the employees from the hardship that will be caused if recovery is ordered. But, if in a given case, it is proved that the employee had knowledge that the payment received was in excess of what was due or wrongly paid, or in cases where the error is detected or corrected within a short time of wrong

A payment, the matter being in the realm of judicial discretion, courts may, on the facts and circumstances of any particular case, order for recovery of the amount paid in excess."

B (emphasis supplied)

65. In these cases the allotment of commercial plots to appellants is valid and legal. The violation is in making such allotment on fixed allotment rate which is less than the rate the plots would have fetched by calling for tenders or by holding C auctions. Therefore the equitable solution in these cases is to give an opportunity to the lessees to pay the difference thereby in consideration which arose on account of wrong interpretation instead of cancelling the leases. According to the State Government, the commercial plots would have fetched a D premium at rate of Rs.70,000 per sq.m at the relevant time (October 2006 to January 2007) and NOIDA had been denied the benefit of that allotment rate, by reason of allotment of the plots at Rs.7400/- per sq.m. Therefore if the appellants are wiling to pay the balance of premium as claimed by E respondents, the leases need not be interfered.

66. In this case the violation of the policies of NOIDA in making allotments has resulted in a lesser premium being charged than what would have been applied for commercial plots. According to respondents the premium that would have F been charged was Rs.70,000/- per sq.m as against Rs.7,400 per sq.m. Therefore, the violation of the guidelines in regard to disposal of commercial plots has resulted only in a loss of revenue by way of premium and if this could be made up, there is no reason why the leases should not be continued.

G

67. The appellants of course disputed the claim for a premium at the rate of Rs.70,000/- per sq.m on several grounds. They contended that Rs.70,000/- was only a circle rate for purposes of registration and was not the actual "market H value". It is also contended that even if Rs.70,000/- was the

market value, it would represent the value of freehold land and not of a leasehold interest. It is submitted that on account of the following restrictive factors in regard to their leases, the value of the leasehold interest will be far less than the value of freehold property:

(a) A transferee has absolute ownership in a freehold property, whereas in a leasehold for 90 years, the lessee has to surrender the property to the lessor at the end of 90 years.

(b) In regard to a freehold property, there is no liability to pay any rent. But in these leases, the lessees are liable to pay annual rent equivalent to 2½% of the total amount paid for the plot as lease rent with an increase of 50% in the annual rent once every ten years. This is a continuing liability for ninety years, unless the lessee chooses to pay eleven years current lease rent as 'one time lease rent'.

(c) The leases are subject to the following among other restrictive covenants: (i) they should commence construction within six months of the allotment and complete the Hotel Project by December, 2009, so as to make the hotel functional by June, 2010 with the threat of forfeiture if the lessee failed to complete the project; (ii) right to transfer being subject to permission from NOIDA and subject to the claim of NOIDA for unearned increases; (iii) risk of termination for breach and resumption of possession; and (iv) the restriction regarding user, that is, the entire property having to be used only for a hotel with only 5% of the FAR being permitted to be used as commercial space. It is submitted that freehold properties will not be subject to any of these restrictions.

68. The respondents admitted that a transfer by sale is more valuable than a transfer by way of lease, but contended that long term leases for 90 years fetch a premium on par with prevailing sale price. It is further submitted that as most of the

properties in NOIDA are leasehold properties, the circle rate represents the premium for long leases and not freehold prices. It is pointed out that even in regard to any sale by NOIDA, restrictive covenants regarding use could be imposed and enforced. The respondents also alleged that when NOIDA invited applications for the unallotted hotel plots, hardly a year later in March 2008, as against a reserved rate (premium) of Rs.77000/- per sq.m. fixed by NOIDA, prospective applicants were willing to pay more and that would show that their claim that prevailing premium rate in 2006-2007 was Rs.70,000/- per sq.m. was justified. The respondents have produced copies of some of the tenders received in respect of the 2008 offer, in support of their contention.

69. The appellants responded by pointing out that the terms of lease under the 2008 scheme of NOIDA offering hotel plots for allotment were far more favourable to the lessees, when compared to the terms on which plots were offered to them, and therefore neither the reserve rate for 2008 offer, nor the responses thereto will be a safe guide to determine the market value of the leasehold interest (premises) in 2006-07. They referred to the following significant differences in the lease conditions which made the offer under the 2008 scheme far more attractive and valuable for a lessee, when compared to the terms of lease offered in 2006-2007 to the appellants:

S. No.	Description of the term	Position under 2006 allotment	Position under 2008 allotment
1.	Purpose and permitted use	For setting up hotels with only 5% of FAR permitted to be used as commercial space	For development of hotels with commercial activities with 40% of FAR permitted to be used as commercial space
2.	Payment of premium	50% in 30 days 50% in 180 days	25% within 30 days Balance 75% in 16 half

			yearly instalments (alongwith interest at 11% from date of allotment compounded half yearly)
3.	Transfer of rights	The lessee shall not transfer the plot before the hotel becomes functional. The Authority may or may not allow transfer If transfer is permitted, transfer charges shall be payable to the Authority.	The lessee is entitled to transfer after obtaining completion certificate and no transfer charges will be applicable if the built up commercial space is transferred within two years from the date of issue of completion certificate

Therefore if the appellants (2006-2007 allottees) are to be extended the aforesaid benefits offered to allottees under the 2008 scheme, the rate of Rs.70,000/- per sq.m. (the rate of 2008 scheme was 10% more than Rs.70,000/- per sq.m.) claimed by the respondents becomes logical and reasonable. We therefore find no reason to reject the claim of respondents that the allotment rate should be Rs.70,000/- per sq.m. We accordingly grant the appellants an opportunity to save the leases by paying the difference in premium at Rs.62600/- per sq.m. to make it upto Rs.70,000/- per sq.m.

70. In view of the above we dispose of these appeals as follows :

(i) The order of the High Court setting aside the revisional order dated 1.8.2007 of the State Government and the consequential orders of cancellation of allotment of plots dated 3.8.2007 by NOIDA, is affirmed.

(ii) The revisional orders dated 8.9.2008 passed by the State Government cancelling the allotments of plots to appellants, are set aside.

A (iii) The appellants are given the option to continue their respective leases by paying the premium (allotment rate) at Rs.70000/- per sq.m. (with corresponding increase in yearly rent/one time lease rent), without any location benefit charges. The appellants shall exercise such option by
B 30.9.2011. Such of those appellants exercising the option will be entitled to the following benefits which has been extended in regard to the allottees under 2008 allotment scheme of NOIDA :

C (a) 40% of FAR can be used by the allottee as commercial space (as stipulated in the 2008 scheme).

(b) Permission to pay at its option, the balance to make up 25% of the premium (after adjusting all amounts paid at Rs.7400/- per sq.m. plus location benefit charges) on
D or before 30.9.2011 and the balance 75% of premium in sixteen half yearly instalments commencing from 1.1.2012 with interest at 11% per annum (as offered to the applicants in 2008 scheme).

E (c) The lessees will be entitled to transfer rights in accordance with the 2008 scheme.

On exercise of such option, the lease shall continue and the period between 1.8.2007 to 31.7.2011 shall be excluded for calculating the lease period of 90 years.
F Consequently the period of lease mentioned in the lease deed shall stand extended by a corresponding four years period, so that the lessee has the benefit of the lease for 90 years. An amendment to the lease deed shall be executed between NOIDA and the lessee incorporating the
G aforesaid changes.

(iv) If any appellant is unwilling to continue the lease by paying the higher premium as aforesaid, or fails to exercise the option as per para (iii) above by 30.9.2011,
H the allotment and consequential lease in its favour shall

stand cancelled. In that event, NOIDA shall return all amounts paid by such appellant to NOIDA towards the allotment and the lease, and also reimburse the stamp duty and registration charges incurred by it, with interest at 18% per annum from the date of payment/incurring of such amounts to date of reimbursement by NOIDA. If NOIDA returns the amount to the appellant within 31.12.2011, the rate of interest payable by NOIDA shall be only 11% per annum instead of 18% per annum.

(vi) Parties to bear their respective costs.

R.P. Appeals disposed of.

Therefore if the ... extended the aforesaid by ... 2003 scheme, the ... 2008 scheme was ... claimed by the ... We therefore find no ... that the allotment ... according ... grant the ... lease by ... seem to make it ...

70. In ... follows

(i) The order of the ... order dated 18.7.20... dated 3.8.200...

(ii) The ...

A BAROT VIJAYKUMAR BALAKRISHNA & ORS.

v.

MODH VINAYKUMAR DASRATHLAL & ORS.

(Civil Appeal Nos. 4959-4962 of 2011)

B JULY 5, 2011.

[AFTAB ALAM AND R.M. LODHA, JJ.]

Service Law:

C *Recruitment – Selection of Assistant Public Prosecutors – Minimum qualifying mark for viva voce, though prescribed in the Rules, not specified in the advertisement – State Public Service Commission fixing cut off mark for viva voce after the result of written examination, and notifying the candidates* D *called for interview about it – HELD: The course followed by the Commission was in compliance with the rules and it did not cause any prejudice to any candidate either – Thus, there is no illegality at all in the selection process much less any bias or malice of any kind – Assistant Public Prosecutor, Gujarat General State Service Class II Recruitment* E *(Examination) Rules, 2008 – r. 12(3).*

Writ petitions were filed before the High Court challenging the selection of Assistant Public Prosecutors on the ground that introduction of minimum qualifying F **mark for the viva voce after the commencement of the selection process was illegal and actuated by bias on the part of the State Public Service Commission. The Single Judge of the High Court dismissed the writ petitions. However, the Division Bench in the intra-court appeals** G **filed by the writ petitioners, quashed the select list and directed that a fresh list be drawn up on the basis of the aggregate of the marks obtained by the candidates in the written test and viva voce regardless of the minimum qualifying mark prescribed by the Commission for the**

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viva voce. Aggrieved, the 102 selected candidates, who were appointed and were not parties in the writ petitions, and the Commission filed the appeals.

Allowing the appeals, the Court

HELD: 1.1. In the facts and circumstances of the case, there is no illegality in the selection process much less any bias or malice of any kind. It is necessary to bear in mind that no objection can be taken to the fixing of the cut off mark separately for the viva voce as that is the mandate of the statutory rules governing the recruitment. [para 20-21] [166-H; 167-A-F-G]

1.2. Further, the marks obtained by the short listed candidates in the written test were kept in a sealed cover and those were taken out only after the oral interview of all the candidates was over. At the time a candidate appeared for the interview, the members of the interview board had no means to know the marks obtained by him/her in the written test. In such a situation it could not be possible for the interview board to purposefully exclude a candidate by giving less than the minimum qualifying mark for the viva voce even though he/she might have been selected on the basis of the marks obtained in the written test alone. In the facts of the case, the examples cited by the respondents do not show that there was any arbitrariness or play of bias in giving marks to the candidates in the viva voce or that there was any flaw in the selection process making it liable to be struck down. [para 22-23] [168-A-E]

Ashok Kumar Yadav v. *State of Haryana*, 1985 (1) Suppl. SCR 657 = (1985) 4 SCC 417 – referred to.

1.3. It is true that the better and the more proper way to give effect to the provision of r. 12 (3) of the Assistant Public Prosecutor, Gujarat General State Service Class II

A **Recruitment (Examination) Rules, 2008 was to specify the minimum qualifying mark for the viva voce also in the advertisement itself. But that was not done. Though the rules framed under Article 309 of the Constitution governing the selection process mandated that there** B **would be minimum qualifying marks each for the written test and the oral interview, the cut off mark for viva voce was not specified in the advertisement. In view of the omission, there were only two courses open. One, to carry on with the selection process and to complete it** C **without fixing any cut off mark for the viva voce and to prepare the select list on the basis of the aggregate of marks obtained by the candidates in the written test and the viva voce. That would have been clearly wrong and in violation of the statutory rule governing the selection. On behalf of the respondents themselves, it was** D **accepted that the direction by the division bench of the High Court to draw up the merit list ignoring the minimum qualifying mark separately fixed for the viva voce may not be sustainable as that would be contrary to the statutory rules governing the selection and appointment. The other** E **course was to fix the cut off mark for the viva voce and to notify the candidates called for interview about it. This is the course that the Commission followed. This was in compliance with the rules and it did not cause any prejudice to any candidate either. Thus, there is no** F **illegality at all in the selection process. [para 6, 25 and 31] [159-C-D; 169-A-C; 173-F-H; 174-A]**

K. Manjusree v. State of Andhra Pradesh and another **2008 (2) SCR 1025 = (2008) 3 SCC 512 and the other** G *Hemani Malhotra v. High Court of Delhi,* **2008 (5) SCR 1066 = (2008) 7 SCC 11 – distinguished**

Ramesh Kumar v. High Court of Delhi and another **2010 (2) SCR 256 = (2010) 3 SCC 104 – held inapplicable.**

H **1.4. The Division Bench of the High Court took a**

wrong view of the matter and, as such, its judgment is set aside and all the writ petitions filed by the respondents before the High Court are dismissed. [para 32] [174-B-C]

Case Law Reference

1985 (1) Suppl. SCR 657	**referred to**	**para 23**
2008 (2) SCR 1025	**distinguished**	**para 26**
2008 (5) SCR 1066	**distinguished**	**para 26**
2010 (2) SCR 256	**held inapplicable**	**para 29**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 4959-4962 of 2011 etc.

From the Judgment & Order dated 10.12.2009 of the High Court of Gujarat in Letter Patent Appeal No. 1586 of 2009 and Special Civil Application No. 7699 of 2009 and Letter Patent Appeal No. 1643 of 2009 in Special Civil Application No. 8287 of 2009 Letter Patent Appeal No. 1644 of 2009 in Special Civil Application No. 8289 of 2009 and Letter Patent Appeal No. 1647 of 2009 in Special Civil Application No. 8292 of 2009.

WITH

Civil Appeal No. 4963 of 2011.

P.P.Rao, Ranjit Kumar, Uday U. Lalit, K.V. Viswanathan, Purushottam Sharma Tripathi, Utsav Sidhu, Filza Mooms, Apeksha Sharan, Sameer Parekh, Shamil Majumdar, Nitin Thukral, Suman Yadav, Parekh & Co., Preetesh Kapur, Hemantika Wahi, Jesal, Nachiketa Joshi, Pankay Chaudhary, Chaitanya Joshi Sudhakar Joshi, Abhishek Kaushik, Minakshi Vij, Praveen Chaturvedi, Jyoti Chaturvedi, Harish Parikh, R.N. Singh, D.B. Vohra for the Appearing parties.

The Judgment of the Court was delivered by

A **AFTAB ALAM, J.** 1. Leave granted.

2. These appeals arise from a batch of writ petitions filed before the Gujarat High Court questioning the validity of the appointments of Assistant Public Prosecutor (Class-II) made
B from the select list prepared on the basis of the written examination and viva voce and personality test held by the Gujarat Public Service Commission. The challenge was based on the ground that the minimum qualifying mark, separately fixed for the viva voce, was introduced just two or three days
C before the commencement of the oral tests though it was not stipulated in the advertisement issued by the Commission for filling up the posts. According to the writ petitioners (respondents before this Court), the introduction of the minimum qualifying mark for the viva voce, after the commencement of the selection process was, illegal and
D actuated by bias on the part of the Commission. It led to a number of highly anomalous results and completely vitiated the selections and the appointments made on that basis.

3. A learned single judge of the High Court did not accept
E the writ petitioners' contention and dismissed all the writ petitions by judgment and order dated August 17, 2009, passed in Special Civil Application No.7699 of 2009 (and other analogous cases).

4. Against the judgment of the single judge, the writ
F petitioners filed intra-court appeals and a division bench of the High Court allowed the appeals and set aside the judgment of the single judge. It held that the action of the Commission in introducing the minimum qualifying mark for the viva voce, in the middle of the selection process, was bad and "the
G Commission appears to have guided by legal malafide (sic)". It, accordingly, quashed the select list and the appointments made on its basis and directed that a fresh list be drawn up on the basis of the aggregate of marks obtained by the candidates in the written test and the viva voce regardless of
H the minimum qualifying mark prescribed by the Commission for

the viva voce. It directed the concerned authorities to complete the process within 2 months from the date of the judgment and till then permitted the appointees to continue to serve in their respective positions. A

5. Against the judgment of the division bench, the appeals are filed (i) by the candidates (102 in number) who were appointed as Assistant Public Prosecutors on the basis of the impugned selection made by the Commission (and who were not parties in the writ petitions, or the intra court appeals before the court) and (ii) by the Gujarat Public Service Commission. B C

6. Before proceeding to examine the facts of the case and the rival contentions of the parties, it may be stated that on behalf of the respondents, it was accepted that the direction by the division bench of the High Court to draw up the merit list ignoring the minimum qualifying mark separately fixed for the viva voce may not be sustainable as that would be contrary to the statutory rules governing the selection and appointment. The only course left open, therefore, was to scrap the entire selection process and start from the beginning all over again. D

7. Coming to the facts of the case, it is interesting to note how the process of filling up the posts of Assistant Public Prosecutor in such large numbers was put into motion. From a limitation petition, for condoning the inordinate delay of 1695 days in filing a State criminal appeal, it came to light that there was acute shortage of Assistant Public Prosecutors and as a result, the functioning of the subordinate criminal courts in the State badly suffered. The High Court took up the matter and on its initiative, the State Government sanctioned 180 new posts of Assistant Public Prosecutors. After due consultation with the Gujarat Public Service Commission and the concerned authorities of the State Government, the Advocate General of the State, assured the High Court that all the newly sanctioned posts and the vacancies existing in the already sanctioned cadre (242 in total) would be filled up in a time bound manner on the basis of rules especially framed for the purpose as a E F G H

A one time measure. The statements made by the Advocate General before the High Court are recorded in the order dated October 08, 2008, passed by a division bench of the High Court in Criminal Miscellaneous Application No.13937 of 2007 in Criminal Appeal No.487 of 2006. From the order of the High B Court it appears that the Advocate General stated before the court that selection would be made on the basis of a written test followed by oral interviews and minimum qualifying marks would be fixed for the tests. The relevant passage in the High Court order is as follows:

C "…. Shri Trivedi, learned Advocate General, in consultation with the Secretary, GPSC, has further submitted that approximately three times of number of posts to be filled in, starting from top to bottom, the applicants will be called for Oral Interviews. However, minimum qualifying marks will D be prescribed and the aforesaid will also be reflected and/ or notified in the Advertisement….."

8. The High Court passed the order incorporating the statements made by the Advocate General and directed the E concerned authorities to make appointments on all the available posts of Assistant Public Prosecutor following the time schedule given in the order.

9. In furtherance of the Advocate General's assurance given to the court and in compliance with the court's direction F on that basis, a set of rules called the Assistant Public Prosecutor, Gujarat General State Service Class II Recruitment (Examination) Rules, 2008 (for short "the Recruitment Rules") were framed by the State Government under the proviso to Article 309 of the Constitution of India and published in the G Gujarat Government Gazette, Extraordinary, dated, August 6, 2008. Rule 12 of the Recruitment Rules dealing with the nature of examination provided as under:

"Nature of Examination

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12 (1) The examination shall be in two parts as shown in Appendix. Part I shall be written examination and Part II shall be viva-voce and Personality Test.

(2) The Commission shall fix the qualifying marks to be obtained by a candidate in Part-I of the examination in Appendix and shall call only those candidates who fulfil qualifying standard for Viva-voce and Personality Test.

Provided that candidates belongs to the Scheduled Castes, Scheduled Tribes or Socially and Educationally Backward Classes including Nomadic Tribes and Denotified Tribes, may be summoned for viva-voce and Personality Test by applying relaxed standard in Part-I of the examination if the Commission is of the opinion that sufficient number of candidates from those communities are not likely to be called for viva-voce and personality test on the basis of the qualifying standard for general category in order to fill up the vacancies reserved for such categories.

(3) *The commission shall fix the qualifying marks to be obtained by a candidate in the viva-voce and personality test.*

(4) The candidate shall be required to attend the written part of the examination and viva-voce and personality test at his own expense;

(5) If the candidate, who is qualified for the viva-voce and personality test, fails to attend the viva-voce and personality test, shall not be eligible for selection."

(emphasis added)

10. Rule 14 dealt with the result of the examination and in sub-rule (1) provided as follows:

"Result of Examination

A 14(1) After two stage of the examination are over, the commission shall prepare the result arranging the marks of the candidates seriatim according to merit taking into consideration the total marks obtained by the candidates *as per the qualifying standards fixed for the written* B *examination and viva-voce and personality test* and shall declare a list of qualified candidates accordingly."

(emphasis added)

At the end of the Recruitment Rules there was an Appendix in C two parts. Part I contained the details concerning the written examination which would consist of five papers with an aggregate of 600 marks; part II provided that there would be a viva voce and personality test of 75 marks.

D 11. After the Recruitment Rules were framed and notified, the Commission on October 17, 2008 issued an advertisement inviting applications for filling up 242 posts of Assistant Public Prosecutor (Class II). Of the 242 posts available, 122 were to be filled up on open merits and the remaining was reserved E for the different reserved categories. Under the marginal heading, "Particulars of Examination", it was stated that the examination would consist of two parts, i.e., written (objective test) and oral interview. The question paper of written examination (Part I) would be of 300 marks. In connection with the second part of the examination relating to the oral interview F it was stated as follows:

"PART- II Oral Interview- 30 Marks

The candidate obtains minimum 105 marks in the written G examination i.e. as decided by the Commission, and the candidate who fulfils the educations qualifications, age, experience, etc., as mentioned in the advertisement shall be called for the oral interview in exact numbers and there shall be 30 marks for the oral interview. The final result of

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this examination shall be published as per the recruitment rules. A

The examination is of objective aptitude type, the provision of re-checking is not adopted. The final result of the examination shall be furnished on the basis of the total marks obtained in written as well as oral examination/ interview.... B

12. Two things are to be seen from the advertisement. One, though in the Recruitment Rules, 600 marks were allotted for the written examination and 75 for the viva voce, in the C advertisement the written examination was given 300 and viva voce 30 marks. The second, though the minimum qualifying mark of 105 out of 300 was fixed for the written examination, no qualifying mark was fixed separately for the viva voce as required by rule 12 (3) of the Recruitment Rules. Nevertheless, D there was a broad and general stipulation that, "the final result of this examination shall be published as per the recruitment rules".

13. The first discrepancy in regard to the allotment of marks E to the written and oral tests respectively, though not quite vital, was rectified by the notification dated October 24, 2008, issued by the State Government, under the proviso to Article 309 of the Constitution. By this notification, rule 19 was added at the end of the Recruitment Rules which reads as under: F

"19. Notwithstanding anything contained in these rules, the competitive examination, held by the Commission pursuant to the advertisement issued during the year 2008 for the recruitment to the post specified in rule 3, shall be the multiple choice objective type written examination for G 300 marks from the subjects mentioned in Papers I, II, III, IV and V in Part I of the Appendix,

Provided that

(i) For papers I and II of the Gujarati and English in Part I H

A of the Appendix respectively except grammar, all other topics be deemed as excluded.

(ii) In Part II Viva-voce and Personality Test, the maximum of 75 marks, shall be read as 30 marks and

B (iii) *The provisions of rules 12,13,14 and 16 shall apply mutatis mutandis to such competitive examination"*

(emphasis added)

C 14. The written test was held by the Commission on January 11, 2009 and its result was published on March 20, 2009 by giving out the roll numbers (and not the names) of the qualifying candidates. Approximately 5,550 candidates sat for the written examination out of which 790 candidates were short-
D listed for being called for the oral interview. After the publication of the result of the written test the marks obtained by the short-listed candidates were kept in a sealed cover.

15. At this stage, while preparations were underway for holding the viva voce of the short-listed candidates, in the
E meeting held on April 22, 2009, it was decided that in terms of rule 12(3) of the Recruitment Rules, the Commission was required to decide the minimum qualifying marks for the viva voce. Accordingly, on April 23, 2009, the Secretary to the Commission submitted the proposal together with a copy of the
F Rules for order of the Commission and on the same day the Commission took the decision fixing 10 out of 30 as the minimum qualifying mark for the viva voce. The proceedings of the Commission dated April 23, 2009 read as follows:

G "The Commission has taken following decision after discussion.

The Commission shall decide qualifying marks to be obtained by the candidate in interview under rule 12(3) of Recruitment (Examination) Rules (Page No.5/C) for this
H post. Accordingly, the Commission is supposed to decide

minimum qualifying marks for considering the candidate successful, in interview. Hence, after careful consideration the Commission decides that to get out of the maximum 30 marks of the interview, 10 marks as minimum qualifying marks.

The intimation of this decision may be given in time, to every candidate before they appear in interview. For this purpose the Commission gives its approval for procedure to be followed as per suggestion made in paragraph No.3 shown against- on previous page. Further, this decision may be displayed on notice board in such a proper way that all the concerned persons may get intimated. It may please be noted that it may get published tomorrow.

Sd/- Member
[Shree Variya]
23.4.09

Sd/- Chairman
(Shree Bhavsar]
23.4.09

Sd/- Secretary
23.4.09
J.S./D.S.
Sd/- (Jt.Secretary)
24.4.09

The details to be displayed on Notice board as well as taken in to register in consonance with the above decision is submitted for approval.

1. Following details may be displayed on notice board.

As per rule 12(3), the Commission has decided the minimum qualifying 10 marks out of 30, for the candidate appearing in interview (Viva-Voce) of Assistant Public Prosecutor Class-II. The candidate getting less marks than the this may not be eligible for selection. Which may be please noted.

Make a note in the register as below, in which

A signatures of the candidates are being taken at the time of interview."

16. Here it needs to be clarified that normally the Gujarat Public Service Commission consists of a Chairperson and four members but at that time the positions of three members were vacant and only a Chairman and a member comprised the Commission. Hence, the proceedings are shown to have been signed by the Chairman and one member.

17. In accordance with the Commission's direction, the decision fixing 10 out of 30 marks as the minimum qualifying mark for the viva voce was put up on the notice board. Further, each candidate was individually intimated and was made to sign a declaration/consent form before going for the oral test. The consent form bore the following declaration under which the candidates were required to put their signatures:

> "Under recruitment rules 12(3) the commission has prescribed 10 qualifying marks to be obtained by candidates out of 30 in viva-voce test for appointment to the post of Assistant Public Prosecutor (Class –II) and *it is to be noted that the candidates who will secure less than 10 marks will not be eligible for recruitment to the post of Assistant Public Prosecutor."*
>
> (emphasis added)

18. The forms signed by each of the candidates are on record.

19. The viva voce of all the 790 short listed candidates was held from April 27, 2009 to July 9, 2009. On July 15, 2009, marks of the written test of the candidates who were called for interview were taken out of the sealed cover and on July 16, the Commission declared the final result as per Rule 14(1).

20. In the facts as stated above, we are completely unable to see any illegality in the selection process much less any bias

or malice of any kind. But on behalf of the writ petitioners-respondents, it is contended that it is a clear case of bias. It is alleged that in order to bring in its favoured candidates the Commission found it necessary to exclude a sufficient number of meritorious candidates by any ruse and the minimum qualifying mark for viva voce was introduced at the last minute only for that intent and purpose. The respondents pointed out that the application of the minimum qualifying mark separately for the viva voce excluded some candidates who would have been selected only on the strength of their marks in the written test even though they were given nil mark in the viva voce. The respondents cited several kinds of figures before the High Court to high light the "anomalies" resulting from the introduction of the minimum qualifying mark for the viva voce. It was pointed out that 81 out of the 203 selected candidates had got the minimum qualifying mark in the viva voce, i.e., 10 out of the total of 30; 190 candidates out of 790 called for interview got just 8 or 9 marks in the viva voce and were, thus, excluded from the final select list; 503 candidates out of the 790 called for interview got less than the qualifying mark in the viva voce. One or two more examples of a similar nature were also cited by the respondents. The Division Bench of the High Court appears to have attached considerable importance to these so called anomalies and its judgment seems to have been influenced by these results.

21. We are unable to accept or even to follow the allegation based on the figures as cited above. It is necessary to bear in mind that no objection can be taken to the fixing of the cut off mark separately for the viva voce as that is the mandate of the statutory rules governing the recruitment. What alone can be objected to is the omission to specify the cut off mark for viva voce in the advertisement and fixing it later on. But we fail to see any connection between the "anomalies" and the fact that the cut off mark for viva voce was fixed at a later stage, though before the commencement of the interviews and with due intimation to all the candidates.

22. Further, as noted above the marks obtained by the short listed candidates in the written test were kept in a sealed cover and those were taken out only after the oral interview of all the candidates was over. At the time a candidate appeared for the interview the members of the interview board had no means to know the mark obtained by him/her in the written test. In such a situation we don't see how it could be possible for the interview board to purposefully exclude a candidate by giving less than the minimum qualifying mark for the viva voce even though he/she might have been selected on the basis of the mark obtained in the written test alone.

23. When playing around with numbers one is quite likely to come up with some figures that might appear unusual and unexpected but that alone will not make out a case of bias or legal malafide (See the decision by a bench of four judges of this Court in *Ashok Kumar Yadav* v. *State of Haryana*, (1985) 4 SCC 417, paragraph 21). In the facts of the case as noted above we are satisfied that the examples cited by the respondents do not show that there was any arbitrariness or play of bias in giving marks to the candidates in the viva voce or that there was any flaw in the selection process making it liable to be struck down.

24. Mr. Viswanathan, senior advocate, appearing for the respondents submitted that the Advocate General had undertaken before the High Court that the qualifying marks for both the written test and the viva voce would be published in the advertisement. He further submitted that sub-rule (2) of rule 12 provided for fixing the minimum qualifying mark for the written test in the same way as sub-rule (3) provided for fixing the minimum qualifying mark for the viva voce. He argued that the provisions of sub-rules (2) and (3) of rule 12 could not be read and given effect to differently and when the minimum qualifying mark for the written test was specified in the advertisement there was no reason for not indicating the minimum qualifying mark for the viva voce in the advertisement itself.

25. The grievance of Mr. Viswanathan cannot be said to be wholly without substance. It is true that the better and the more proper way to give effect to the provision of rule 12 (3) of the Recruitment Rules was to specify the minimum qualifying mark for the viva voce also in the advertisement itself. But that was not done. The question is what would be the consequence of the omission and was it open to the Commission to rectify the error by fixing the minimum qualifying mark for the viva voce later on and giving intimation of its decision to each of the candidates appearing for the oral interview before the beginning of the test.

26. The Division Bench of the High Court has held that the introduction of the minimum qualifying mark for the viva voce at the later stage in the selection process was not permissible and it completely vitiated the selection process. Mr. Viswanathan strongly supports the view taken by the High Court. In support of its view, the Division Bench of the High Court, has placed reliance on two decisions of this Court, one in *K. Manjusree* v. *State of Andhra Pradesh and another*, (2008) 3 SCC 512 and the other *Hemani Malhotra* v. *High Court of Delhi*, (2008) 7 SCC 11. Mr. Viswanathan also cited before us the decision in *K. Manjusree* and invited our attention particularly to the following passage in paragraph 33 of the judgment:

> "33..... Where the rules do not prescribe any procedure, the Selection Committee may also prescribe the minimum marks, as stated above. But if the Selection Committee wants to prescribe minimum marks for interview, it should do so before the commencement of selection process. If the Selection Committee prescribed minimum marks only for the written examination, before the commencement of selection process, it cannot either during the selection process or after the selection process, add an additional requirement that the candidates should also secure minimum marks in the interview. What we have found to

A be illegal is changing the criteria after completion of the selection process, when the entire selection proceeded on the basis that there will be no minimum marks for the interview."

B 27. In our view, both the decisions relied upon in support of the respondents' case are completely distinguishable and have no application to the facts of this case. *K. Manjusree* was a case of selection and appointment to the posts of District & Sessions Judge (Grade II) in the Andhra Pradesh Higher Judicial Service. The selection and appointment to the post of C District & Sessions Judge was governed by the resolutions of the High Court and the resolution dated November 30, 2004 decided the method and manner of selection. It resolved to conduct the written examination for the candidates for 75 marks and oral examination for 25 marks. It also resolved that the D minimum qualifying marks for the O.C., B.C., S.C. and S.T. candidates would be as prescribed earlier. Following the written examination, the qualified candidates were called for interview before a committee of five judges. After the interview, the select committee of five judges prepared a merit list on the E basis of the aggregate of marks obtained by each of the candidates in the written test and the oral interview. At that stage, the select committee did not apply any cut off mark for the viva voce. The list prepared by the select committee was approved by the administrative committee and it finally came F before the Full Court of the High Court. The Full Court decided to have the matter reviewed by a committee of two judges constituted by the Chief Justice of the High Court. It was at that stage that the committee of two judges decided that there should have been a minimum qualifying mark for the oral G interview as well, in the same ratio as prescribed for the written test. It, accordingly, decided that only those candidates who secured the minimum of 12.5 out of 25 (for the open category), 10 marks (for B.C, candidates), and 8.75 marks (for SC and ST candidates) would be considered as having succeeded in H the interview. The decision of the committee of two judges was

approved by the Full Court and consequently, the earlier list prepared by the select committee and approved by the administrative committee was revised and the final recommendation for appointment was made by the High Court on the basis of the revised merit list. It was in those facts that this Court held that the introduction of the cut off mark for the viva voce after the oral interviews were over amounted to changing the rules of the game in mid-play and was not permissible in law. The passage from paragraph 33 of the judgment relied upon by the respondents must be understood in the facts of the case.

28. The decision in *Hemani Malhotra* is equally inapplicable to the facts of the case. *Hemani Malhotra* was a case of selection and appointment to the vacant posts in the Delhi Higher Judicial Service and those appointments too were governed by the administrative resolutions of the High Court. For filling up the posts, the Registrar General of the High Court issued an advertisement that laid down that the minimum qualifying mark in the written examination would be 55% for general candidates and 50% for scheduled castes and scheduled tribes candidates. In the advertisement there was no indication at all about any cut off mark for the oral interview. After the written examination, no result was published giving out the names or roll numbers of the qualified candidates but the successful candidates were called to appear for the oral interview individually through letters. After the date fixed for oral interview was postponed three or four times the selection committee of the High Court resolved that it was desirable to prescribe a minimum mark for the viva voce and referred the matter to the Full Court. The Full Court accepted the suggestion made by the select committee and resolved that for recruitment to the Delhi Higher Judicial Service from the Bar the minimum qualifying mark in the viva voce will be 55% for general candidates and 50% for scheduled castes and scheduled tribes candidates. After the decision, interviews were held but significantly the candidates were kept in dark about the decision

A fixing the cut off mark for the viva voce. The High Court prepared the select list applying the cut off mark fixed for viva voce but the candidates who appeared for the oral interviews still did not know why they were not selected despite getting higher marks. It was only through applications made under the B Right to Information Act that some of the unselected candidates were able to gather that their non-selection was on account of their failure to secure the cut off mark in the viva voce and then the selection was challenged before the Court. It is evident that the facts of the case in hand are entirely different and the C decision in *Hemani Malhotra* has no application to this case.

29. Mr. Viswanathan also relied upon the decision of this Court in *Ramesh Kumar* v. *High Court of Delhi and another*, (2010) 3 SCC 104. This decision also has no relevance to the facts of the present case. In *Ramesh Kumar*, what this Court D said is that for appointment to the judicial services, *in the absence of any contrary provision in the relevant rules* Delhi High Court should not have fixed any minimum qualifying marks for the viva voce because this Court had accepted Justice Shetty Commission's report which had prescribed not to have E any cut off mark for interview. Actually what is said in paragraph 15 of the judgment in *Ramesh Kumar* demolishes the case of the respondents:

> "15. Thus, the law on the issue can be summarised to the F effect that *in case the statutory rules prescribe a particular mode of selection, it has to be given strict adherence accordingly.* In case, no procedure is prescribed by the rules and there is no other impediment in law, the competent authority while laying down the norms G for selection may prescribe for the tests and further specify the minimum benchmarks for written test as well as for viva voce.

30. Having, thus, made the legal position clear, the judgment in paragraph 16 went on to say:

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"16. In the instant case, the Rules do not provide for any particular procedure/criteria for holding the tests rather it enables the High Court to prescribe the criteria. This Court in *All India Judges' Assn. (3) v. Union of India,* [(2002) 4 SCC 247], accepted Justice Shetty Commission's Report in this regard which had prescribed *for not having minimum marks for interview.* The Court further explained that to give effect to the said judgment, the existing statutory rules may be amended. However, till the amendment is carried out, the vacancies shall be filled as per the existing statutory rules. A similar view has been reiterated by this Court while dealing with the appointment of Judicial Officers in *Syed T.A. Naqshbandi v. State of J&K [(2003) 9 SCC 592]* and *Malik Mazhar Sultan (3) v. U.P. Public Service Commission* [(2008) 17 SCC 703]. We have also accepted the said settled legal proposition while deciding the connected cases i.e. *Rakhi Ray v. High Court of Delhi* [(2010) 2 SCC 637] vide judgment and order of this date. It has been clarified in *Rakhi Ray* that where statutory rules do not deal with a particular subject/ issue, so far as the appointment of the Judicial Officers is concerned, directions issued by this Court would have binding effect."

31. Now coming back to the facts of the case in hand, though the rules framed under Article 309 of the Constitution governing the selection process mandated that there would be minimum qualifying marks each for the written test and the oral interview, the cut off mark for viva voce was not specified in the advertisement. In view of the omission, there were only two courses open. One, to carry on with the selection process and to complete it without fixing any cut off mark for the viva voce and to prepare the select list on the basis of the aggregate of marks obtained by the candidates in the written test and the viva voce. That would have been clearly wrong and in violation of the statutory rule governing the selection. The other course was to fix the cut off mark for the viva voce and to notify the

A candidates called for interview about it. This is the course that the Commission followed. This was in compliance with the rules and it did not cause any prejudice to any candidate either. We, thus, see no illegality at all in the selection process.

B 32. In light of the discussions made above we find that the Division Bench of the High Court took a wrong view of the matter and its judgment and order are quite unsustainable. We, accordingly, set aside the impugned judgment and dismiss all the writ petitions filed by the respondents before the Gujarat High Court.

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33. In the result, the appeals are allowed but with no order as to costs.

R.P. Appeals allowed.