Bhagwati Foundation v. Municipal Corporation of Delhi, 2006

Bench: G Mittal

Bhagwati Foundation And Ors. vs Commissioner Of Mcd And Ors. on 31/10/2006

JUDGMENT

Gita Mittal, J.

1. By this judgment, I propose to dispose of a bunch of writ petitions all laying a challenge to a decision taken by the Municipal Corporation of Delhi (referred to as MCD hereafter) to transfer all Community Toilet Complexes (hereinafter referred to as CTCs) constructed by it and under its jurisdiction for operation and maintenance to the Sulabh International Social Service Organisations (referred to as Sulabh for brevity) and cancellation of the agreements with the petitioners and other Non-Governmental Agencies (referred to as NGOs) to whom they were handed over for operation and maintenance. The challenge has been laid primarily on grounds of violation of Article 14 of the Constitution of India so far as the decision to hand over the CTCs to Sulabh is concerned while the cancellation of the allotments of the NGOs is challenged on grounds of arbitrariness, malafide, illegality and violation of principles of natural justice.

2. Sanitation is undoubtedly a basic service which is a right which must be ensured to every citizen, be it an adult or a child. Sanitation is a felt need while hygiene is important to health. This is a service which needs to be imperatively maintained at the community level. While those who are poor cannot pay for the provision and maintenance of the basic service provided to them, a completely free service runs the risk of the service not being valued at all and even be misused. Community participation in planning, construction and maintenance of such like services ensures that the community values it and will use it. Contribution to creation of such facilities may be by dispensation of finance, real estate, labour or service. When people do not have the time to contribute labour or otherwise to the construction, operation and maintenance, they are required to pay a charge for the service. A small contribution, no matter how small, is often a confirmation of the value of a service to the people and their willingness to maintain it. In developing nations, the problem is more aggravated, inasmuch as it is necessary even to educate and inculcate the habit of using a toilet in people who have never seen the facility. This lack of information and knowledge however exacerbates the problems which are faced by metropolitan cities to which people from remote corners of the country migrate without any idea of sanitation facilities or basic hygiene.

In certain countries, much has been done to generate enlightenment about private toilets even in remote villages. My attention has been drawn to a good practice example which is to be found from Bangladesh where large NGOs provide the material for constructing a latrine but the beneficiary family, however poor, finds the time to construct the soak pit and the walls (often of thatch material and bamboo). BRAC, an NGO in Bangladesh has created an entire movement for sanitising entire villages based on this type of participation by the users of the service themselves. Some other agencies even give material on credit, of about 600 taka and recover it slowly over several years. This is not a significant burden on the family, but works as a mechanism through which people actually demand and value basic services.

3. The pressure on this city has been always in tremendous. Large numbers from all over the country descend in droves upon Delhi in search of employment or other opportunities and never leave. It is to address the basic needs of such persons who have no permanent abodes that the civic authorities including the Municipal Corporation of Delhi have had to concentrate, conceptualise and develop common toilet complexes which provides both toilet and bathroom facilities for the community.

4. Over the years, several modules of the operation and maintenance of these common toilet complexes (hereinafter referred to as 'CTCs') have been tested by the Municipal Corporation of Delhi which is the primary body concerned with health, sanitation, sewerage and other areas relating to provision of civic amenities and facilities to the citizens of Delhi. As the present matter impugns the actions of this body,

consideration is confined to this civic authority, which for brevity is referred to as the `MCD'.

Perspective

5. In order to appreciate the issues raised in the present writ petition, it becomes necessary to see the historical perspective of the experience of the corporation in this behalf. These can be divided into six stages and modules which briefly put, would be as hereunder:

(a) Between 1988 to 1994, CTCs numbering 124 were got constructed by MCD from Sulabh at the cost of the MCD. This non-governmental organisation was paid the estimated cost of the construction on market rate; cost of boring the tubewell; and 12.5% of the implementation charges. They were given to Sulabh on pay and use basis for a period of 30 years. Electricity, water charges and cleaning of the septic tank of the CTC was the responsibility of the MCD. The salient features of the operation and maintenance terms of these CTCs were that the NGO was to run them on the 'pay and use basis' for a period of thirty years. These complexes were known as the 'Sulabh Shauchalya's'.

Sulabh was thus responsible for 124 CTCs on these terms.

(b). Between 1994-2000, the Slum & JJ Department has delegated 207 CTCs to other NGOs on the same terms. These 207 CTCs were known as the 'Jan Suvidha Complexes'.

It is noteworthy that no complaint in respect of either the operation or the maintenance or the management by either Sulabh of these 124 Sulabh Sauchalayas or the other NGOs who are running operating maintaining and managing the 207 Jan Suvidha Complexes has been brought to the notice of the MCD or has been placed before this Court.

(ii) Between 1975 and 1980 construction of 66 CTCs was carried out by the MCD as per usual contract procedures through contractors and handed over for further maintenance to the Conservation & Sanitation Engineering Department for further maintenance with effect from 1992 onwards. These toilets have been called as the 'Jan Suvidha Toilet Complexes'. In the year 1990, these 66 CTCs were handed over to Sulabh for a contract of one year which was to be extendable up to 5 years. As per the agreement between the MCD and M/s Sulabh, the MCD was required to make annual payment of Rs. 1000/- per WC seat per bathroom plus per bath room on account of annual repairs to Sulabh in respect of these toilets. The MCD was also responsible for payment of electricity and water consumption as well as cleaning of the septic tanks. They were to be operated by Sulabh on pay and use basis.

(iii). The third category consists of the 84 CTCs constructed by the Slum & JJ Department, then of the DDA, during the period 1984 to 1990 in Jhuggi Jhompri Clusters and were transferred in 1992 from the DDA to the Conservation & Sanitation Engineering Department of the MCD for further maintenance. Eighty four such CTCs were handed over to Sulabh for a period of 30 years on the same terms as the earlier 66 CTCs. MCD also undertook to pay Rs. 1000/- per WC seat plus per bathroom annually on account of annual repairs to the NGO. In addition, the MCD was responsible for bearing electricity and water consumption charges and cleaning of the septic tank was also the responsibility of the MCD.

The MCD has not placed the expenditure that it has incurred on the payments which were effected to Sulabh on these agreements or the electricity, water and cleaning of the septic tank. However the petitioners have placed information before this Court to the effect that the MCD was allegedly paying an amount of Rs. 97,66,000/- each year to Sulabh towards the Rs. 1000/- per seat per WC per bathroom amount. Even these agreements were for a period of thirty years in favor of Sulabh and the user was on 'pay and use' basis.

(iv). The fourth category of CTCs was constructed by the Slum & JJ Department through contractors during the period 1994 onwards. 166 CTCs were so constructed. MCD had decided to hand over their operation and

maintenance to NGOs on a license fee basis. Consequently allocation was made by tenders for a period of one to three years on license fee basis to NGOs, CBOs and local residents etc. As per the agreement entered into by the MCD and the allottees for the operation and maintenance of these CTCs, they were to be operated on 'pay and use basis'. Additionally the NGO/allottee was responsible for all repairs including the day to day maintenance upkeep; the annual repairs as well as maintenance etc. The NGO was also responsible for payment of the electricity and water consumption charges as well as the maintenance and cleaning of the septic tank.

Thus the MCD had clearly abdicated all responsibilities of running and maintenance of these CTCs to the NGOs.

The petitioners have pointed out that so far as these 166 CTCs are concerned, 30 NGOs were successful in securing contracts with the MCD for the operation and maintenance of these CTCs. These 30 NGOs included 7 organisations which, according to the petitioners, are sister concerns of Sulabh. The petitioners have contended that the MCD has collected substantial amount as license fee from these NGOs. Additionally, there is no complaint whatsoever in respect of the running and operation and maintenance of these CTCs ever since they were allotted and handed over to the NGOs.

The MCD however is silent in all its assertions with regard to the amount that it had earned from these CTCs and no information in this behalf has been placed even before this Court.

(v). The fifth category of the CTCs are the 357 complexes which are being operated, managed and maintained by the MCD itself. There is no dispute that the MCD has a large infrastructure of personnel as well as the requisite infrastructure and has been successfully operating these CTCs through its own staff. The benefit to the citizens is that these CTCs were being operated on a free of charge basis. The MCD has the total responsibility for these complexes. Obviously there is no complaint with regard to the operation and maintenance of these 357 CTCs.

6. In the year 1999, the Commissioner MCD asked the Additional Commissioner Engineering to prepare a white paper on the management and maintenance of the Jan Suvidha Complexes. He joined in consultation, the Additional Commissioner(S&JJ), Additional Commissioner(HQ), Engineer-in-Chief and the Director(Sanitation)-I. This matter also came up for discussion in the meeting of the Standing Committee on 15.09.1999. Thereafter the Commissioner also issued some instructions recording that in the last Standing Committee meeting, services provided by Sulabh were discussed at length where after a three member committee was decided to be constituted which was to be headed by Shri Vishnu Swaroop Sharma, Additional Commissioner(Engineering). In addition, Shri Manjeet Singh, Additional Commissioner(S&JJ) and Shri K.S.Sandhu, Director(Sanitation)-I were to be the members of the Committee to go into the entire functioning of the system including the agreement signed with Sulabh, maintenance/services provided by them, offers by NGOs etc. and to submit a comprehensive report so that the future course of action could be discussed.

7. This Vishnu Swaroop Sharma Committee visited eight Jan Suvidha Complex for inspection on 13.10.1999.

8. Incidently five of the complexes visited by the Committee were being maintained by Sulabh for which the MCD was paying the amount of Rs. 1000/- per WC per bathroom per annum for the maintenance. All aspects of the matter including the status of these complexes, agreements concerning the CTCs, offers received from other social service organisations, objections and explanations rendered by Sulabh to the objections raised by the committee and the comments of the sanitation department of the MCD on the explanation rendered by Sulabh were taken into consideration. After a detailed consideration, several recommendations were given by this committee and a model agreement was also suggested. The committee took into consideration the following basics while preparing its report:

(a) Status of Sulabh Shauchalayas and Jan Suvidha Complexes.

(b) Terms and conditions of the agreements executed with NGOs for the maintenance of these complexes.

(c) Shortcomings noted in these agreements.

(d) Drafting of a model agreement recommended to be executed with the NGOs in future.

(e) Inspection of certain complexes/shauchalayas in order to ascertain how far the terms and conditions of the agreements are being adhered to.

(f) The statement of M/s. Sulabh International appeared in the press commenting on the discussion held in the meeting of the Standing Committee and the department's report thereon.

9. The findings of the committee as given in its report read thus:

1. In all the Jan Suvidha Complexes the caretakers were found collecting "Use Charges" @ Rs. 1/- per use from the users. At the counter it was displayed on the wall "USE CHARGES-Re.1/-". This is against the terms and conditions of the agreements.

2. Live electric wires were lying loose and at some places the wires were naked causing chances of electrocution. Wiring at the meter and switch box was also seen in a dangerous condition.

3. Several toilets were without doors. Many doors were broken and in most of the doors there was no bolt from inside. A person using the toilet cannot close the door from inside and as such there was no privacy.

4. Structural maintenance was very poor. Plaster of the walls was seen damaged and peeled at several places.

5. It appeared that the complexes have not been white washed for years together.

6. On interrogation the caretakers of the complexes informed that they had been requesting the persons who come to collect money on behalf of the maintenance agency for carrying out necessary repairs but nobody bothered.

7. Troughs made for washing hands were without taps.

8. Drains were found choked.

9. The sanitation condition was also not found up to the mark as a number of seats were found choked emitting stinking smell.

10. The environment of the complexes was not healthy. The open set-back area was found generally dirty. No plantation was seen there.

11. In one Jan Suvidha Complex, on interrogation, the ladies told that they were allowed to wash their clothes in bathrooms on payment of Rs. 2-3 depending upon the number of clothes to be washed. This is, as a matter of fact, misuse of water.

12. The caretakers informed that they were being paid Rs. 900/- p.m. by the maintenance agency apart from daily expenses varying from Rs. 10/- to Rs. 30/-.

Some photographs were taken during the course of inspection. These photographs can be seen in the following pages which tell about the poor maintenance of these Jan Suvidha Complexes.

10. This committee considered and compared various provisions/ clauses of the other agreements which had been entered into by Sulabh. After a detailed consideration the Committee proposed a "model agreement". Amongst others, the terms and conditions included the allocation of the CTCs for management operation and maintenance to different parties for a period of three years which could be extended with the mutual consent of parties by adopting the open tender process. The committee proposed a deposit of earnest money @ 2.5% of the tender amount to be worked out for a contract period of one year @ Rs. 150 per WC per bath per urinal per month at the time of purchase of tender. This amount was required to be adjusted as a security deposit for the tenderer whose tender is ultimately accepted by the MCD. In the event of inability to carry out the work, this amount was liable to be forfeited. The proposed terms included the right to black list and to debar an agency for failure to carry out the terms and conditions.

11. In the event of an offer being approved and the work order issued to a party, it would also be required to deposit the security amount of 10% of the total amount calculated @ Rs. 150 per WC per bathroom per urinal per month for a period of one year which would be refundable after due inspection of the complex after completing the maintenance period. Loss caused to the complex was required to be assessed by an officer not below the rank of the Executive Engineer(Civil/Electrical) and the amount of the loss to be deducted from the security amount. The license fee which was to be fixed was required to be paid in advance on quarterly basis at a rate accepted by the MCD within 15 days of the award of the work. In case of delay in payment, after 15 days of the next quarter, interest would be payable by the tenderer @ 18% per year which could be recovered from the security deposit.

12. The committee had also suggested an insurance cover to be undertaken by the organisation which was taking over the CTC to cover the risk of theft, riots, natural calamities etc. at his own cost. The water and electricity charges were also to be the responsibility of the operating agency while obtaining the connections would be the responsibility of the MCD. The electricity was to be supplied through a generator, the diesel consumption expenditure on its procurement as per actual consumption was to be borne by the operating agency while the generator set etc. would be provided by the MCD. Again MCD would reserve the right to adjust unpaid bills against the security deposit. The Committee was of the firm view that the CTCs would be operated, managed and maintained on "pay and use basis"and had suggested a charge of 50 paisa per use from all users except children below the age of 12 years who would be allowed to use the WC free of charge. A user would require to be supplied a teaspoonful of soap powder for washing hands after defecation without additional charges.

13. Apart from suggesting the ideal maintenance staff ratio, the Committee had emphasised the requirement to increase public consciousness of the use of the CTCs by giving due publicity by the agencies and also maintenance of close liason with the local public and public representatives in the clusters where the CTC was operating. The social welfare requirement of abiding by the provisions of the Minimum Wages Act, 1948 and the Contract Labour(Regulation and Abolition) Act, 1970 and other labour laws was also emphasised.

14. So far as recommendations were concerned, the Vishnu Swaroop Sharma Committee made the following recommendations:

RECOMMENDATIONS

1. The C.S.E. Department should exercise effective control and supervision over the functioning of these Jan Suvidha Complexes being maintained by NGOs so as to ensure that the terms and conditions as contained in the agreements executed with them are being adhered to properly. The field staff should visit the Jan Suvidha Complexes from time to time and submit their reports to the senior officers of the department.

2. An unified authority which is statutorily C.S.E. Department should be made responsible for monitoring and exercising effective control/supervision over the functioning of all toilet complexes whether constructed by the Ceneral Wing of the Slum Wing of the M.C.D.

3. The proposed model agreement given at preceding pages of this report. If approved by the Commissioner, should be placed before the Standing Committee in the form of a preamble for approval and hereinafter this should be executed in respect of the Jan Suvidha Complexes to be handed over to the NGOs/Community based Organisations/Basti Co-operative Societies. The Department may consider giving preference to Basti Co-operative Societies/Community based Organisations (duly registered under the Societies Registration Act) consisting of local community people themselves in the allotment to public toilet blocks for the respective basti itself.

4. As reported by the C.S.E. Department the period of agreement executed with M/s. Sulabh International in respect of certain Jan Suvidha Complexes has already expired. In all such cases the department should process the matter for calling bids for their allotment on the proposed model terms and conditions and till the time such allotments are made, present arrangement may be allowed to continue.

5. Since after conducting a sample survey of certain Jan Suvidha Complexes it has been noted that M/s. Sulabh International are not maintaining the complexes in accordance with the agreed terms and conditions, the agreements executed with them for thirty years may be terminated after giving show cause notice etc. and the complexes may be handed over to other NGOs etc. prepared to maintain them on the terms and conditions of proposed model agreement.

15. These recommendations of Shri Vishnu Swaroop Sharma Committee were considered by Shri V.K. Duggal, the then Commissioner of the MCD who recorded the following order on 22.3.2000 thereon:

The mater regarding maintenance of 164 Jan Suvidha Complexes now with Sulabh International was discussed at length in the Standing Committee meeting and a decision was taken that we should take over the complexes back from Sulabh International in view of the recommendations made in the report of three senior officers headed by Shri V.S. Sharma, Addl. Commissioner(Engg.). It was also decided that a three member committee should be constituted to prepare an action plan in this respect so that these complexes can be taken over in a phased manner starting from April, 2000. Shri Manjit Singh, Addl. Commissioner(S&JJ) will head this committee and Shri K.S.Sandhu, Director(Sanitation)-I and Shri O.P.Garg, B&FO will be the members. Fortnightly progress report may be submitted to the undersigned.

16. The further Committee consisting of the Additional Commissioner(S&JJ), Director(Sanitation)-I MCD and the B&FO, MCD held various deliberations for finalising the terms and conditions for maintenance and management annually on lines which were followed in the S&JJ Department. Attention was paid to the difference in the method adopted by the S&JJ Department and the practice in the General Wing of the MCD. It appears that the S& JJ department was generating revenue from the NGOs for the maintenance of the toilet complexes instead of paying to them. This was contrary to the practice in the General Wing. The Standing Committee of the MCD was also of the view that there should a uniform system in the MCD and such comprehensive exercise was required to be undertaken in view of the concerns expressed.

17. This Committee which had been appointed pursuant to the decision taken by the Commissioner MCD on 22.3.2000 invited applications from the NGOs by placing public advertisements twice in leading newspapers. 174 NGOs who were registered under the Societies Act had applied pursuant to these advertisements. These applications were categorised into four categories. The first category consisted of 43 applicants who met all the eligibility requirements which were suggested in the advertisement including registration under the Societies Act, possessing the requisite experience and had displayed good performance through documentary evidence thereof. The three member committee appointed pursuant to the order dated 22.3.2000 recommended that initially, the work may be given to those NGOs who fell in this first category and tenders be called from them. So far as the others were concerned, they would be considered for assignment of work upon production of documentary proof of their claimed registration and experience. The method which was being followed was allotment of the Jan Suvidha Toilet Complexes to the NGOs for operation and maintenance in a phased manner so that a uniform management system was followed.

Another consideration which weighed with this committee was that there could be clubbing of five Jan Suvidha Toilet Complexes or even more with a view to ensure that remunerative as well as less remunerative Jan Suvidha Toilet Complexes are covered for award of work in the package to one NGO so that the interest of the NGO also does not suffer. The terms and conditions for allotment of the operation, maintenance and management of these complexes on pay and use basis were suggested. The Commissioner vide his letter dated 8.9.2000 required these to be placed before the Standing Committee of the Corporation for approval thereof.

18. The proposal of the Commissioner was considered by the Standing Committee which, vide its resolution No. 262 dated 20.9.2000, recommended to the Corporation that the proposal of the Commissioner as contained in the letter dated 8.9.2000 be approved.

The Full House of the Corporation by its resolution No. 445 in the meeting held on 8.11.2000 approved the recommendations of the Standing Committee as contained in resolution No. 262 dated 20.9.2000.

19. It is an admitted position that pursuant to this decision of the MCD, 66 CTCs which had been awarded to Sulabh were withdrawn from it. After advertisement and consideration, five NGOs were awarded the work of operation and maintenance. However, there was non-payment of the license fee by the NGOs and MCD has contended that action has been initiated for debarring these NGOs for a period of three to five years.

20. So far as the 1004 CTCs which form part of the five categories noted above, at the time of filing the writ petition, the responsibility for the operation maintenance and management of these CTCs can thus be summed up as hereunder:

(i) With Sulabh under different agreements 208

(ii) With other NGOs 373

(iii) With the MCD 357

(iv) Taken back from Sulabh after a decision

of the MCD dated 8.11.2000 66

Total 1004

Undoubtedly there was no complaint with regard to the experience of the MCD so far as operation, maintenance and management of these 1004 CTCs was concerned.

Yamuna Action Plan

21. This brings us to the sixth category of CTCs wherein the petitioners were involved. Much concern has been expressed in the last two decades with regard to the state of River Yamuna as it flows through Delhi. Its pollution levels have engaged the attention of not only the conservationists, ecologists, town planners, the civic authorities but have engaged serious consideration by the Apex Court as well. One of the major pollutants of the river Yamuna has been the untreated sewage which flows directly into the river Yamuna on account of the jhuggi clusters and unauthorised colonies.

22. At the same time, concerned with the state of the River Yamuna as it flows through Delhi and agitated by the fact that it has been reduced to almost a major drain, the authorities were of the view that large scale multiple intervention was necessary to facilitate reduction of the sources of its pollution. Untreated sewage was found to be a major contributory factor to the pollution in the river and lack of toilet facilities and lack of proper sewage disposal systems in slum areas, re-location settlements and other low income settlements was

found to be a major source of the untreated sewage. One of the measures which was identified was construction of large number of toilet complexes with all proper facilities including a round the clock water supply from an independent tubewell with back up generating sets so that the lakhs of people who are still defecating in the open areas in the city of Delhi are discouraged from so doing. Apart from creating unhygienic and unsanitary public conditions, this results in the carriage of the discharge to public drains and through them, ultimately reaching the river Yamuna. Notified areas under the Slums Act also have inadequate toilet facilities in highly populated areas. It was realised that hence there was a dire need of toilet complexes in such areas in Old Delhi. Resettlement colonies numbering forty six were also identified as lacking in adequate public toilets.

23. In the matter of cleaning up of the river Yamuna, a "Yamuna Action Plan" ('YAP' for brevity)was conceived after detailed interaction by the Ministry of Environment & Forest, Government of India, in conjunction with the Municipal Corporation of Delhi with a Japanese team pertaining to various sanitation related issues such as:

(i) public toilet facilities Along with maintenance and management;

(ii) low cost sanitation

(iii) maintenance and management by NGOs and CBOs

(iv) de-centralised sewage disposal system in the slum areas, relocation settlements and other low income settlements including walled city areas.

24. Taking the totality of the population requiring reasonable access to organized/institutionalised toilet arrangements, it was planned that community toilet complexes be constructed. The Yamuna Action Plan also provided for de-centralised mini sewage treatment plants as pilot projects in various relocation colonies such as Holambi Kalan, Tikri Khurd, Bhalasva, Bakkarwala, Molarbandh, where there is no possibility of sewer lines in the near future. In addition 10 micro sewage treatment plants were also provided in place of septic tanks. A provision of Rs. 16 crores had been made in the Yamuna Action Plan which envisaged four module components.

25. In order to provide reasonable access to toilets to the population and to organise/institutionalise arrangements for toilet facilities, it was estimated that 1150 community toilet complexes comprising of 30,000 WC seats in the module of 20, 30 and 40 WC seats were required. Based on the information gathered from different quarters, a project report for an estimated expenditure of Rs. 250 crores was sent by the MCD to the Advisors/Joint Secretary of the Ministry of Environment and Forest through the Commissioner, MCD vide a letter No. PSC/672/2000 dated 28th July, 2000 for consideration and the necessary approval from the Government of India. Several meetings thereafter were held between the representatives of this Ministry; the Japan Bank for international cooperation and the consultant-TEC-DCL consortium. After detailed deliberations, the Ministry vide its letter dated 5th June, 2001 agreed to provide Rs. 164.82 crores to the MCD only for provision of the following:

i. Module 1 - Construction of 1146 community toilet complexes at a cost of Rs. 149.96 corres

ii Module II - Construction of Mini/Micro sewage treatment plan cost of Rs. 9181 crores.

iii Module III - Procurement of Sanitation equipments costs of Rs. 2.89 crores.

iv Module IV Public Participation & Awareness Programme - costs Rs. 216 crores - total Rs. 164.82 crores.

26. These 1146 CTCs were to be constructed in 12 zones under the MCD. Anticipating water and electricity shortages as well as lack of adequate area, the proposal therefore included provision of tube wells for round the clock water supply; generating sets to provide for electricity failures as well as multi storeyed toilet facilities where there was no adequate land available.

The project was required to be completed before the 31st March, 2002 in all respects as per the loan agreement of the Government of India with the Japan Bank for International Cooperation. The Ministry of Environment and Forest had clearly stipulated that no extension of time would be permitted. Therefore, a monitoring management and information control room was established at the Slum Wing headquarters under the overall administrative control of the additional commissioner(S&JJ)/YAP with the requisite manpower and communication networking.

27. In view of the allegations by the respective parties before this Court with regard to the nature of the construction and non-utility of the CTCs it is necessary to consider the monitoring of this project as well as its implementation in some detail. A control room was specially established for monitoring the Yamuna Action Plan project. For monitoring the progress of the work on daily basis, 10 field monitors were employed by the authorities who reported back to the control room. These reports were being submitted to the Commissioner in the weekly review meetings under his Chairmanship where the Engineer-in-Chief, Chief Engineers, Superintending Engineers, Director CSE-I/II, Director(Hort.), Zonal Development Commissioners, representatives of the Ministry of Environment & Forest, TEC-DCL Consortium, JBIC, ACORD etc. were present. In these meetings, the physical and financial progress of various stages of the construction of CTCs and other modules under the Yamuna Action Plan were allegedly reviewed.

28. In addition to the CTCs, where new toilet complexes were being constructed after demolishing the old dilapidated ones which were in use, 174 mobile toilet vans were provided as an alternative temporary arrangement with the stipulated cost of Rs. 4.10 crores out of the total provision of Rs. 149.38 crores The operation, maintenance and management of the toilet complexes constructed under the Yamuna Action Plan were to be entrusted to NGOs who were to operate and maintain these complexes on 'pay and use' culture.

29. The construction of these CTCs was apparently carried out by the MCD by inviting tenders from amongst the class I contractors registered with the DDA, CPWD and other Government departments. The tender was a composite tender covering civil work, sanitary works and water supply and drainage work; electrical works; tubewells; submersible pumps; DG sets etc. thereby avoiding division of responsibility. Tenders were invited for 984 complexes which are stated to have been awarded after detailed negotiations with various contracting agencies. The works were divided amongst the 20 divisions of the General Wing of the MCD and 8 divisions of the Slum & Jhuggi Jhompri Wing also of the MCD who were the executing agencies under the project to get the work executed through contractors. The MCD, undoubtedly to maintain a tight control over the work, had appointed 70 temporary work supervisors specially for carrying out the supervision of the execution of the project. In order to ensure that effective and timely execution was undertaken, for each contracting agency, 4 to 8 complexes of varying seat capacities of 20, 30 and 40 seaters were grouped to form one contract. A period of six months was granted in the tender for completion of the CTC and a special bonus clause was included to the effect that those contractors who complete the work before the six months period would be paid a bonus of 1% of the contract value and per cent of the value if the work is completed before 15 days of the contract period. Since tenders were floated during the month of June to September, 2001 and works actually commenced at the site in 2001 itself onwards, the six month period was to end around February to March,2002. According to the MCD, 90% of the works were completed by the 31st March, 2002 which was the final date of the completion of the project.

These facts were stated in a detailed project report which was based on a revised completion cost estimate for the Yamuna Action Plan Project Phase-I which was forwarded by the MCD vide its letter dated 24.12.2002 to the Additional Director NRCD, Ministry of Environment & Forest. The final date for completion of the project was also the 31st March, 2002.

30. In the light of the above, it is obvious that tight control and supervision of the MCD was envisaged and its officials were required to maintain a close vigil over the construction. This was reinforced through the field monitors and supervisors who it had appointed against payment of charges.

It would appear that the construction which is stated to have been effected by class-I contractors ought to have been first class in nature and impeccable. There can be no reason or justification for any CTC to be deficient in construction or functioning.

31. In the report which the MCD submitted with its letter dated 24.12.2002, it expressed some problems faced during the construction period. These related to public resistance in certain areas; objections raised by land owning agencies; requirement of permission at 134 sites specially in the South and South West areas to be given by the Central Ground Water Authority for digging of tubewells and the need for finding alternative sources including direct water supply from municipal mains; the failure of the Delhi Vidyut Board Authorities to provide permanent electrical connections to certain CTCs which stood constructed and difficulty in getting permission for sewerage connections from the Delhi Jal Board Authorities. Even at the time of submission of the report, on 24.12.2002, the MCD has stated that "even though CTCs have been constructed for 52 sites permission for boring of tubewells from the Central Ground Water Authority is still to be obtained with the result even though CTCs are constructed, they are not put into operation." It was stated that work at 10 sites had to be abandoned due to non-availability of boring permission.

Finally, the MCD constructed 952 CTCs under the Yamuna Action Plan in this manner.

Allocation of CTCs

32. So far as the operation, maintenance and management of the CTCs in areas within the jurisdiction of the MCD for the 952 complexes finally constructed under the YAP was concerned, the issue was addressed in a letter dated 19th August, 2002 by the Commissioner. It had been considered that the contract for the same be awarded by auction amongst identified/shortlisted NGOs on the already considered and stipulated terms and conditions. The allotment was to be through a transparent and open process amongst the identified/shortlisted NGOs.

This proposal was got approved on 20th March, 2002 through a process of anticipatory approval by the Chairman of the Standing Committee and the Mayor of the city. The programme for auction was thus fixed for 28th March, 2002, 30th March, 2002 and 1st April, 2002. However the NGOs who were being considered for the allotment had suggested several valid changes in the terms and conditions of allotment. Detailed deliberations were held on the suggestions made. The modified preamble was got cleared on 10th May, 2002 by the Chairman of the Standing Committee and the Mayor in anticipation of approval of the Corporation.

Accordingly, new dates for the auction programme were fixed as 21st May, 2002, 22nd May, 2002 and 23rd May, 2002 and one week notice thereof was given through publication in leading newspapers.

The 952 toilet complexes which consisted of 25231 WC seats excluding children seats and bathers were clustered into 103 groups.

33. Fairness in the action of the MCD was further underlined by the restrictions in the allocations to the effect that an NGO who had successfully bid in two groups would not be allowed to participate in any further auction and would have to leave the auction hall immediately. This condition was also announced at the time of conduct of the auction programme. Thereby the MCD ensured that a single NGO was not able to unfairly successfully bid for a large number of CTCs and that more than one NGO was successful in the bidding. Thereby, MCD was able to ensure provision of facilities to the users in the event that any one or the other NGO was unable to perform its duties, the MCD had options/alternatives to fall back upon.

34. So far as the terms and conditions for allotment of the operation, management and maintenance of the community toilet complexes was concerned, perusal thereof would show that the same showed due consideration and were based on the past experience of the MCD in having allotted CTCs on different basis to different persons. Each eligible short-listed NGO was required to deposit Rs. 15,000/- by a demand draft in favor of the Commissioner, MCD for participating in the auction programme. It was also mandated that only two groups of CTCs (ranging from 8 -10 complexes in one group and number of seats varying from 240 to 300 WC seats) would be entrusted to one agency/NGO. The terms and conditions had clearly stated that the successful agency/NGO would not be allowed to participate in any further auction, if he had successfully taken two groups by auction. A minimum reserve price per seat had been fixed at the rate of Rs. 20/- per month. As per Clause 4(a) of the terms and conditions of license, the NGO who offered the maximum rate per seat of the group of complexes, was required to deposit 25% of the total finalised auction license fee for each group, calculated on quarterly basis immediately after the auction was decided in his favor, either in cash or by way of a demand draft in favor of the Commissioner, MCD.

35. In the auctions held, 80 groups comprising of 749 toilet complexes with 19065 WC seats were successfully auctioned.

In 23 groups, there was no response and the MCD proposed to initiate separate auction programme for disposal of the same.

36. So far as the distribution of the CTCs between the NGOs is concerned, as noticed above 87 NGOs had been shortlisted. However only 53 NGOs participated in the auction programme while 34 NGOs did not participate in the process to offer a bid or remained absent. Twenty seven NGOs had each taken two number of groups or clusters while 26 NGOs had taken only one group.

37. As per the terms and conditions on which these CTCs were auctioned, in respect of the 80 groups for which the auction was successful, the MCD was to receive a sum of Rs. 40 lakhs as security deposit. So far as the other amounts which were payable by the NGOs towards the license fee was concerned, the MCD would receive an amount of Rs. 28,60,246.00 per month in respect of the 80 groups alone. The MCD proposed to place the same in a separate Escrow Account in the name of the Commissioner, MCD having joint signatories, one from the Finance Department, another from the Slum Department and the third from the General Wing.

38. A proposal was placed as item No. 496 for consideration by the Standing Committee for the allotment of the remaining 23 groups in respect of which there was no response in the auctions. It was proposed that instead of the restriction of confining the NGOs to only two groups, they may be allowed to take up three groups so as to dispose of the 23 remaining groups. It is noteworthy that, out of these 23 groups, 22 belonged to the general wing of the MCD while one belonged to the slum wing. All the 87 shortlisted NGOs were to be called for participation in the auction bid to be held for disposing of the remaining 23 groups. This was placed as item No. 496 for consideration of the Standing Committee in its meeting dated 13th December, 2002 and was approved by Resolution No. 770 dated 13th December, 2002 by the Standing Committee.

The same was thereafter was approved as Resolution No. 769 dated 13th December, 2002 of the MCD.

39. An auction programme was thereafter fixed for 25th June, 2002 in respect of the remaining 23 groups which could not be earlier auctioned and were successfully auctioned on this date.

40. It is noteworthy that so far as these 23 groups were concerned, it was anticipated that the MCD would receive an annual license fee amount of Rs. 3,00,149.00 per month in addition to the amount of Rs. 28,60,246/- per month in respect of the earlier 80 groups auctioned earlier. So far as security deposit was concerned, from these 23 groups, a sum of Rs. 51.51 lakh would be received as a security deposit.

41. Approval of the highest bids received in respect of these 23 groups of CTCs was sought from the Standing Committee of the MCD which was granted vide a Resolution No. 769 dated 13th December, 2002.

42. By Resolution No. 424 dated 30th December, 2002, the house of the Municipal Corporation of Delhi accorded its formal approval for the empanelment and shortlisting of the 87 NGOs and the proposed changes in the terms and conditions of operation and maintenance work of the community toilet complexes under the Yamuna Action Plan.

43. It is necessary to consider certain material changes in the terms and conditions which were observed and objected to by the Finance Department of the MCD and replies thereto which were approved by the Municipal Corporation of Delhi read as hereunder:

Observations raised by finance and replies thereto:

(1) Under Clause 2, the period of contract has been enhanced from one year to 3 year without giving any rational for change. Finance is of the view that it should be initially for a period of one year and renewed thereafter.

Earlier terms and conditions were finalised for one year maintenance, but majority of O&M agencies insisted that period of operation & maintenance should not be less than 5 years and after detailed deliberations it was considered necessary to raise it from 1 year to 3 years.

In earlier terms & conditions approved by Corporation vide Resolution No. 445 dated 8.11.2000 the term of O&M work was for 3 years.

(ii) Under Clause 4(a), rationale for deleting the "'B aths' from the original proposal has not been given.

Since, the change of Re.1/- is for each entry to the complex and coupon entry besides are of WC. Bath can also be used and nothing extra on account to be charged and, hence, it was decided in return we may accept suggestion of O&M agencies. However, it does not affect the revenue aspect of the assignment of O&M work of CTC is to be determined by auction process.

(iii) Under Clause 5, security amount has been reduced from Rs. 60,000/- to Rs. 50,000/- without giving any reasons. The security amount should be proportional to the cost of infrastructure to be handed over to the second party and tentative license Fee to be recovered from the complexes awarded to the agency.

The security amount reduction was considered as all these necessary, O&M agencies insisted for this and was agreed to.

(iv) Under Clause 10, it should be clearly stipulated that in no case, NGO will be allowed to put any advertisement board, bill board, kiosk or banner etc. at the toilet complex. Any breach of this clause shall be liable to termination of contract.

Accepted and incorporated in the modified terms and conditions.

(v) Under Clause 14.8, the department shall insert after 3 months notice - except in case of serious violation of any clause of contract to be determined by the first party in which case contract will be terminated by the first party immediately and security forfeited. This part may be go verified from CLO again.

Accepted and incorporated in the modified terms & conditions.

44. So far as the modification which was proposed with regard to the advertisement rights and financial viability of the CTCs is concerned, Clause 10 of the terms and conditions and the proposed change as was considered and approved by the Corporation read as follows:

Suggestion Approved clause

10. Financial Viability of CTCs:

10. Financial Viability of CTCs:

10.1 The first party can invite various companies or organisations to put up the advertisements of their products, services on CTCs as per guidelines.

10.1 The first party can invite various companies or organisations to put up the advertisements of their products services on CTCs as per guidelines. Advertisement revenue may be shared as per mutual consent between first and second party on complex-to-complex basis to be decided by the competent authority. Further second party shall extend full cooperation and shall bear necessary charges for the watch and ward and other expenses like electricity charges etc. However, any motivational public concern slogans and advertisements write ups by the first party shall be put up on site on complimentary basis and NGO's shall extend full requisite cooperation and care. No case, NGO will be allowed to put any advertisement board, bill board, kiosk or banner etc. at the toilet complex. Any breach of this clause shall be liable to termination of contract.

45. In the event of a default by a successful NGO, the terms and conditions stipulated a forfeiture clause of the amount of Rs. 15,000/- earlier deposited as well as the 25% amount deposited after the bidder was successful. The NGO/agency was also required to deposit license fee for the next quarter in advance and within 15 days before the completion of the quarter. In case of default in payment of the license fee after 15 days of the next quarter, it was stipulated that interest would be charged at the rate of 18% per year which would be recoverable from the security deposit. In case of failure to deposit license fees for two consecutive quarters, license fees would be recovered from the security deposit and the MCD had the authority to take action to rescind the agreement and withdraw the CTCs from the NGO for further operation, maintenance and management after a seven day notice.

46. The agency/NGO was required to deposit a further amount of Rs. 35,000/- which, together with the amount of Rs. 15,000/- deposited earlier to participate in the auction, was to constitute the security deposit which amounted to a total of Rs. 50,000/- for each group of the CTC.

47. Assessment of loss caused to the CTC was to be at the instance of an officer not below the rank of executive engineer (civil/electrical) and the MCD was entitled to deduct this amount also from the security deposit.

48. The terms and conditions stipulated that the CTC was required to be comprehensively insured for several contingencies. Initially, comprehensive insurance was required to be effected by the MCD for which the requisite amount of premium was to be debited to the NGO/agency.

49. In view of the vehement submissions made on either side in respect of the operation worthiness of the CTCs, it becomes necessary to notice the stipulations with regard to the handing over and mobilisation period of the CTC. This was provided in Clause 6 of the terms and conditions of allotment which reads as under:

6. Handing over and mobilisation period

The first party shall hand over possession of the complex along with inventories to the Second party after deposit of entire Security Deposit and license fee according to the availability of the complex within the group & balance complexes to be handed over by 25.06.2002. The second party shall be given 7 days time by the first party to mobilise his resources for starting the operation, management and maintenance. The obligation of the Second party for the maintenance shall be reckoned after 3 days from the date of handing over the complexes by the first party to the second party.

50. The terms and conditions further contained certain "Special Conditions". These included Special Condition No. 14.4 which reads as under:

14.4. The second party shall hand over the units in the operational condition to the first party at the time of completion/termination of the agreement. For any defects and deficiency at the time of transfer, the cost shall be recovered from the Security deposit of the Second party.

51. It would therefore appear that the use of the expression "availability of the complex" would show that the complex was to be handed over in a condition which would have enabled the NGO/agency to commence operation, management and maintenance of the same.

52. The CTCs were required to be operated and maintained on "pay and use" basis by utilising the money collected by the NGO/agency by way of collection on a monthly payment as per the following slab system if any family wanted a family coupon:

(i) Single user : Rs. 25/-

(ii) Family of 2 adults : Rs. 50/-

(iii) Family of 3-4 adults : Rs. 75/-

(iv) Family of 5 & above adults : Rs. 100/-

In case of any adult user not availing the monthly payment system, the user charges were fixed at Rs. 1/- while children below the age of 12 years were permitted free use of the WC and the bath facility. Each user was required to be supplied a teaspoonful of soap powder for washing after defecation without any additional charge.

The NGOs/agencies were completely prohibited from putting up any advertisement on the CTC complex by Clause 10 of the terms and conditions which has been reproduced above.

53. Day to day repairs of the fittings and fixtures and other systems at the CTC was also the responsibility of the agency. MCD was specifically authorised and empowered to inspect the CTCs at any time. Additionally, as per Clause 17, MCD was mandated to nominate an agency to monitor the functioning efficiency of the CTC managed by the NGO which would also have the right to inspect the premises at any point of time.

54. So far as its satisfaction with the performance by any of the NGOs/agencies was concerned, condition 15.5 provided that in case of unsatisfactory condition prevailing for more than 7 days, a 7 days notice shall be served upon the NGO for maintaining satisfactory improvement failing which the contract was liable to be rescinded. The MCD also reserved the right to effect the necessary improvement at the risk and cost of the second party.

It is therefore apparent that the MCD had taken care of every aspect of the operation and maintenance of the CTCs while notifying the terms and conditions.

Operation & utilisation of the CTCs, interaction with MCD officers

55. The importance of this sixth category of CTCs cannot be adequately emphasised. It was as one of the prime measures to contain the level of pollution in the River Yamuna, that the MCD constructed these 959 CTCs under the what has been called as the "Yamuna Action Plan" through private contractors and carefully decided to allot the same through competitive bidding on terms and conditions decided after detailed and cautious deliberations which also involved revenue generation and monitoring in public interest.

56. What transpired thereafter has to be examined in the light of this background. All the petitioners have made a grievance that the MCD did not appoint any agency in terms of Clause 17 for monitoring the operation and maintenance. They only continued with the Field Monitors who had been nominated prior to the construction of the CTCs being undertaken. MCD also did not serve any kind of notice in terms of Clause 15.5 upon any of the NGOs/agencies.

57. It now becomes necessary now to examine as to the manner in which some of the petitioners who participated in the auction were treated and their experience.

M/s Bhagwati Foundation, writ petitioners in W.P.(C) No. 10685/2004 participated in the auction which was held in May, 2002. By a letter of 10th June, 2002, M/s Bhagwati Foundation was informed that it was successful in being allotted group No. 69 of CTC in the Civil Line Zone which consisted of 180 WCs and 9 CTC complexes and 180 WCs at different locations for a period of three years. One Mr. Rahul Priyadarshi had been nominated as the Field Monitor.

It made the deposit of Rs. 51,300/- and Rs. 1,88,900/- towards the security and the license fee, by the letter dated 10th June, 2002.

Upon an inspection of the group 69 CTCs which were allotted to it, M/s Bhagwati Foundation informed the MCD by a letter received by it on 21st June, 2002, that it had deposited the security deposit as well as the license fee at the place of the auction and that MCD was bound to hand over the CTCs to M/s Bhagwati Foundation up to 26th June, 2002 in complete condition. The CTCs of group No. 69 were stated to be full of deficiencies on the civil and electrical side and M/s Bhagwati Foundation had informed MCD even prior to the receipt of the possession that the material used in construction of the CTCs was not up to mark and would not stand or be durable even for a period of one year.

58. There does not appear to have been any response to this communication by the MCD but by a letter dated 13th August, 2002, MCD informed M/s Bhagwati Foundation that 9 CTCs which were covered under group 69 were handed over to it and called upon the successful bidder to execute the agreement within seven days of the communication. M/s Bhagwati Foundation addressed a letter dated 25th September, 2002 reminding MCD about the joint inspection which was conducted on 8th August, 2002 in the presence of the local councilor and the engineering department of the MCD. This letter was addressed to the Executive Engineer(CSC)/XII/CLZ of the MCD and it clearly stated that the joint inspection committee had found defects in the civil and electrical works which were not even complete and most of the work was still pending. All the nine toilet complexes could not be commissioned and the Bhagwati Foundation could not undertake the maintenance work in these CTCs which were still closed on account of the deficiencies. According to the Bhagwati Foundation, it had taken possession subject to rectification, renovation and repair which were pointed out during the inspection. The petitioner requested the MCD to direct the concerned contractor in this behalf. The petitioner had pointed out that the engineering department of the MCD had participated in the joint inspection. Even as late as on 24th December, 2002, no steps had been taken by the MCD and M/s Bhagwati Foundation pointed out that several joint inspections had been organized together with the field monitor but of no avail. This communication was addressed by the petitioner to the deputy commissioner of the zone with copies to the OSD, YAP, Executive Engineer as well as the concerned superintending engineering. The petitioner thereafter wrote a letter dated 23rd January, 2003 to the OSD, YAP and a letter dated 10th March, 2003 to the

Additional Commissioner, Slum and JJ Department of the MCD pointing out the defects and the urgency in effecting the repairs in the civil and electrical work which was essential for the maintenance and operation of the CTCs. The petitioner undertook that he would deposit the license fee as soon as the electrical and civil work was complete and the CTCs were rendered functional.

Despite the MCD not paying any heed to these requests, M/s Bhagwati Foundation contended that it deposited a further amount of Rs. 91200/- towards the license fee by a letter dated 13th August, 2003 again pointing out detailed deficiencies in the 9 CTCs and that both the electrical and civil work was totally incomplete. The petitioner wrote that the civil work has not been done and the septic tank was found full of malba, electric meter was not provided and where it had been provided, the meter was defective. The caretakers room had not been constructed and therefore the contractor had refused to hand over keys of the CTCs to the petitioner. As such the CTCs remained closed and non-functional. Other old dilapidated CTCs in the vicinity of the petitioner CTCs had to be demolished as the public continued to be utilizing these CTCs illegally and unauthorisedly. However, the MCD has taken no steps to remove these old and dilapidated CTCs.

59. In its writ petition, the petitioner has also pointed out the minutes of several meetings which were held and assurances were given by the MCD and its officials that license fee would be charged not from the date when the CTCs were provided but from the date the defects were removed and the complexes rendered functional. In the meeting which was held on 9th July, 2003, the petitioner had pointed out that the flooring in two complexes of the CTCs in group No. 69 had settled besides other defects and deficiencies. In the complex at Lalbagh, only one room had been provided in which the generator had been installed while there was no place for the caretaker or the safai karamchari. No ventilation system has been provided while the efflux from the bathroom and the toilet had not been connected to the septic tank as a result of which this tank was choked. Other CTCs allocated to the petitioner were also situated in institutional areas in respect of which the MCD had taken a decision to hand over the same to the institutions.

60. As noticed above, the field monitors who were appointed by the MCD had been specifically assigned to the CTC complexes for facilitating the communication between the NGO operator and the Municipal Corporation of Delhi.

61. On 23rd January, 2003, Bhagwati Foundation addressed yet another communication emphasisng the urgency to remove the deficiencies and pointing out a complex wise position with regard to the works necessary in the civil and electrical areas. This time, the Bhagwati Foundation addressed the letter to the OSD(YAP) of the S & JJ Department of the MCD with copies to the Deputy Commissioner, Executive Engineer (Project) Civil and the Executive Engineer(Project) Electrical of the MCD. Bhagwati Foundation also made a request for an agreement incorporating the objections of the petitioner with regard to the deficiencies and pointed out that different executive engineers in the MCD were furnishing different conditional agreements with different NGOs. Yet another letter dated 10th March, 2003 was addressed this time to the Additional Commissioner of the Slum & JJ Department of the MCD pointing out that despite repeated requests and intimations, the initial deficiencies in the CTCs were still pending and that the same had not been removed. Bhagwati Foundation pointed out that this was despite deposit of the license fee for the quarter and that the CTCs were non-functional.

62. Noteworthy is the course of events thereafter wherein the MCD appears to have admitted several aspects of the situation. A meting was held on the 2nd July, 2003 in the office of the Additional Commissioner, Slum & JJ under his chairmanship with officers of the General Wing, Slum & JJ Wing and the operating and maintenance agencies that is the NGOs wherein the field monitors also appear to have participated. These minutes were circulated to all the stake holders by a communication dated 11th July, 2003. The observations and decisions in this meeting deserve to be considered in extenso which were to the following effect:

1. Addl. Commissioner (S&JJ) asked the NGOs that whether they are maintaining the records of the users coming to use the complex or not and it was found that all the NGOs are not keeping any record of the users.

Addl. Commissioner (S&JJ) mentioned that as per terms and conditions of the Agreement NGOs are supposed to keep the record of the users and asked the NGOs to keep the record of the users using the complexes. It was decided that concerned Junior Engineer/Assistant Engineer and Field Monitors will check the records maintained by the NGOs and will sign the register/record maintained by the NGO to certify the correctness of the records.

2. It was mentioned by the NGOs that in the earlier meeting convened by former Addl. Commissioner (S&JJ), Sh. Ramesh Negi. It was assured that the license fees will be charged from the date on which all the facilities like permanent electric connections, tubewells are provided defects/deficiencies are removed and the complexes are made functional. Addl. Commissioner (S&JJ) asked OSD (YAP) that whether such decision taken in any meeting and it was mentioned by OSD(YAP) all the letters received from NGOs have already been forwarded to the concerned Executive Engineers and reminders have also been sent but no action has been taken by them. Addl. Commissioner (S&JJ) asked OSD (YAP) to put up all the letters of the NGOs and he will take action against the executive Engineers who are not taking action to sort out the issue.

3. It was mentioned by the NGOs that there are various defects/deficiencies in many complexes for which they have been regularly writing letters to the concerned executive engineers with a copy to OSD (YAP) but no action has been taken so far for removing the defects/deficiencies. It was mentioned by OSD(YAP) all the letter received from NGOs have already been forwarded to the concerned Executive Engineers and reminders have also been sent but no action has been taken by them. Addl. Commissioner (S&JJ) asked OSD(YAP) to put up all the letters of the NGOs and he will take action against the Executive Engineers who are not taking action to sort out the issue.

4. Addl. Commissioner (S&JJ) asked the NGOs that why they are not depositing the license fees, which is outstanding for three quarters and it was mentioned by the NGOs that license fees has been charged from the date on which the complexes were handed over to them and at that time there were many defects/deficiencies in the complexes and permanent electric connections, tube well connection, etc. were also not provided to which complexes were not made functional from the date of handing over. Some complexes were made functional on the date when the defects/deficiencies were removed some complexes have not been made functional till now because of non-availability of electricity, water, no user, etc. and the license fees has been charged for all the complexes from the date of handing over. It was mentioned by the NGOs that they are ready to deposit the license fees for the complexes, which are functional and it was mentioned by the Addl. Commissioner (S&JJ) that the complexes can be made functional without electric connections, as DG sets have been provide at all the sites. Addl. Commissioner (S&JJ) asked the NGOs to deposit the license fees except for complexes where water connections have not been provided from the date of functioning of the complex and not from date of handing over of complexes and the date of functioning and number of complexes functioning will be certified by the concerned Executive engineer until the matter is finally sorted out.

5. It was mentioned by the NGOs that in spite of letters to the Executive Engineer concerned suction cleaning machines are not provided at sites to clean the septic tanks and as a result of which complexes are not operational. It was decided to take up the matter with Director in Chief, CSE Department.

6. Addl. Commissioner (S&JJ) asked Chief Engineer (S) about the position of 218 complexes pertaining to Slum & JJ Department and it was mentioned by the Chief Engineer S(S) that in the complexes pertaining to Slum & JJ department the problem is of electricity and water and in most of the cases defects/deficiencies as pointed out by the NGOs have been addressed to and the 6 Nos. of Suction Cleaning Machines procured by Slum & JJ Department are being used regularly. It was decided that Chief engineer (S) will have regular review meetings with the executive Engineers of Slum & JJ Department to sort out all the issues of rectification of defects/deficiencies such as electric connection, tube well payment of license fees, electricity bill and insurance charges and will submit a report to the Addl. Commissioner(S&JJ).

7. It was mentioned by OSD(YAP) that NGOs are not mobilizing the public to use the CTC facility and are not convening monthly meeting with the local residents as per terms and conditions of Auction Agreement. It was mentioned by one NGO that they are mobilizing the public and convening meeting with the local residents, but even then they are not ready to use the CTC facility. It was also pointed out by the NGOs that some complexes have been constructed at the places such as Tihar Jail, Shamshan Ghat where there was no requirement and at places like Mangolpuri, Sultanpuri, etc. complexes have been constructed in cluster where there are no users. Besides people are doing open defecation as there is plenty of vacant place near the CTCs.

8. It was mentioned by the NGOs that in the earlier meeting held under the Chairmanship of FA(S) it was assured that 66 old complexes, which are in dilapidated condition and are functioning un-authorisedly in the nearby vicinity of new complexes constructed under Yamuna Action Plan are to be demolished as these are also affecting the functioning the New complexes and hence some of the new complexes are kept closed. So far no action has been taken in demolishing the old dilapidated complexes.

9. Addl. Commissioner (S&JJ) asked the NGOs why they have not deposited the electricity bills and it was mentioned by the NGOs that they received the electricity bill for the previous period also on which the complexes were not handed over to them. NGOs were asked to deposited the electricity bill for period pertaining to them. Addl. Commissioner (S&JJ) asked the executive engineers to look into the matter and get the electricity bills deposited by them and take action against the NGOs not depositing the electricity bill and if action is not taken by the executive engineer concerned well in time, they will be held responsible for this and action will be taken against the concerned Executive Engineer including deduction from their salaries.

63. As per the decisions which were taken in this meeting, several actions were proposed to be taken by the parties. So far as the Chief Engineer (Slums) was concerned, he was required to undertake the following:

Chief Engineer (S) -

(1) To convene a meeting with the executive Engineers (C/E) of Slum & JJ Department to have detailed discussions with respect to -

(a) Removal of defects/deficiencies in all the complexes.

(b) Functioning of all the CTCs under each executive Engineer.

Importantly, what was to be undertaken by the NGOs is the following:

(1) To deposit all the electrical bills received from the DISCOMs and send copies of the receipt to the Executive Engineer(C/E) concerned

(2) Payment of up to date license fees as per terms and conditions of auction agreement especially of the CTCs, which are functioning as per the certification by the Executive Engineer concerned.

(3) Payment of insurance premium on early basis immediately

(4) Report of the actions initiated by them with regard to public awareness programmes, display board, etc. as decided in the meeting and as required as per terms and conditions of the auction Agreement.

The Executive engineers of the MCD were required to inter alia ensure the following:

3. To remove all the defects/deficiencies in the construction of CTCs if any in order to see that the CTCs function properly including making arrangement for the sewerage cleaning machines from CSE Department immediately on receipt of any request from the NGOs.

4. To see that the formal Agreements are signed by the NGOs and if not, matter should be reported immediately.

64. The meeting was comprehensive and even the field monitors were required to undertake several specific measures including:

2. To report about difficulties faced by the NGOs to the concerned in Executive Engineers and see that the actions are taken by the Executive Engineers concerned in time.

3. To report regarding the payment of license fees, installment of insurance premium, payment of electricity bills by the NGOs.

Copy of these minutes were sent by the OSD of the Yamuna Action Plan to the Secretary to the Commissioner of the MCD as well as the Additional Director of the Ministry of Environment and Forest besides all the other participants.

65. The petitioners have vehemently urged that the concerned officials had repeatedly required the NGOs to deposit license fee only for such complexes which were functional. In this behalf, the minutes of the several meetings after the above which were held between all the stake holders including the competent authorities of the Municipal Corporation of Delhi have been placed before this Court.

(I) Again in the meeting held on 9th July, 2003 again under the chairmanship of the Additional Commissioner of the Slum and JJ Wing which were circulated by the communication dated 13th August, 2003 wherein amongst others, the following was discussed and directed and decided:

(2) Addl. Commissioner (S&JJ) asked the NGOs that why they are not depositing the license fees, which is outstanding for three quarters and it was mentioned by the NGOs that license fees has been charged from the date on which the complexes were handed over to them and at that time there were many defects/deficiencies in the complexes and permanent electric connections, tube-well connection, etc. were also not provided due to which complexes were not made functional from the date of handing over. Some complexes were made functional on the date when the defects/deficiencies were removed some complexes have not been made functional till now because of non-availability of electricity, water, no user, etc. and the license fees has been charged for all the complexes from the date of handing over. It was mentioned by the NGOs that they are ready to deposit the license fees for the complexes, which are functional and it was mentioned by the Addl. Commissioner (S&JJ) that the complexes can be made functional without electric connections, as DG Sets have been provided at all the sites. Addl. Commissioner (S&JJ) asked the NGOs to deposit the license fees except for complexes where water connections have not been provided from the date of functioning of the complex and not from date of handing over of complexes and the date of functioning and number of complexes functioning will be certified by the concerned Executive Engineer.

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4. It was mentioned by the NGO of Group No. 70 that in 2 complexes of his group at Kodiapul and LNJP Hospital sewer connections have not been made due to which the sewer line is getting chocked and as a result of which the complexes are kept closed most of the time. It was also mentioned by the NGO that there are no women users in this area and requested for some concession in the license fees for these complexes and it was mentioned by the Addl. Commissioner (S&JJ) that any concession in the license fees for these complexes cannot be considered as the NGO has taken these complexes in the auction after inspecting the sites. Letter of defects/deficiencies was handed over in the meeting by the NGO. Addl. Commissioner (S&JJ) mentioned that he himself will inspect the site as the NGO was expressing lots of difficulties and the Field Monitor concerned was asked to give the report of this group.

5. It was mentioned by one of the NGO that in Mangolpuri 10 complexes have been constructed in cluster and there are no users. Addl. Commissioner (S&JJ) asked the NGO to show the record/register of daily users coming to use the complex and it was found that the NGO has not kept any record/register of daily users. Addl. Commissioner (S&JJ) asked the NGO to maintain the record/register of daily users and present before him duly signed by concerned Assistant Engineer/Junior Engineer/Field Monitor then only his case can be considered.

6. It was mentioned by the NGO of Group No. 1 that till date 1 complex at Delhi Zoo has not been handed over to him and Delhi Zoo Authorities have been saying that they will operate this complex. It was decided by the Addl. Commissioner (S&JJ) to take back this complex from the NGO and hand over to Delhi Zoo Authorities for operation and maintenance and the license fees of this complex will be returned to NGO. It was also mentioned by the NGO that in 2 complexes at Sarai Kalen Khan and ISBT electric connections have not been provided and he has to run these complexes through DG Set, which costs higher than the electric connections. It was decided to work out the difference between the functioning complexes through electric connection and DG set and the difference of amount will be adjusted in the license fees of the NGOs.

7. It was mentioned by the NGO of Group No. 35 that in all complexes of his group there is electrical problem and Panel Board at S-Block Near Bus Stand has not been fixed. It was decided that concerned Field Monitor co-ordinate with the Executive Engineer concerned to get these issues resolved.

8. It was mentioned by the NGOs that in the earlier meeting held under the Chairmanship of FA (S) it was assured that 66 old complexes, which are in dilapidated condition and are functioning un-authorisedly in the nearby vicinity of new complexes constructed under Yamuna Action Plan are to be demolished as these are also affecting the functioning the New complexes and hence some of the new complexes are kept closed. So far no action has been taken in demolishing the old dilapidated complexes.

At the end, the following conclusion was arrived at:

Addl. Commissioner (S&JJ) clearly mentioned that these meetings are being arranged with the NGOs in groups Along with Executive Engineers to understand the actual situations so that the problems can be crystallised and necessary recommendations could be forwarded as found suitable to the Competent Authority before implementation is carried out. He also mentioned very clearly that the discussions during these meetings should not be construed as decisions taken, since the Competent Authority for this is the Commissioner/Hon'ble Standing Committee of MCD. He further reiterated that whatever decisions taken will not be applicable with retrospective effect.

It is noteworthy that even till the commencement of hearing, the position regarding the details noticed in para No. 2 above was not available with the MCD.

MCD has placed no material of any certifications by its executive engineers as to the functionality of the CTCs.

66. Yet another meeting was held on 10th July, 2003, minutes whereof were also circulated on 13th August, 2003 wherein also the following issues were discussed and decisions taken inter alia:

(2) Addl. Commissioner (S&JJ) asked the NGOs that why they are not depositing the license fees, which is outstanding for three quarters and it was mentioned by the NGOs that license fees has been charged from the date on which the complexes and permanent were handed over to them and at that time there were many defects/deficiencies in the complexes and permanent electric connections, tube-well connection, etc. were also not provided due to which complexes were not made functional from the date of handing over. Some complexes were made functional on the date when the defects/deficiencies were removed some complexes have not been made functional till now because of non-availability of electricity, water, no user, etc. and the

license fees has been charged for all the complexes from the date of handing over. It was mentioned by the NGOs that they are ready to deposit the license fees for the complexes, which are functional and it was mentioned by the Addl. Commissioner (S&JJ) that the complexes can be made functional without electric connections, as DG Sets have been provided at all the sites. Addl. Commissioner (S&JJ) asked the NGOs to deposit the license fees except for complexes where water connections have not been provided from the date of functioning of the complex and not from date of handing over of complexes and the date of functioning and number of complexes functioning will be certified by the concerned Executive Engineer until the matter is finally sorted out.

(6) It was mentioned by the NGOs that there are various defects/deficiencies in many complexes for which they have been regularly writing letters to the concerned Executive Engineers with a copy to OSD (YAP) but no action has been taken so far for removing the defects/deficiencies. It was mentioned by OSD (YAP) all the letters received from NGOs have already been forwarded to the concerned Executive Engineers and reminders have also been sent but no action taken report has been sent by them. Addl. Commissioner (S&JJ) asked OSD(YAP) to put up all the letters of the NGOs and he will take action against the Executive Engineers who are not taking action to sort out the issue.

(7) It was mentioned by one of the NGOs that the complexes of his group have been constructed in Bhalaswa where there are no users due to non-shifting of population and mentioned that he cannot operate these complexes and has already written letters to the concerned Executive Engineer for surrendering the group, but no action has been taken so far by the Executive Engineer for taking over of complexes. NGO was asked to write a letter to OSD(YAP) for surrendering the group and license fees for these complexes will be returned to the NGO or complexes will be allotted when the population is shifted there.

(8) It was mentioned by the NGO that in Jahangirpuri women users are not paying the user charges as they were using the old complexes free of cost. It was also mentioned by the NGO that there are electrical problems in almost all the complexes of this group and the Warrantee card and other documents of DG Set, Submersible Pump, Motors, Fans have not been handed over to him. It was decided to hand over the warrantee card and other documents to the NGO.

(9) It was mentioned by the NGO of Group No. 69 that flooring in 2 complexes of his group have settled and there are various other defects/deficiencies in almost all the complexes. Field Monitor concerned was asked to give the report of this group in writing. It was also mentioned by the NGO that in the complex at Lal Bagh only 1 room has been provided in which Generator has been installed and there is no space for the Caretaker and the Safai Karamchari and the ventilation system has also not been provided. It was decided to provide the ventilation system in the room and install the generator outside the room. It was also mentioned by the NGO that the water of the bathroom and the toilet both have been connected to the septic tank as a result of which the septic tank is getting chocked.

(10) It was mentioned by the same NGOs that other complexes have also not been completed and there are various defects/deficiencies in the complexes, which have not been rectified so far. It was mentioned by the Assistant Engineer concerned that the Contractors are not turning up for completing these works as the defects and liability period is over. It was mentioned by Chief Consultant (YAP) that the defects and liability period is not yet over, as the completion certificate has not been issued to the contractors. It was decided in the meeting not to release the security deposited by the contractors and any other payment due to him and issue the notice to the contractor for getting these defects/deficiencies rectified.

(11) After discussing with the NGOs it was found that NGOs are facing various difficulties and the Addl. Commissioner (S&JJ) asked the NGOs to choose 4-5 Representatives out of them and a meeting of them will be fixed with the Commissioner, MCD so that the Commissioner can also be apprised about the position.

67. Minutes of third meeting held on 15th July, 2003, which were also circulated on 13th August, 2003 have also been annexed with the writ petition. This meeting also notes the discussion and the decision that the NGOs should deposit the license fee except for complexes where water connections have not been provided from the date of functioning of the complex and not from the date of handing over of the complexes; that the date of functioning and number of complexes functioning would be certified by the concerned Executive Engineer until the matter is finally sorted out. This meeting also notices various defects and deficiencies which went to the root of the functioning of the CTCs including the fact that civil and electrical defects which were pointed out including lack of permanent electric connection, non-functional tubewells and lack of water facilities etc. As late as on 15th July, 2003, this meeting, amongst other defects, notices the following:

(12) It was mentioned by the NGO of Group No. 74 that 1 complex at Bazar Sita Ram has not been completed so far, at Kharia Mohalla sewer connection has not been done, at Motia Khan bore is failed, at Nabi Karim electric connection has not been provided and the complex at DCM Near Police Booth has been occupied by some illegal persons and the Police is also not intervening in the matter. Executive Engineer concerned was asked to get all these issues resolved.

(13) It was mentioned by one of the NGO that in 1 complex at Slaughter House blood is coming along with water from the bore and the complex is closed due to un-sanitary condition. Field Monitor concerned was asked to visit the site and give the report in writing of this complex.

(15) It was mentioned by the NGOs that in the earlier meeting held under the Chairmanship of FA (S) it was assured that 66 old complexes, which are in dilapidated condition and are functioning un-authorisedly in the nearby vicinity of new complexes constructed under Yamuna Action Plan are to be demolished as these are also affecting the functioning the New complexes and hence some of the new complexes are kept closed. So far no action has been taken in demolishing the old dilapidated complexes.

68. The extent and manner of the problem faced is to be found in what is noticed in para 11 of the meting dated 15th July, 2003 wherein it is noticed thus:

(11) It was mentioned by the NGO of Group No. 24 that in 3 complexes high-tension wires of 33000 watts are going above the 2 complexes due to which an accident has taken place in which 2 children have died and these complexes cannot be made operational and requests have also been made for surrendering these complexes. Addl. Commissioner (S&JJ) asked the NGO to give a request in writing duly certified by the Executive Engineer/Field Monitor concerned. Field Monitor concerned was asked to give the report of these complexes.

So far as the payment of the license fee was concerned, the minutes of this meeting which were circulated recorded thus:

(10) It was mentioned by the NGOs that in the earlier meetings convened by former Addl. Commissioner (S&JJ), Sh. Ramesh Negi and Sh. V.K. Singh, it was assured that the license fees will be charged from the date on which all the facilities like permanent electric connections, tube-wells are provided, defects/deficiencies are removed and the complexes are made functional. Addl. Commissioner (S&JJ) mentioned that he is not the Competent Authority for giving moratorium/concession in the license fees and Commissioner/Chairman, Standing Committee is the Competent Authority and he will send his recommendations to the Competent Authority and mentioned that if these recommendations are approved then also it will be applicable from that date and not from the back date.

A stipulation was noticed as a conclusion wherein it was mentioned so:

Conclusion

Addl. Commissioner (S&JJ) clearly mentioned that these meetings are being arranged with the NGOs in groups along with Executive Engineers to understand the actual situations so that the problems can be crystallised and necessary recommendations could be forwarded as found suitable to the Competent Authority before implementation is carried out. He also mentioned very clearly that the discussions during these meetings should not be construed as decisions taken, since the Competent Authority for this is Commissioner/Hon'ble Standing Committee of MCD. He further reiterated that whatever decisions taken will not be applicable with retrospective effect.

69. There appears to have been no change whatsoever in the ground position and the minutes of the meeting held on 17th July, 2003 again under the chairmanship of the Additional Commissioner (Slum & JJ) noticed all the above including the directions by the Additional Commissioner (Slum & JJ) to deposit the license fees except for complexes where water connection have not been provided from the date on which the complexes were rendered functional. The meeting notices that toilet complexes had been constructed at places as the Tihar Jail, Samshan Ghat where there was no requirement; at locations as at Mangol Puri, Sultan Puri etc. It was noticed that these CTCs were constructed in such clusters for which there were no users beside the defects and deficiencies which were not being removed despite regular letters to the concerned Executive Engineer. The minutes record that the executive engineer would report on the matter and that action would be taken against defaulting executive engineers.

70. Despite the specific responsibility imposed on the executive engineers, not a single report from any official of the MCD with regard to any step taken to remove any of the deficiencies pointed out has been placed before this Court. In addition to the above, the following specific instances have also been noticed in these minutes:

10. It was mentioned by the NGO of Group No. 47 that 1 complex of this group has been constructed in the corner of DDA Park and the approach road for this complex has not been provided. Executive Engineer assured that he will provide the approach road for this complex.

11. It was mentioned by the NGO of group No. 88 that 1 complex of his group has been constructed in the nearby vicinity of 2 old complexes, which have been handed over to CBOs who are charging less from the users, which is affecting the users to his complex. Executive Engineer concerned was asked to give the report of this complex.

12. It was mentioned by one of the NGO that in complex at Sarai Rohilla approach road has not been provided. Executive engineer, CD (S) - II assured that he will provide the entrance to this complex from the main road.

13. It was mentioned by the NGOs that the electricity in the Community Toilet Complexes is charged on the basis commercial tariff, which is very much high and this should be charged on the basis of residential tariff and requested that Department should take up the matter with Electricity Authorities. Addl. Commissioner (S&JJ) mentioned that he will write a letter to Electricity Authorities, but it is not sure that it will be done or not.

14. It was mentioned by the NGO of Group No. that in complex at Palam septic tank has been provided at a very low level due to which it is getting chocked and it will not be possible for him to it cleared every time. Executive Engineer concerned was asked to get in touch with CSE Department and provide sewer cleaning equipment for getting the septic tank.

15. It was mentioned by the NGO of Group NO. 565 that there are various defects in almost all the complexes of his group such as flooring settled down, sewer line not connected, seepage. Executive engineer concerned was asked to look into the matter and submit the report of these complexes.

16. It was mentioned by one of the NGO that in complex at Jai Bharti Camp East Vinod Nagar sewer line has not been connected with main sewer line as the main sewer the line is chocked. Executive Engineer mentioned that the matter is pursued with DJB Addl. Commissioner (S&J) asked the Executive Engineer to give the report of this complex to OSD (YAP) so that the matter is pursued with DJB.

17. It was mentioned by the NGO of Group No. 48 that he cannot operate the complexes of his group and wanted to surrender the group for which he has been writing letters from August Addl. Commissioner (S&JJ) asked the NGO to give a request letter or surrendering the group.

18. It was mentioned by the NGO of Group No. 5 that 6 complexes of his are not functioning as the water and electric connections have not been provided in these complexes Field Monitor concerned mentioned that it comes under unelectrified area. Executive Engineer/Field Monitor concerned was asked to give the report of these complexes.

19. It was mentioned by one of the NGO that complex of his group near Gagan Cinema was constructed for the Subzi Mandi proposed to be shifted there, but till that Subzi Mandi has not been shifted there and there are no users in that area as a result of which the complex is not functioning. NGO was asked to give it in writing duly certified by Executive Engineer concerned.

20. It was mentioned by the NGO of Group No. that out of complexes are not functioning and generators have not been made functional till date for which he has written various letters, but nothing has been done so far and license fees for the complexes which are functional have already been deposited. Executive Engineer (E) concerned was asked to look into the matter and get the matter resolved. Executive engineer (E) mentioned that Caretakers does not operate the generators property and NGOs were asked to provide the trained caretakers who can operate the generators properly.

21. xxxx

22. It was mentioned by one of the Executive Engineer that the NGO of Group No. 60 has taken over some complexes of his group and he is not ready to take over the remaining complexes. It was mentioned by the NGO that there are various defects/deficiencies in the complexes and there are no users also in the area and requested for surrendering the remaining complexes, which have not been taken over by him. Executive Engineer concerned was asked to give the report of these complexes.

71. In another meeting held on 18th July, 2003, further difficulties which were recorded were to the following effect:

7. It was mentioned by the NGO of Group No. 63 that in Jahangirpuri he is receiving the electricity bills for the complexes which are not functioning and requested to cut the electric connections of these complexes. Addl. Commissioner (S&JJ) asked the NGO to give his application in writing duly certified by executive Engineer/Field Monitor concerned.

8. It was mentioned by the NGO of Group No. 76 that in Pandav Nagar Complex boring has been failed on 17th October, 2002 and motor has been brunt, which has not been rectified till date. NGO was asked to get the motor repaired and the expenditure incurred on repairing will be adjusted in his license fees and the expenditure will be certified by Executive Engineer concerned.

9. It was mentioned by one of the Executive engineer that in Majnu Ka Teela complex NGO has kept the material of tent house, rickshaws, etc. Addl. Commissioner (s&JJ) mentioned that NGO s should not do these types of activities and operation and maintenance should be in accordance with terms and conditions.

10. It was mentioned by the NGO, M/s Kaitihar District Sulabh Shauchalaya Sansuthan that he has made various requests to the department for deduction in license fees or surrendering the complexes as there are no users in the area and mentioned that he can operate these complexes @ Rs. 80/- per w.e. Addl. Commissioner (S&JJ) asked the NGO to give it in writing duly certified by the executive Engineer.

11. It was mentioned by the NGO of Group No. 75 that at 4 complexes permanent electric connections have not been provided due to un electrified area and 1 double storey complex at Anand Parbat is closed due to electric wires passing over the complexes and he is ready to operate the ground floor complex. It was mentioned by the Assistant Engineer concerned that the matter has been pursued with Electricity Authorities for removing the electric wires.

12. It was mentioned by one of the NGO that in Narayana, ZA-Block 2 complexes are not functioning due to sewer line chocked. It was mentioned by the executive Engineer concerned that the matter was taken up with DJB, but till date the issue has not been sorted out.

13. It was mentioned by the NGO of Group No. 46 that in 1 complex at Trilokpuri boring has been failed due to which the complex is closed and the theft has taken place in the complex and the Insurance Company need some documents for reimbursing the same but the same has not been provided by the Department. It was mentioned by the Field Monitor concerned that DG set has been stolen from the complex and law and order situation is very bad in this area. It was mentioned by OSD (YAP) that the letter of the NGO has been forwarded to the Executive Engineer concerned for providing the necessary details.

14. It was mentioned by one of the NGO that in A-Block, wazirpur complex of Division XVII approach road has not been provided in some complexes septic tanks are chocked and in some complexes sewer connection has not been made and the license fees for these complexes have already been deposited. Field Monitor concerned was asked to get in touch with executive engineer concerned for providing sewer cleaning machines for the complexes where septic tanks are chocked and getting all other issues resolved.

15. It was mentioned by one of the NGO that in Wazirpur Industrial Area complex rickshaws and other material have been kept of the Contractor who has constructed the complex. Executive Engineer Div. - XVI assured that these materials will be removed with 2 or 3 days.

16. It was mentioned by the NGOs that in the earlier meeting convened by former Addl. Commissioner (S&JJ). Sh. Ramesh Negi, it was assured that the license fees will be charged from the date on which all the facilities like permanent electric connections, tube wells are provided, defects/deficiencies are removed and the complexes are made functional. Addl. Commissioner (S&JJ) asked OSD (YAP) and it was proposed to give moratorium of 90 days but no such decision was taken. Addl. Commissioner (S&JJ) mentioned that he will talk with Sh. Ramesh Nego and will sort out the issue.

17. It was mentioned by the NGOs that in the earlier meeting held under the Chairmanship of FA(S) it was assured that 66 old complexes, which are in dilapidated condition and are functioning un-authorisedly in the nearby vicinity of new complexes constructed under Yamuna Action Paln are to be demolished as these are also affecting the functioning the New Complexes and hence some of the new complexes are kept closed. So far no action has been taken in demolishing the old dilapidated complexes.

18. It was mentioned by one of the NGO that he wants to surrender his group of complexes as he cannot these complexes. Addl. Commissioner(S&JJ) mentioned that, if you want to surrender your group then it should be done in accordance with terms and conditions of auction agreement.

19. xxxx

20. It was mentioned by one of the NGO that 1 complex of his group has been captured by the local councilor. Addl. Commissioner (S&JJ) asked the executive Engineer/Field Monitor concerned to give the report of this complex.

72. The petitioners have placed before this Court even minutes of the review meeting of the Yamuna Action Plan which was held on 22nd January, 2004 under the chairmanship of Shri Naresh Sharma, Additional Secretary, Project Director which was circulated by the MCD along with its letter dated 30th January, 2004. These minutes' record the concern expressed by the Chairman about the non-submission of the audit report even for the year 2002 by the MCD till the date of the meeting on 22nd January, 2004. In the meeting, it was decided that MCD submit the audit report for the year 2002 by 15th February, 2004 and for the year 2003 by 31st March, 2004.

73. This fact by itself speak volumes about the conduct of the officials of the MCD. As late as in January, 2004, even accounts of the year 2002 and 2003 had not been prepared. Obviously, MCD was not in a position to label anyone as a defaulter or to take any kind of action against them up to this date with regard to the CTCs under the Yamuna Action Plan.

74. So far as the other CTCs were concerned, other than 164 CTCs which were the subject matter of the report of the Vishnu Sharma Committee dated 16th September, 1999 and in respect of which the decision dated 23rd March, 2000 had been taken by the then Commissioner, there was no complaint with regard to their operation, worthiness and maintenance.

75. It is noteworthy that there is no answer by the Municipal Corporation of Delhi to any of these issues which were raised by the NGOs. The fact that these problems existed is evident from the very presence of the executive engineers and the field monitors who participated in these meetings. Every meeting records that the executive engineer would report with regard to the position as to the removal of the deficiencies and also take immediate steps. Apart from repeatedly urging that the NGOs were defaulters, no material has been placed by the Municipal Corporation of Delhi before this Court to show that any of the decisions taken during these meetings were implemented. The caution at the end of the record of the minutes appears to have been intended only as a cosmetic protection for the MCD, in the event that the NGOs resorted to any legal action against the Municipal Corporation of Delhi.

76. The MCD has not placed even iota of material before this Court to show that anything was done despite the specific problems which were pointed out in the repeated meetings or action which was to be taken by the executive engineers. No action has been pointed out as having been taken even against the executive engineers who appear to have taken no action in respect of these CTCs or against the contractors despite the specific complaints. Defects admittedly existed. The NGOs were clamouring for their removal. Despite repeated directions by the officials, the concerned Executive Engineers do not appear to have moved an inch.

77. In this behalf, it would be useful to refer to a status report of operation and maintenance submitted by the field monitor appointed by the NGO so far as M/s Bhagwati Foundation, (petitioner in W.P.(C) No. 10685/2004) is concerned. This report has been placed before the court Along with the rejoinder wherein the field monitor has pointed out that the CTC bearing the site code No. 104 was closed due to the septic tank being filled; the CTC at code No. 111 was not functional as Delhi Vidyut Board electricity connection had not been provided; the floor had collapsed in the ladies section; there was no window in the caretaker room; the septic tank was full and had not been connected with the sewer line. The position at the CTC bearing code No. 112 was similar. This report even points out that despite defects in other CTC bearing code No. 997, M/s Bhagwati Foundation was still using it. The defects pointed out by the field monitor in this CTC included seepage in the caretaker room, there was no boundary wall in the back of the complex and there was seepage in the connection between the complex and the septic tank.

What could be the utility of a CTC in which the septic tank was full or of a toilet which was not connected to a sewer line?

78. It is noteworthy that M/s. Bhagwati Foundation has further complained that three complexes which were auctioned and allotted to it, were located in hospitals. Therefore as late as on 3rd January, 2004 problems relating to want of electricity and boring of tube wells for provision of water in the CTCs was still being considered. These minutes were circulated by the letter dated 21st January, 2004 to all concerned.

79. So far as some of the other writ petitions are concerned, W.P.(C) NO. 11865/2004 has been filed by the Himalayan Institute of Pollution Control and Social and Economic Development. This institute successfully bid for 19 CTCs, 9 under the Yamuna Action Plan and 10 under the Slum & JJ Department. According to this writ petitioner, all the 9 CTCs which it had successfully bid for under the Yamuna Action Plan were non-functional when the allocation was made. Out of these CTCs, 8 CTCs were made functional by the Himalayan Institute by spending its own funds. As on 27th January, 2005 out of the 19 CTCs, 18 CTCs were functional, the one CTC which was non-functional was due to non-user and its being situated in an open area in the village. The writ petitioner has contended that the CTCs were made functional by expenditure of substantial funds which was the responsibility of the MCD.

The Himalayan Institute of Pollution Control & Social and Economic Development has contended that the first letter addressed by the MCD to it is on 3rd July, 2004. The petitioner addressed a detailed reply dated 18th August, 2004 giving the status and pointing out that in the minutes dated 11th July, 2003, noticed hereinabove, the MCD had agreed that the payment of license fee would be made after the CTCs are functional.

80. W.P.(C) 11857/2005 has been filed by the Dalit Manav Uthan Sansthan which successfully bid for 18 CTCs under the Yamuna Action Plan. Nine were in a group which was numbered as No. 1 while the remaining 9 were in group No. 50. The petitioner has claimed that all these CTCs were non-functional when allocation was made. The petitioner has made 6 CTCs in each group functional by spending its own funds. As on 27th January, 2005, 11 CTCs are functional while 7 of these are non-functional. The explanation given by the petitioner is that the site of the Rajiv Gandhi Smriti Van became non-functional from 17th August, 2004 due to non-availability of electricity, choking of sewer line and failure of the tube well bore. The zoo site CTC which was allotted to the petitioner was not available at all which has been included in the non-functional CTCs while 5 of the CTCs are non-functional due to there being no sewer line connection, electricity short circuiting and failure of the tube well bore etc.

81. Writ petition being W.P.(C) NO. 12142/2004 has been filed by the Akhil Bhartiya Manav Seva Sansthan which successfully bid for 20 CTCs. Nine of these CTCs formed part of group No. 2, while eleven formed part of group No. 95. At the time when the CTCs were allocated, twenty CTCs were non-functional. The petitioner has claimed that it has successfully made six CTCs in group No. 2 and eight CTCs in group No. 95 functional which brings the total to only thirteen. Therefore, 9 CTCs out of the total of 20 allocated to this petitioner are non-functional. The reason given by the petitioner for the CTCs still being non-functional are for the reason that in three of the CTCs, there is failure of boring in the tube well; one CTC stands encroached upon by the villagers, in one CTC the sewer line is choked apart from other reasons and in two CTCs, no electricity has been provided. Out of these two, it has been stated by the petitioner, that one has still not been handed over.

Therefore, according to the petitioner, none of these causes for the CTCs being non-functional can be attributed to the petitioner.

82. In W.P.(C) 12944/2004 Rajya Jan Vikas Samiti v. Commissioner, MCD and Ors. with an affidavit dated 6th September, 2004, the MCD has filed such handing over, taking over notes wherein in each of these notes, it has been recorded that the power connection and gensets have not been provided as yet. The water sources

in these CTCs was a tubewell.

It is for the MCD to explain as to how these CTCs could be operated and maintained without electricity to run the tubewell. Rightly none has been given.

83. In W.P.(C) 13389/2004 Shakti Jan Sudhar Samiti v. The Commissioner, MCD and Ors., the petitioner has placed reliance on a report of a field monitor to the effect that the MCD had constructed the CTCs behind the slaughters house. There was no water connection the borewell had been provided which when started, instead of water, blood was coming out.

The MCD has failed to reply to these submissions. The petitioner has also placed reliance on the handing over and taking over reports placed before the court. So far as 6 CTCs are concerned, the petitioners have submitted that the survey report dated 6th July, 2004 prepared by Sulabh and MCD deserves to be scrutinized which supports the case of the petitioner.

84. Appearing for the petitioner, Mrs. Avnish Ahlawat, learned Counsel in W.P.(C) 7622/2005 Akhil Bhartiya Jan Rachnatmak Karya Sansthan v. MCD submitted that though nine CTCs were allotted to this petitioner, only six were actually handed over. The petitioner has been repeatedly protesting to the MCD with regard to the CTCs allotted to it and their misrable state. In this behalf, several letters have been placed on record several letters pointing out that there is no water supply in urinals, no over flow pipe, no generator connections, several electric current problems, water collection on the roof, choked sewers, broken toilet seats, etc. in all the toilet complexes allotted to it. In this behalf, letters have been placed on record from pages 151 to 167 which are amongst others dated 29th October, 2002, 28th November, 2002, 10th May, 2003, 5th January, 2004 and the letter dated 20th January, 2004. This organisation wrote that inspite of the repeated requests to correct the problems to the MCD in writing and orally, the same were not being rectified and that possession of five toilet complexes be taken back because this petitioner was bearing heavy financial loss on looking after these toilet complexes. It was even stated that these complexes could not be used on account of the problems which were notified to the MCD since the time they were allotted. This petitioner repeatedly further protested even thereafter by a communication dated 25th February, 2004. In this letter, the petitioner even wrote that it had taken possession of the toilet only on the assurance and pressure of the MCD that the problems would be sorted out. In the letter dated 28th November, 2002, the petitioner pointed out the deficiencies sitewise. The petitioner submits that the MCD addressed a show cause notice to it on 25th February, 2004. The petitioner responded by a letter dated 12th March, 2004 calling upon the MCD to take back possession of the CTCs. The petitioner has also pointed out that despite its license from the MCD, the CTCs allotted to it have been taken over by Metro. Again on 24th March, 2005, the petitioner wrote a letter informing the MCD that DDA has demolished the CTCs.

This petitioner had also placed reliance on a joint survey conducted by the Executive Engineer(Electrical) and Executive Engineer(CSE) conforming the defects in the CTCs. The petitioner has complained that it is till date awaiting a response from the MCD on all these issues.

85. Mr. Vikas Singh, learned senior counsel appearing for the petitioners in W.P.(C) Nos. 7855/2005 S.A.V.E.R.A. Thr. Secy. Mritun v. Commissioner OF M.C.D. and Ors. and WP (C) No. 8067/2005 Rajya Jan Vikas Samiti v. MCD and Ors. has also urged that in the instant case, the decision to award the CTCs to Sulabh was not taken because the NGOs had committed breaches of any agreement.On the other hand, it was because the MCD had decided to award the CTCs to Sulabh that the contracts with the NGO were cancelled. In this behalf, it is urged that the decision of the MCD to rescind the agreement with the petitioners and cancel the same is in violation of not only the terms of the contract which provided a notice but is also in violation of the principles of natural justice inasmuch as grave allegations having been levelled against the petitioners without giving them an opportunity to meet the same.

Placing reliance on the pronouncement of the Apex Court in E.P. Royappa v. State of Tamil Nadu it is urged that the MCD cannot act at its whim and caprice. In fact the petitioners were entitled to an equal opportunity to operate and maintain the CTCs on the terms as those on which the same have been offered to Sulabh. Thereby, the MCD has denied the petitioners the right to consideration for the award of work without consideration of the expertise and capability.

86. In W.P.(C) 6945 - 48/2005 filed by Slum & Environment Improvement Society and Ors. v. MCD. on 19th April, 2005, the petitioner has comprehensively challenged all the guidelines and decisions of the MCD and sought the following prayer:

a. Call for the records of Municipal Corporation of Delhi and quashed/set-aside the proposal given in letter No. F.33/CSD/1047/C&C dated 19.07.2004 and the resolution No. 400 dated 25.10.2004 of the Standing Committee of MCD hereby the standing committee has approved the proposal of commissioner, MCD vide his letter dated 19.7.2004 and also the consequent actions taken including the letter dated 4.3.2005 and 16.3.2005 or proposed to be taken by the respondents on the basis of said resolution No. 400 of the Standing Committee; and/or

b. Direct the respondent MCD not to hand over all 1963 CTCs to Sulabh International Social Service Organisation or any other agency without inviting tenders or competitive bids and without providing an opportunity to participate in the said allocation of the work; and/or

c. Direct the respondent MCD not to hand over the Jan Suvidha Complexes (JSCs) allotted to the petitioners as per the details given in para No. 7 of the writ petition to Sulabh International Social Service Organisation or any other agency without following tender process; and/or

d. Pass any other or further order/s as this Hon'ble Court deems fit and proper in the facts and circumstances of the case.

This writ petition was filed by four NGOs who successfully participated in the auctions of the CTCs. They have set out in a tabulation the dates with effect from which they have maintained the CTCs and state that up to date license fees stand paid by them. The copies of the receipts issued by the MCD have been enclosed. It is noteworthy that no counter affidavit has been filed and there is also no denial to the claims made by the petitioner.

87. Other writ petitions also relate similar difficulties. In any event, the record of the meetings noticed hereinbefore are testimony to the unfortunate saga and the appalling state of affairs.

88. It is noteworthy that there is no dispute to these assertions by the MCD.

89. Mr. V.P. Choudhary, learned senior counsel appearing for the petitioner in W.P.(C) 11865/2004 Himalayan Institute of Pollution Control and Social Economic Development has submitted that the MCD had evolved the process of allotment of the CTCs to the NGOs after a detailed report of the committee and deliberations thereon. The MCD, as a result of its decision, had issued advertisements in national dailies having a wide circulation and also displayed the same on the notice boards at relevant places, besides informing the shortlisted NGOs by speed post, with regard to the applicability of the terms and conditions Along with the group list of the CTCs as well as the auction schedule thereof. The NGOs were advised by this advertisement also to visit the groups of community toilet complexes constructed under the Yamuna Action Plan and collect such requisite information as may be deemed fit before participating in the auction programme. The notices clearly stated that the auction was being held for assignment of the complexes for purposes of operation and maintenance. It has been vehemently urged that inherent in this stipulation was that the CTCs were operable and maintainable, that is to say, that they were free of defects and were in a ready to use condition. It has also been urged that the petitioner was required to inspect these CTCs from the point of

view of financial viability of the group as it was not possible to inspect the same for the purposes of assessment of the construction that is civil and electrical defects which could have been revealed only after commissioning of the CTCs. No NGO was permitted to run the CTCs to ascertain their operability. It is pointed out that the auctions were being held even prior to the date of completion which was given to the contractors for construction of the CTCs. There is force in the submission of learned senior counsel that this clearly established the contention of the petitioner that the inspection envisaged in the terms of auction was only to enable an inspection as to whether the CTCs comprising a group were financially viable on the terms and conditions on which the allotment was proposed.

Consideration afresh & changes in decisions

90. In the meantime, an agenda item No. 348 captioned as "Free of Cost Use of all Toilet Blocks Constructed Under Yamuna Action Plan" was placed before the Standing Committee in its meeting held on 17th December, 2003. By its resolution No. 673 passed on this date, the Standing Committee recorded that 50% of these toilet blocks are either lying closed or not being used due to their dilapidated condition and that the Corporation had given these toilet blocks on lease to various NGOs and these organisations are charging Rs. 1 to 2 per person for defecating facility while the above said organisation is contributing no amount to the corporation. For this reason, the Standing Committee on 17th December, 2003 by the resolution No. 673 resolved that free of charge service to Delhites be provided by abolishing the lease on all toilet blocks being run under the aforesaid scheme.

91. On this resolution No. 673, the Commissioner of the MCD recorded a noting in respect of the different measures which would be required to be taken if the CTCs were to be operated on day to day basis by either the MCD itself or by engaging any other agency with different terms and conditions. It was noticed that in case the CTCs have to be run as free of charge service to Delhites, an expenditure of Rs. 12,000/- per CTC per month which included caretaker, safai karamchari, electricity consumption, cleaning material, maintenance of pumps/generating sets, site/building etc was required. Further, for running and maintaining all the 959 CTCs constructed under the Yamuna Action Plan, the amount worked out to Rs. 10.2 crores approximately per month i.e. Rs. 14 to 15 crores per year and that the same would require allocation of funds in the yearly budget. The Commissioner noticed that this would have an adverse effect on other toilet complexes constructed by the MCD which are being maintained by various NGOs on pay and use basis which would add a burden of Rs. 10 to 15 crores on the MCD to run the same.

The other alternative which was pointed out was that the CTCs were to be operated and maintained by appointing any other agency. In this eventuality, the Commissioner noticed that such agency would demand payment for operation and maintenance of these toilets on complex/seat basis since the agency would have to pay the charges of electricity, caretaker etc and it was to provide free of charge service. A problem with regard to taking over the CTCs from the existing NGO and their operation and maintenance in the period between taking over the CTCs from the NGOs and handing over to other agencies was also required to be provided for. Terms and conditions on which operation and maintenance of the CTCs would be given to the outside agency were to be examined and it was also noticed that it would take four to five months in the transaction.

92. It appears that the Commissioner of the MCD convened a meeting on 3rd January, 2004 to discuss issues related to utilisation of the CTCs and submission of the audit report as well as other pending issues under the Yamuna Action Plan. In this meeting, upon discussion of the issues, certain decisions were taken. It was noticed that the Central Ground Water Authority had given permission for boring of tube wells for CTCs in South and South West Delhi to the Delhi Jal Board. The position of boring of the tube wells was reviewed. The OSD of the Yamuna Action Plan informed the meeting that at two sites, boring was not done in the S Block, Okhla and the Sangam Vihar Turning Point despite repeated reminders. A direction was given to effect the boring be undertaken within 15 days. So far as permanent electric connections at the CTC sites were concerned, it was reported that even as on 3rd January, 2004, permanent electric connection at 85 sites had not

been obtained due to the areas being unelectrified and that some of the NGOs were running some of the CTCs with the help of generating sets. The issue which required a decision related to consideration of a subsidy i.e. a difference between the running cost of the generating sets compared to running of the CTCs with electricity which had been recommended. The recommendation was that these subsidies be adjusted in the respective license fees payable by the operating agencies i.e. the NGOs as the petitioners. This recommendation was rejected by the Commissioner, MCD on the ground that the operating and maintenance agencies were not paying their license fees and not operating all the CTCs.

In this meeting on 3rd of January, 2004, the Commissioner thus decided as follows:

(2). Commissioner MCD revised the position of permanent electric connections at CTC sites. It was reported by OSD (YAP) that till today permanent electric connections at 85 sites have not been obtained due to unelectrified area and mentioned that DG sets at all the sites have been provided and some of the O&M Agencies (NGOs) are already running the CTCs with the help of these DG sets. However, some consideration of subsidy (difference in running cost of DG sets compared to running of the CTCs with electricity) were included in the recommendations forwarded. These subsidies have to be adjusted in their respective license fees payable by the O&M Agencies. However Commissioner, MCD mentioned that O&M Agencies are not paying their license fees and are not operative all the CTCs hence this kind of subsidy cannot be considered. It was decided by Commissioner MCD that CTCs which are not functioning shall be handed over to M/s. Sulabh International for operation and maintenance without levy of any charges because M/s.Sulabh International is highly professional and experienced Agency and can make these CTCs functional. It was decided to prepare the list of CTCs which are not functional and which can be considered for handing over to M/s.Sulabh International is to be contacted by Addl.Commissioner (S&JJ) to conduct the survey of these CTCs and then submit their proposal.

(3). It was mentioned by OSD (YAP) that some complexes have been constructed in the Institutional Areas like Tihar Jail, Delhi Zoo, Hindu Rao Hospital etc., and it was decided by Commissioner, MCD to hand over these CTCs which have been constructed in Institutional Areas to the concerned Institution and asked to put the file before him for taking decision in the matter.

(4). It was mentioned by OSD (YAP that audit report for the financial year ending March, 2002 has still not been submitted to Ministry of environment & Forest, GOI and JBIC Commissioner, MCD asked the CA, MCD to look into the matter and submit the audit report to the JBIC through ministry of Environment & Forest.

(5). It was mentioned by the Chief Engineers of MCD

General Wing present in the meeting that payments have still not been made to the Contractors for construction of CTCs under Yamuna Action Plan Commissioner, MCD asked OSD (YAP) about the pending amount of Rs. 16 crores (approx.) OSD (YAP) explained that ministry of Environment & Forest has already cleared their position in respect of this payment in the meeting held on 16th July 2003 and they have also mentioned this amount can be released now, as the entire account of the Yamuna Action Plan Phase-I have already been closed and the Loan Agreement with JBIC in respect of Yamuna Action Plan Phase-I have already been finalised and further funds will not be available. Further while releasing the entire amount by the Ministry of Environment & Forest it was clearly mentioned that this amount were not allowed due to the reasons (a) DG sets and (b) Construction of CTCs in clusters in Mangolpur, Sultanpuri, Gokulpuri & Jwalapuri by the MCD General Wing Commissioner, MCD has desired to identify some commercial plots, which can be sold and payment can be made to the Contractors.

(6). OSD (YAP) mentioned that decision for appointment of M/s.TERI for continuing with the Public Participation & Public Awareness programme is still pending and the funds of Rs. 45 lacs (Approx.) under the Module-IV are still available with the Department. Commissioner, MCD mentioned that there is no need for

appointment of M/s.TERI to continue with the Pubic Awareness Programme and the funds available under this Module can be utilized for making payments to the Contractors and asked OSD (YAP) to put up the case before him for taking decision in the matter.

(7) Commissioner, MCD also mentioned that no further meeting will be taken by him in respect of construction of CTCs under Yamuna Action Plan Phase-I and that any decisions that are required to be taken on any pending issue, the Addl.Commissioner (S&JJ) should put up the concerned file for necessary approval and orders.

93. It appears that there was a change of thought as on 3rd January, 2004. Despite noticing that several sites of the CTCs had not been handed over to the NGOs and also subsidies had to be approved with regard to certain running costs, boring of wells for the water supply had not be undertaken at several sites and several others were without electric connections, the Commissioner decided that CTCs which are not functioning would be handed over to Sulabh for operation and maintenance without levy of any charges because Sulabh is highly professional and experiences agency and can make these functional. A list of such 346 CTCs was prepared which was handed over to Sulabh.

94. On 22nd January, 2004, a Review meeting of the Yamuna Action Plan in Delhi was held under the chairmanship of Shri Naresh Dayal, Additional Secretary and Project Director, NRCD, Ministry of Environment and Forest at the Paryavaran Bhawan, New Delhi.

95. The petitioners in these writ petitions i.e. the NGOs have complained that they were not called for this meeting while Shri Bindeshwari Pathak, Chairman of Sulabh International Social Service Organisation was called for this meeting.

96. So far as CTCs are concerned in this meeting, the following decisions were taken:

(1). Status of utilization of CTCs:_ MCD officials informed that the proposed action plan and measures for increasing the utilization level of CTCs have not been agreed by the Mayor/Standing Committee, MCD officials also informed that the CTCs, which are locked and not being run by NGOs for want of their running. The representative of M/s.Sulabh informed that a decision to take over such CTCs will be taken after proper field survey in the light of their location and scope of utilization.

The Chairman directed that since in original plan all the CTCs were proposed to be run on "pay and use" basis to make them self sustainable, MCD should again take up the matter with Mayor/Standing Committee for implementation of action plan and other measures for increasing the utilization level of CTCs as discussed in the last review meeting.

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97. The petitioners have pointed out that at this stage the Field Monitors appointed by the MCD were all giving reports which clearly evidenced that no fault was attributable to the NGOs for the CTCs not being in operational condition.

98. It appears that the MCD was required to submit a status report to the Ministry of Environment and Forest inasmuch as funding for the CTCs was provided by it. One such background note on the Yamuna Action Plan prepared for MCD for the Ministry has been placed by M/s Bhagwati Foundation before this Court. This document is undated. However, there is no dispute to the same by the MCD. In this background note of the MCD, it has been noticed that MCD has received an amount of Rs. 51,50,000/- as security deposit in the auction process conducted and Rs. 94,81,185/- as license fees for the first quarter alone and that the same has been kept in the Escrow Account as noticed above. This background note also records the following:

Although all out efforts have been made to recover the license fees for the subsequent quarters, but the same could not be realised due to various reasons enumerated below:

1) Permission for boring of tube-wells from CGWA

2) Permanent electric connections

3) Permission for sewer connections from DJB

4) Non-shifting of population in new settlement colonies due to Hon'ble High Court Orders

5) Peoples habit of open defecation and hence not utilising the CTCs

A decision was taken in the meting chaired by Sh. K.C. Mishra, Secretary, Ministry of Environment & Forest, GOI in December, 2002 to review the operationalisation of CTCs constructed under Yamuna Action Plan.

The proposal based on recommendations given by the Committee headed by FA(S&JJ) along with other Officers duly constituted by Commissioner, MCD to conduct a detailed review of functioning of all the CTCs constructed under Yamuna Action Plan were approved by Hon'ble Standing Committee through Commissioner, MCD in principal.

Regular review meetings were again held by Add. Commissioner (S&JJ) with the NGOs (O&M Agencies) & concerned Executive Engineers (Civil/Electrical) of General Wing and Slum & JJ Wing, MCD where the Chief Engineer (S) & FA(S) also participated.

The O&M Agencies also expressed their difficulties and problems in respect of (a) water, (b) electricity, defects/deficiencies in certain complexes, (d) CTCs constructed in clusters & institutional areas, (e) public not ready to pay the user charges of Rs. 1/- as per the term and agreement, (f) insufficient number of users, (g) old Jan Suvidha Complexes existed in dilapidated condition not demolished etc.

The O&M Agencies also suggested the following solutions:

(a) Reduction in the pay & use charges from Rs. 1/- to Rs. 0.50 paise and in certain cases free use of toilets.

(b) Consideration in giving subsidy to O&M Agencies where the O&M Agencies are running the CTCs with DG Sets where no permanent electric connections are obtained .

(c) Exemption from license fees where tube-wells are not bored.

(d) Demolition of the dilapidated Jan Suvidha Complexes existing near the new CTCs so as to prevent the public to use the old dilapidated complexes.

(e) CTCs constructed in the Institutional areas to be made operational and to be handed over to O&M Agencies.

(f) license fees to be charged from the actual date of functioning of the CTCs including payment of electricity bills.

(g) O&M Agencies were prepared to pay the full license fees for the complexes, which are running properly and concessions in the license fees for such complexes where no users are coming forward or in resettlement colonies where the population has not been shifted.

Further detailed deliberations with O&M Agencies and Officers of Slum & JJ Department and General Wing, MCD the following problems are being faced in the real functioning of the CTCs and they seem to be quite genuine.

a) Non-availability of water due to delay in obtaining permission for boring of tube-wells in South & South-West Delhi from CGWA.

b) Non-obtaining of permanent electric connections for CTCs and CTCs constructed in un-electrified areas.

c) CTCs constructed in clusters in certain localities with the result sufficient number of users do not exist and the some of the CTCs are kept locked.

d) Public do not want to pay the usage charges of Rs. 1/- which they consider high, especially in resettlement colonies and in residential areas where slum population exist.

e) CTCs constructed in the resettlement areas like Cremation Ground, CRPF Camp. Delhi Zoo, Red Fort, etc. are not being utilised.

f) Non-availability of sewerage connections in certain areas.

g) The O&M Agencies are facing difficulties in running of the CTCs, payment of license fees to MCD, payment of electricity bills and insurance premium, since the O&M Agencies have bid very high rates for some groups of CTCs, at the time of auction due to which they are finding it not economically viable. Due to this some of the NGOs have gone to the extent of surrendering their group of toilet complex.

99. Upon consideration of these difficulties, the then Additional Commissioner, Slum & JJ forwarded certain recommendations to the competent authorities to streamline the proper functioning of the CTCs. The background note records that the approval was still awaited on these aspects. Inter alia, these recommendations included the following:

(i) The date from which the license fee should be charged maybe reckoned from the date of functioning and not from the date of handing over. In such cases where the functioning was held up mainly because of incomplete Community Toilet Complexes, the date of actual functioning should be authenticated by the concerned Executive Engineers with adequate reasons.

(ii) Electricity bills in all such cases shall be paid by the NGO from the date of functioning only.

However, the minimum electricity charges shall be payable from the date of handing over.

(iii) The electricity charges prior to the date of handing over shall be borne by the Deptt. and a certificate from the Executive Engineer (Electrical) shall be obtained to this effect.

(iv) No license fee be charged for the complexes located in Re-location colonies, where the population has not been shifted due to High Court Orders, which are not put to use but are locked up.

(vi) No license fee of CTCs shall be charged where tubewell are not bored.

(vii) Where permanent electric connection are not obtained and in Un Electrified Areas where the NGO is running the CTCs with DG set, concession may be granted on case to case basis, on the difference in cost to run the CTCs with DG sets and with electricity.

(ix) Immediate measures should be taken to demolish the dilapidated Jan Suvidha Complexes existing near the Community Toilet Complexes so that the public do not use the old & dilapidated complexes/prefab Community Toilet Complexes. This has to be done by CSE Deptt. of MCD.

(x) The CTCs constructed in institutional areas like Red Fort, Cremation ground, CRPF, Horticulture Deptt., Zoo, etc. should be handed over to the respective institution for operation & maintenance of CTCs without levying any charges and the NGOs should also be not charged the license fee.

(xi) These concessions have to be worked out on case-to-case basis and it will be applicable only to the NGOs who are:

a) Paying the license fee for every quarter, and who have cleared the entire license fee up to date, especially of those, which are running properly.

b) Payment of all the electricity bills.

c) Payment of Insurance premium as per the terms of agreement.

d) NGO's who have signed the formal agreement with the concerned Executive Engineer (Civil)

e) For NGO's who are making all efforts for conducting Public Awareness programs as required by them, providing of proper display boards, maintaining all records etc. as per the terms of agreement.

100. Thereafter, a meeting was held on 30th April, 2004 minutes of which were circulated on 11th May, 2004 and make very interesting reading as they disclose decision making at the highest level in the MCD. Apart from senior officers of the MCD, Sulabh was represented and participated. None of the other NGOs were called. They are also evidence of the manner in which public property constructed by expending Rs. 7 crores granted by the Japanese Bank with Central Government participation is dealt with `Decisions' are taken because Sulabh `submitted' & `mentioned', the Additional Commissioner informed and it was `impressed upon by the Commissioner, MCD'. The minutes of the meeting dated 30th April, 2004 record thus:

It was informed by Addl. Commissioner (CSE) that as per the decision taken in the meeting held on 03-01-04, a meeting was convened by her on 20-01-04 wherein the issue regarding handing over of non-functional CTCs was discussed with the Representatives of M/s Sulabh International and it was agreed by them to do the detailed survey of all the non-functional CTCs and submit the detailed survey report along with their proposal. The list of 346 non-functional CTCs was handed over to M/s Sulabh International in the meeting held on 22-01-04 under the Chairmanship of Addl. Commissioner (S&JJ) on 22-01-04 to complete the survey within 15 days time, but they submitted the report after a lapse of 2 months.

M/s Sulabh International after conducting the detailed survey, submitted their detailed report vide letter No. SISSO/5239/2004 dated 24th March, 04 vide which they have mentioned that most of the toilet complexes are locked or closed and majority of them are made in clusters or are very near to each other and hence most of them are non-functional as there are not many users. The basic structures of most of the complexes are sound but their electrical fittings, WCs, GI pipes, etc. are stolen or damaged and in some cases doors have also been damaged or stolen.

M/s Sulabh International have mentioned that taking over of 346 toilet complexes would not be a viable propositions, as large number of toilet complexes are in bad condition, the principle of cross subsidisation will not work. It would not, therefore, be possible to take over them. They have also proposed as an alternative, if all 959 toilet complexes constructed under Yamuna Action Plan including these 346 CTCs are handed over to them, they will be able to operate, maintain and run them on `pay and use' basis on cross subsidisation basis for a period of 30 years along with advertisement rights on these complexes.

It was further informed by Addl. Commissioner (CSE) that in the light of above, another meeting was convened by her wherein it was decided that all the complexes, which are at present functional under the charge of CSE Department should also be handed over to M/s Sulabh International for operation and maintenance. It was agreed by M/s Sulabh International to do survey of all these CTCs and submit the detailed report along with the proposals of each of the complex within one month i.e. by 30th April, 2004, which is still awaited.

In the meeting, it was impressed upon by the Commissioner, MCD that the idea of getting license fees from the NGOs to operate and maintain CTCs is not working out well as most of the NGOs after taking initially at some bid/tender rate defaults in making payments of the due license fees and other related charges and thereby jeopardising the whole purpose of giving it to NGOs and he also shown his dis-satisfaction regarding operation and maintenance of CTCs by the existing 70 NGOs and also non-payment of due license fees, insurance premium, electricity bills, etc. However, various communications have already been sent to all the Executive Engineer by the Addl. Commissioner (S&JJ) to take immediate necessary action against the defaulting NGOs for recovery of license fees, insurance premium, electricity bills, etc.

This matter was further discussed with the Representative of M/s Sulabh International present in the meeting wherein they have reiterated their stand that "if all 959 toilet complexes constructed under Yamuna Action Plan including these 346 CTCs are handed over to them, they will be able to operate, maintain and run them on `pay & use' basis on cross subsidisation basis for a period of 30 years along with advertisement rights on these complexes".

In the meeting, it was decided by Commissioner, MCD to rescind all the present contract of operation & maintenance of CTCs with the NGOs as most of them are defaulting in making payment of license fees and other related charges, etc. Engineer-in-Chief, MCD has to convene a meeting of all the concerned Executive Engineers to impress upon them for taking immediate action against the defaulting NGOs.

It was decided to hand over all the 959 CTCs constructed under Yamuna Action Plan and 413 CTCs under the charge of CSE Department as reported by Jt. Director V (CSE) to M/s Sulabh International for operation & maintenance by the end of June, 2004 for a period of 30 years on lease basis with a facility of advertisement right on these complexes, on the terms & conditions to be finalised by Addl. Commissioner (S&JJ) and Addl. Commissioner (CSE). The operation & maintenance of CTCs will be done by M/s Sulabh International on no profit no loss basis and all the maintenance such as annual repairs & maintenance, day-to-day maintenance, wages of Caretaker and Safai Karamchari, electricity charges, etc. will be done by them and Department will not have any liability to that effect. These complexes will be taken over by them on as is where is basis.

101. Thus, the decision to rescind all present contracts of operation and maintenance of all the CTCs with the NGOs and to hand over the 413 toilet complexes under the CSD department, Slum & JJ Department and the 959 CTCs under Yamuna Action Plan to Sulabh. Sulabh had demanded only the 959 complexes. The decision included a decision to hand over operation and maintenance to it for a period of 30 years on lease basis with the facility of advertisement rights on these complexes. These CTCs were to be handed over on an 'as is where is basis'.

The decision to rescind all the contracts with the NGOs was taken as "most of them are defaulting in making payment of the license fees". Thus, admittedly, all the NGOs were not defaulting in payment of the license fees. So far as other 413 CTCs which were functional under the charge of CSE department of the MCD were concerned, there was no reason whatsoever for the decision taken.

There was also no assessment as to what would be the cost of the operation and maintenance, financial implications of a lease of 30 years, assessment of the revenue which would be generated by the advertisement right on a single complex, on the cluster or on all the complexes. The meeting held on 30th April, 2004 uses expressions as "most of them are defaulting"; "payments of other related charges etc."

Therefore, the decision of the Commissioner, MCD on 3rd January, 2004, that only such CTCs as were not functional would be handed over to Sulabh, it was widened on 30th April, 2004. According to Sulabh, it had not even undertaken the inspection of the 346 CTCs which were not operational as most were lying locked.

Interestingly, no other person was called to these meetings. There was certainly no material before the Commissioner or the MCD as to which of the NGOs has been performing and which is non-performing. There was no assessment or record with regard to payments which have been received and made and as to whether these are dues of any of the NGOs. No decision was taken on the repeated recommendations of the Addl. Commissioner, Slum & JJ with regard to the factors which needed to be considered prior to imposition of liabilities upon the NGOs. Not a single notice as contemplated under Clause 15.5 of the license agreements had been issued or had been placed before the Commissioner either on 3rd January, 2004 or 30th April, 2004.

102. Thereafter, on 7th June, 2004, in a meeting held under the Chairmanship of the Additional Commissioner (CSE) the decision was reiterated to hand over all the 2066 CTC complexes (i.e. 1042 CTCs under the General Wing; 413 under the CSE Department and 611 CTCs under the Slum & JJ Wing) to Sulabh for operation and maintenance on a 30 year lease period with the facility of advertisement rights. These complexes were to be taken over by Sulabh on an 'as is where is' basis.

103. It is noteworthy that despite prolonged hearing in the matter, even at the time the matter was reserved for judgment, nothing was placed before this Court with regard to the consideration or any decision taken on these recommendations by the competent authorities in the Municipal Corporation of Delhi.

104. My attention has been drawn to minutes of a meeting held on 7th of June, 2004 under the Chairmanship of the Additional Commissioner (CSE) again attended by officials of the MCD & Sulabh. From these minutes, it is disclosed that:

(i) the MCD had sent a copy of the draft terms & conditions to Sulabh for their comments.

(ii) MCD had proposed a condition on Sulabh to deposit Rs. 5 crores on account of security.

Sulabh had objected on the ground that in the other complexes being maintained by them, no such condition was imposed.

So this condition was also abandoned.

(iii) the decision was taken that "all the present contracts either with NGOs or with Sulabh International should be rescinded and all the 2066 complexes constructed by general wing/CSE Department/Slum & JJ Department should be handed over to Sulabh International for operation and maintenance on the uniform terms and conditions to be decided mutually.

There is not a whit of a reason for the above decisions. No material or basis for the above is disclosed to this Court nor forth coming from the records which were called for.

Most important is the question raised in the last para of these minutes which reads thus:

In the meeting, Addl. Commissioner (CSE) mentioned that a decision is required to be taken that whether first present contracts should be rescind or first Agreement with M/s Sulabh International is to be signed. It was decided that this decision will be taken by CLO (MCD).

A decision on this aspect has not been placed before this Court till date.

105. It is noteworthy that so far as 1004 CTCs were concerned, there was no complaint by the MCD or by any user so far as their operation, maintenance and management is concerned. Out of these, 373 CTCs were under the operation, maintenance and management of other NGOs(including some of the petitioners for several years prior to 2004). Three hundred and fifty seven CTCs were under the direct operation, management and maintenance of the MCD, which the citizens were permitted to use on a free of charge basis.

106. Matters did not stop here. On the 21st June, 2004 another meeting was held under the Chairmanship of the Commissioner, MCD. In this meeting, Sulabh mentions that some of the complexes are in a very bad condition where major repair is required and taking over of complexes on "as is where is basis" will not be possible for them.

On 21st June, 2004, itself the Commissioner decided that each CTC would be inspected by a joint team of MCD and representatives of Sulabh to assess and record the condition of each CTC and make an assessment of the expenditure required for renovation, rectification and removal of major defects/structural defects, provision of missing articles etc. It was further decided that the work would be done by Sulabh while the cost was to be borne by the MCD so that "quality work" is done and Sulabh does the work to its own satisfaction after receipt of the estimated cost involved from the MCD. The duration of this inspection was to be from 1st July, 2004 to be completed by 31st July, 2004.

Legal proceedings and MCDs action thereafter

107. On the 8th July, 2004, M/s Bhagwati Foundation which was successful in being allocated operation and maintenance of nine CTCs, filed a Writ Petition (C) 10685/2004. This petitioner has contended that after the allocation, it found that the CTCs could, in no situation, be operated or maintained provided initial deficiencies/defects in the construction work were rectified, removal of malba from septic tank, repairing of electric lines, electric meter and construction of care taker room, removal of seepage etc. was effected. Innumerable letters at regular intervals were addressed to the MCD and its officers apart from the defects being confirmed in joint inspections. Even though, the officials of the MCD accepted the existence of these defects in the CTCs. However, in the meanwhile, it kept sending letters to the petitioners demanding lincence fee. The MCD did not consider the request of the petitioner for incorporating the defects etc. in the agreement. The petitioner throughout was willing to deposit the charges for the CTCs which were functional. Various complexex in dilapidated conditions were unauthorisedly permitted to function in the minimum vicinity of the new complexes, constructed under the Yamuna Action Plan which were to be demolished but not done so. Placing reliance on the minutes of the meetings held on 2nd, 9th, 10th, 15th, 17 & 18th July, 2003, it was asserted that the MCD was bound by the representation made in these meetings. However, without taking any action, a decision was taken to hand over the CTCs to Sulabh without levy of any charges. The petitioner has placed before this Court copy of the minutes of the meeting dated 21st January, 2004 and official memorandum dated 30th January, 2004 wherein this position was accepted. The petitioner has challenged the claim of the MCD that Sulabh was a highly professional and experienced agency and placed reliance on instances cited in the petition.

The petitioner was compelled to file a writ petition on the ground that it had made payment of huge amount towards license fee including the amount of Rs. 1,14,000/- even on 1st July, 2004 yet the MCD had illegally issued a letter dated 10th March, 2004 demanding an exorbitant amount of Rs. 16,26,024/-. This communication was also in the nature of a show cause notice issued to the petitioner and it was stated that if no cause was shown then action would be taken by the MCD. M/s Bhagwati Foundation has contended that it had also addressed a detailed communication to the MCD and the decision stated therein was confirmed by it. It also sent a letter dated 1st July, 2004 to the executive engineer giving the position CTC-wise. It was averred that in the light of the above, there was no dues of this petitioner and the proposed action of the MCD was bad in law.

As the MCD appeared to be proceeding with the decision taken to allot the CTC to Sulabh, the petitioner filed this writ petition.

108. M/s Bhagwati Foundation has challenged the action of the MCD on grounds of arbitrariness and discrimination hence being violative of Article 14 of the Constitution of India. It has further been urged that the decision to allocate is without following due process of law and amounts to creation of a monopoly unreasonably and illegally in favor of one person. The decision is without taking into consideration any of the relevant factors and is based on misconception. The petitioner has urged at length that the officials of the MCD are bound by the assurances and representations to the petitioner to rectify the defects and deficiencies which were their obligation which they have failed to do despite innumerable requests. It is further contended that CTCs allocated were incapable of being operated and maintained. It was also urged that the petitioner was an organisation of repute and doing commendable social work and that the demand raised upon it was arbitrary.

109. M/s Bhagwati Foundation has dwelt at length about the conduct of the officials of the MCD, who issued routine letters to it requiring it to enter into the agreement and chose not to discharge their statutory functions and public law obligations in any manner. The petitioner has also pointed out that an arbitrary and malafide decision was taken by the MCD to hand over the CTCs to Sulabh International without levy of any charges. This decision was taken by the MCD without discharging its obligations. Details of allegations against Sulabh which have been noticed herein were pointed out in the writ petition and it was averred that the MCD ought not to undertake handing over the CTCs to Sulabh International without following due process of law and undertaking the process of inviting tenders and permitting all other persons to participate. The petitioner contended that the MCD had squandered the amount of Rs. 7 crores given by the Japanese Bank of International Cooperation towards promoting hygiene and sanitation for the protection of the environment involved in the Yamuna Action Plan, primarily on the ground that its officials had displayed non-professionalism and incompetence and who were following arbitrary practices and frittering away valuable aid. Bulky annexures were enclosed with the writ petition and the following prayers were made by the petitioners:

1) call for the records of the respondent and quash the letter dated 10.3.2004 whereby the respondent MCD has raised an illegal demand of Rs. 16,26,024/- and direct the respondents to charge license fee from the date on which the CTC become functional and not from the date of handing over of CTC; or

2) direct the respondent MCD not to take any coercive measures and withdraw the CTCs allocated tot he petitioner; or

3) direct the respondent MCD to remove initial civil, electric and other deficiencies and offer full cooperation to make the CTCs operational;

4) direct the respondent MCD not to hand over the CTCs allocated to the petitioner to Sulabh International Social Service Organisation or any other agency without following due process of law; and

5) pass any other or further order/s as this Hon'ble Court may deem fit and proper.

110. Along with this writ petition, the petitioner filed an application seeking interim relief. When the matter came up for hearing on 9th July, 2004 while issuing notice to the respondent to show cause as to why rule nisi be not issued, this Court on 9th of July, 2004 passed interim orders of status quo in respect of the nine CTCs allocated to the petitioner.

111. It is therefore noteworthy that on service of the advance copy of the writ petition being WP (C) No. 10685/2004 Bhagwati Foundation v. MCD, the respondents including the MCD were aware of the nature of the challenge to its action being made by the NGOs.

112. Mr. V.P. Choudhary, learned senior counsel appearing for the petitioners in W.P.(C) 11865/2004, M/s Himalayan Institute of Pollution Control & Social and Economic Development has pointed out that this writ petition was also filed in the middle of July, 2004 and an interim order had been passed in this matter on 27th July, 2004 in favor of the petitioner. This petitioner had categorically taken the stand that it had not received any notice whatsoever of any kind of a breach from the MCD at any point of time. It has been contended that on or around the 3rd August, 2004, the petitioner received a notice from the MCD which had been ante dated as 23rd July, 2004 (Annexure P21 at page 301) wherein the MCD had only raised a financial demand without making any allegation that the CTCs were not functioning. The petitioner has given a detailed reply thereto on 18th August, 2004 wherein details of the defects in every single CTC were pointed out.

113. Significantly, it is after only after the filing of the writ petition by Bhagwati Foundation and passing of the orders therein, that the Commissioner of the MCD addressed a communication dated 19th July, 2004 and efforts were made to put together a semblance of application of mind to the decisions making by the respondents.

In this letter dated 19th July, 2004, the Commissioner set out his aforenoticed recommendation to hand over the CTCs to Sulabh and requested that this proposal Along with the draft memorandum of understanding be placed before the corporation through the Standing Committee for according approval for handing over the 1963 community toilet complexes to Sulabh for operation and maintenance on lease basis for a period of 30 years with the facility of advertisement rights on these complexes.

114. Upon considering the proposal of the Commissioner as contained in his letter dated 19th July, 2004, the Standing Committee by a resolution No. 202 dated 21st July, 2004 resolved to constitute a Sub-Committee of 5 members to submit its report.

115. The Sub-committee submitted its report wherein it recorded that the NGOs after taking over complexes started collection of money from such of the public toilet complexes which gave good returns profits and closed down and shut those of the CTCs which were proving to be unprofitable. It was stated that simultaneously they started writing to the MCD justifying closure of such complexes with a view to evade depositing further the bid amounts due from them resulting in arrears and loss of reveune. Names of 15 NGOs were mentioned which includes only such NGOs who had filed writ petitions. It was stated that loss of revenue was to the tune of Rs. 45-60 crores which was taken by loan from the Japan Bank of International Cooperation and that further that the purpose of the Yamuna Action Plan, which was reduction of pollution from sewage of the river Yamuna, stood defeated. It was alleged that the dual responsibility in the maintenance of the toilet was responsible for the lack of maintenance. The Sub-committee placed strong reliance on the recommendation of the Commissioner, MCD which, according to it, had taken into consideration the past experience of construction and maintenance of public toilets by the MCD itself and that by Sulabh as well as by other NGOs. It noticed that the Commissioner's view was based on the fact that "the organisation has greater credibility and trust worthiness than enjoyed at present by any other NGO working with the MCD".

116. The Sub-committee also noted that handing over of the toilet complex to Sulabh would be in public interest and that the organisation had been awarded works on nomination basis by almost all the states and union territories of India. It noticed that even High Courts of Rajasthan and Himachal Pradesh have accepted the decision so taken by the state government. It recorded that no dispute had arisen between MCD and Sulabh in respect of toilet complexes which were constructed by Sulabh i.e. about 100 toilet and their maintenance for 30 years because the sole responsibility lay with Sulabh except as regard supply of electricity, water and septic tank cleaning. Comparing this experience with 700 toilets constructed during 1989 to 1992 for the MCD by contractors which allegedly developed defects, it was also noticed that out of 166 of these toilet complexes handed over to Sulabh, they maintained them for 12 years while in 2001 MCD withdrew the maintenance of 66 of such complexes giving them to different NGOs. Within two to three years, about 30 of these 66 CTCs became dysfunctional while the remaining 36 were in a state of total dis-repair.

Thus, according to the Committee, out of 700, only 83 CTCs looked after by Sulabh were well maintained while NGOs which took the toilets on bids are not paying the amounts payable by them. On this basis, it was concluded that toilets built under the Yamuna Action Plan "will meet the same fate as that of 700 toilets built by the contractors. The MCD did not learn the lesson from its past experience of getting toilets constructed by contractors and again committed the same mistake."

117. On these considerations, the five member committee made the following recommendations:

After examining everything in detail and taking all aspects of the matter into consideration, the Committee has arrived at the conclusion that construction, repair and maintenance of Public Toilets in MCD area by Sulabh International Social Service Organisation will be in public interest and that this arrangement be made for the first time to ensure that responsibility is not divided and the public Toilets are maintained for public use without putting any financial burden on the MCD.

Therefore, the Committee is in favor of the proposal put before the Standing Committee by the Commissioner, MCD to hand over in public interest the maintenance to Sulabh International Social Service Organisation.

118. Unfortunately, this report is also replete with generalisations. 'Public interest' is cited as a justification without any consideration as to how the decision was for the benefit of the public. It does not even consider which elements of public interest were satisfied. Furthermore, the committee has based its decision on the "past experience" of construction of toilets. The proposal under consideration does not entail construction. The NGOs could not operate the defective toilets taken back from Sulabh as admittedly there were defects in these. So far as the CTCs under the Yamuna Action Plan were concerned, the Committee based its recommendation on an apprehension that they "will meet the same fate". This sub-committee has completely overlooked the costs which were to ensure to the MCD in effecting the repairs before handing over the CTCs to Sulabh which were running into several crores. The revenue which could be earned by MCD from advertising and the revenue loss from the return of the security amounts to the NGOs running the 959 CTCs under the Yamuna Action Plan as well as the loss of the license fee which they were to pay. The sub-committee has completely ignored the fact that several NGOs were successfully operating and maintaining CTCs without complaints. Therefore, so far as Delhi was concerned, Sulabh was not the only option available to operate and maintain the CTCs and consequently reliance on the allocations of CTCs to Sulabh without public tendering by other states and cities was misconceived. Additionally, it failed to consider the material fact that several NGOs were regularly paying the license fee and running the toilets.

119. During the course of submissions on behalf of the petitioners, Mr. Jayant Bhushan, learned senior counsel has pointed out that Mr. Vijender Kumar Gupta, who was one of the members of the Sub-Committee appointed on 21st July, 2004, raised several pertinent questions in writing by a letter dated 28th July, 2004. The MCD had sent a reply to the queries raised by the aforesaid Mr. Gupta which would establish beyond any doubt the fact that the MCD had not taken any of the relevant material into consideration and had placed reliance on wholly extraneous and irrelevant considerations in its decision making which also displayed blatant non-application of mind.

120. On the other hand, Mr. Valmiki Mehta, learned senior counsel for the MCD has sought to brush aside the reliance placed on behalf of the petitioners on the dissent of Mr. Vijender Kumar Gupta who was the member of the sub-committee appointed on 21st July, 2004 by the Standing Committee of the MCD. It has been contended that Mr. Vijender Kumar Gupta was the member of the political party which was in opposition in the Municipal Corporation of Delhi. The political party to which this member belonged is of no importance so far as the present case is concerned. However, it is necessary to consider some of the questions which were raised by this member of the sub-committee and the answers given by the MCD to the same.

121. In this behalf, it would be useful to set down some of the questions raised by this member and the answer given by the Corporation to them along side. Shri Vijender Kumar Gupta upon examination of the matter, addressed the communication dated 28th July, 2004 to the Commissioner of the MCD which were answered by the MCD. These answers have also been placed by the petitioner before this Court in W.P.(C) 10046/2005. Some of the questions raised in the letter dated 28th July, 2004 which deserve to be noticed and the answers thereto by the Municipal Corporation of Delhi are therefore placed below in extenso and read as follows:

Q3. What is the annually estimated advertisement income from all the CTCs to be transferred to Sulabh International?

Answer - Not explored yet.

Q4. What is the justification for 30 years agreement with Sulabh International, as recommended under the proposal?

Answer - The earlier agreements with various NGOs along with Sulabh International are for a period of 30 years and accordingly on the same lines it was offered to Sulabh International for 30 years.

Q 5. What is the area for advertisement will be made available to Sulabh International at 1963 CTCs? What are the conditions/terms of the present agreements with the NGOs in respect of Advertisemesnt rights as CTCs?

Answer - There is no fixed area for advertisement, which can be made available, it is only the complexes which are coming in the commercial areas can be exploited for advertisement purposes. Whereas CTCs are located all over Delhi and most of them in Harijan Basties, Balmiki Basties, urbanized villages, unauthorized colonies, etc.

Q 6. Why the conditions on which the CTCs are to be given to Sulabh International were not made part of the earlier tenders?

Answer - In order to rationalize the above situation and also to avoid duality of control in certain contracts, it was thought of to modify the certain terms and conditions to make non-functional complexes viable and put to use for common public.

Q7. What are the reasons for inserting new conditions in the agreement for Sulabh International ? Why these were not inserted in the earlier agreement?

Answer - The certain modifications were proposed in the terms and conditions with Sulabh International keeping in views the economic viability of large number of complexes, which are non-functional. Reason why could not be inserted in the earlier agreement as explained in Para 6 above.

Q 8. Why not open tenders on the terms and conditions agreed to with the Sulabh International have been called?

Answer - As per the past practice Sulabh International has been awarded works without call of tenders.

Q9. How the Corporation can rescind the contract of the present NGOs who have not violated the terms/conditions of their agreement?

Answer - As already explained in Para 6 the contracts covered under Yamuna Action Plan can be terminated by giving three months notice on either side.

As regard to 30 years maintenance contract there is no direct clause to terminate the contract, but in case of default by the NGO action can be taken against him after giving due notice and on consistent default his contract can be terminated.

Q 10. When the Corporation has already deleted the name of non-functional CTCs for which the contracts were given to the NGOs earlier, than how these NGOs are responsible for not operating of non-functional CTCs ?

Answer - It is wrong to say that Corporation has deleted the name of non-functional CTCs for which the contracts were given to the NGOs. Out of 959 Community Toilet Complxes (CTCs) constructed under Yamuna Action Plan, 952 CTCs were put to auction and around 30-35% complexes are non-functional due to various reasons attributable to the NGOs.

Q 11. The properties and income to be received from the properties of the Slum & JJ Department cannot be clubbed with the properties and income of General Wing. Also, the officer of the General Wing has no powers to enter into contract on behalf of the JJ and Slums Wing.

Answer - This is more a technicality and will be looked into accordingly.

Q. 12. The CTCs are to be operated upon by the Sulabh International on "no profit no loss basis". What is the operational cost to be incurred by the Sulabh International and the estimated income from the advertisement rights plus the pay and use charges?

Answer - No comments can be offered on this as the estimated income and operational cost to be incurred by Sulabh International cannot be computed at this stage.

Q 13. When the CTCs are to be handed over to the Sulabh International on "As is where is basis" than what is the justification of making the non-functional CTCs into functional at the cost of the Corporation? What is the estimated cost for making functional the CTCs covered under the conditions of the recommended proposal?

Answer - Out of the CTCs, which are proposed to be handed over to Sulabh International there are certain complexes, which are more than 15-20 years old and require major repairs before they can be put to public use. However the estimated cost of making these CTCs functional is yet to be worked out.

Q.18. The Commissioner can only appoint mutually agreed arbitrator with the Sulabh International. It does not give absolute power to the Commissioner to appoint arbitrator. However in all the contracts Commissioner has such powers. Why this preferential treatment in this particular case?

Answer - 'This clause can be reviewed to safeguard the interest of the Department.

Q.19. What is the justification of 10% enhancement in the Pay & Use charges per year?

Answer- To cover up the increasing cost of operation, maintenance and other aspects of these CTCs the provision of 10% enhancement in the user charges was made with a view to revise the users charge with reasonability as the contract given under this case is for a period of 30 years.

Q22. What is the justification for keeping the JJ & Slum Department outside the scope of the Contract ? As per the agreement the present contract with the Sulabh International for the CTCs already maintained by them will be ceased and covered under the new agreement. How much comparatively financial benefit will incur to the Sulabh International under this condition?

Answer - This is a mere technicality and will be looked into accordingly.

122. From a perusal of the above, it appears that all works relating to financial benefits which would occur to Sulabh were considered to be 'mere technicality'. There is an admission so far as dispute redressal is concerned that the interest of the MCD required to be looked at. It is also admitted that the MCD has qualified staff to do the renovation and rectification. The estimated cost of making the CTCs functional had not still been worked out. Yet, a decision is taken without even working out the financial implications of the exercise, when even the estimated income and operational cost of the CTCs had also not been worked out and had not been computed. The decision to hand over the 1963 CTCs without calling of tenders to Sulabh was based on 'as per past practice' and nothing more.

123. The MCD had also not explored what would be the annual estimated advertisement income from 1963 CTCs which were to be transferred to Sulabh. In the same breath, it has been asserted that modifications in terms and conditions which Sulabh were proposed keeping in view the economic viability of a large number of complexes which are non-functional.

The answers given to the questions are in contradiction to each other. The CTCs which are non-functional were to be handed over to Sulabh after effecting repairs of crores of rupees and rendering them functional.

124. The petitioners have vehemently protested to the answers given by the MCD. Question No. 9 raised by Vijender Kumar Gupta relates to the jurisdiction of the corporation whereby it could rescind the contract of the present NGOs who have not violated the terms and conditions of their agreement. It had been submitted that the stand of the MCD was that the contracts covered under the Yamuna Action Plan could be terminated by giving three months notice on either side. It has further been submitted that as regards the thirty year contract, there is no clause to terminate the contract but action could be taken only in the case of default by the NGOs.

Therefore, in the light of what has been noticed hereinabove, it is evident that there is no material to show any default by the NGOs who was maintaining the CTCs under the thirty year contract. There is also an admission in the answers given to the member of the committee that even in respect of the CTCs under the Yamuna Action Plan, there were persons who were not defaulters. This is evident even from the stand of the Commissioner taken on 3rd January, 2004 when he noticed that only non-functional CTCs be given to Sulabh. Again, from the answer given to question No. 8 noted above, it is evident that MCD had not taken any considered or conscious decision not to invite tenders because there was no person who was competent to operate and maintain the CTCs other than Sulabh International but because of MCD's'past practice'in relation to its dealings with Sulabh. Again from the answer to question No. 9, it is evident that termination of the agreement was not because of the advanced reason of the NGOs being defaulters but because the MCD has power under the contract to do so.

125. From the above it is evident that there is no justification even for the 10% enhancement in the pay and use charges per year. Without knowing what would be the cost of operation and maintenance and other aspects of the CTCs, an answer has been given to the member of the Committee that this clause has been provided to cover up the increasing cost of operation, maintenance and other aspects of the CTCs.

126. It would be useful to also notice that in the thirty year agreements for maintenance of the CTCs, in respect of those CTCs which were being operated by Sulabh International, the usage charges were only 0.50 paise per use. In the new agreement, Rs. 1 has been provided for as a usage charge in some areas while Rs. 2 in other areas with the increase. The admitted position is that these CTCs have been constructed to address the needs of the poorest of the poor in the city of Delhi. It is the respondent's case that the allocation, operation and maintenance is based on sheer altruism and philanthropy of Sulabh which is stated to be an organization which does not participate in any competitive bidding processes for allocation of CTCs for maintenance to it nor is in such occupation for any motive of profit. If the allotment of the CTCs to Sulabh was truly only in public interest, then where would be the questions of an incorporating such a clause in the agreement which substantially increased the usage charge in respect of CTCs being run without a complaint from free use (in

respect of those run by the MCD itself) or from Rs. 0.50 in those under the earlier 30 year agreements to usage charges Rs. 1 or Rs. 2 with the right to enhance the cost? Is it in public interest that a user of a community toilet complex be required to ultimately have to pay Rs. 16/- per use in respect of a toilet in the slum area or Rs. 32/- in the non-slum area in view of the permissible enhancement? Where is MCD's consideration that the users of such facilities would have the means or the ability to use these community toilets if the charges were raised to these exorbitant limits? What is the element of public interest in such charges?

127. The Municipal Corporation of Delhi has filed an affidavit of Mr. S.K. Mahajan of the Officer on Special Duty (Yamuna Action Plan) which is dated 12th August, 2005 (at page 948 in W.P.(C) No. 10685/2004). It is admitted therein that the letter dated 28th July, 2004 was received from Mr. Vijender Kumar Gupta and that the aforenoticed answers thereto were sent only to the member and that they were not placed before the sub-committee of the standing committee even though the said Mr. Gupta had specifically asked for the same.

In this behalf, the MCD has stated thus:

2. That I have been able to locate the file No.

CE(S)/4100(309)CRY/Vol.IV/OSD/2004 of the Department. As per the record a letter dated 9.8.04 was received in the Slum & J.J. Department from the Commissioner MCD, forwarding the letter No. VK/04/42/1729 dated 28.7.04 of Sh. Vijender Kumar Gupta, Municipal Councilor vide which certain queries had been raised by Sh. Vijender Kumar Gupta who was also the Member Standing Committee with regard to the Community Toilet Complex. A copy of the said letter dated 9.8.04 received from the Commissioner Along with a copy of the letter dated 28.7.04 of Sh. Vijender Kumar Gupta is collectively annexed as Annexure A1 hereto.

3. I state that the queries by Sh. Vijender Kumar Gupta were duly examined by the Department and appropriate reply was duly sent to him vide covering letter dated 13.9.04 by the then Addl. Commissioner (S&JJ). Copy of the said reply Along with covering letter is collectively annexed as Annexure AII hereto.

Can it be said that the issues raised in the aforenoticed queries were not relevant in taking a decision? The answer clearly has to be in the affirmative i.e. they were relevant factors which deserves to be considered.

128. The Sub-Committee was formed after these issued raised by the petitioners were before this Court and interim orders of stay had been passed. The sub-committee has attempted to give some details of dues of license fees of the different NGOs. Interestingly, only the 15 NGOs who had come to the court have been considered while other NGOs have not been dealt with or considered at all.

129. This report of the Sub-Committee, were accepted by the Resolution No. 229 of Standing Committee on the 22nd September, 2004.

So far as the decision to award the CTCs to Sulabh as contained in the resolution of 22nd September, 2004 is concerned, it is noteworthy that only such NGOs who were in court are set out in this resolution.

130. The recommendation of the Standing Committee by its resolution No. 229 was placed before the Corporation as item No. 25 in its meeting held on 25th October, 2004. By a resolution No. 400 passed on 25th October, 2004, the Corporation resolved that the proposal of the Commissioner contained as contained in his letter dated 19th July, 2004 be approved.

131. It is also noteworthy that a draft memorandum of understanding('MOU') was prepared and enclosed with the letter of the Commissioner dated 19th July, 2004. This MOU was also approved and finalised in this meeting without consideration of any of the financial and revenue implications and finalised in this meeting.

The other liability of Sulabh was with regard to payment of advertisement tax to the MCD. Though there is no computation placed before the court, however the revenue which Sulabh was to generate from the advertisement can be envisaged from the stipulation which was made by the MCD in the meeting on 26th June, 2004 which was to the following effect:

10% service tax will be levied on the advertisement tax to be received from Sulabh International, will be kept in a separate account subject to a ceiling Rs. 1 crore to meet out any unforeseen expenditure/default by Sulabh International

All these terms and conditions were incorporated in the memorandum of understanding. Thus on the premise that Rs. 1 crore was also not even 10% of the total, it would appear that the revenue which the MCD expected Sulabh to generate and earn from the advertising ran into several crores.

132. The petitioners have pointed out that on the terms and conditions on which the CTCs were allotted to the petitioner there were substantial revenue drawings by the MCD from the operation and maintenance of the CTCs and the NGOs. As per the terms and conditions of the auction, the NGOs were required to: (i) deposit security of Rs. 50,000/- at the time of participation in the auction; (ii) deposit 10% of the license fee for the first quarter of the year; (iii) The NGOs were also required to meet the expenditure of electricity, water and the cleaning of the septic tank. Under the terms and conditions of the auction, repairs were also the responsibility of the NGOs. MCD itself recognized that usage charges alone would not be sufficient to make the scheme viable. However Clause 10 of the terms and conditions of auction prohibited the NGOs from undertaking any advertisement or any revenue generating expenses.

133. As against this, so far as Sulabh was concerned, a decision was taken to allot all the CTCs to it without it part taking in any competitive bidding. Sulabh was not required to furnish any security nor was it required to pay any license fee. On the contrary, in clear admission and acceptance of the fact that the CTCs were structurally and technically defective and required extensive repairs, the memorandum of understanding proposed with Sulabh contained the following recital:

Where as the MCD is the absolute owner of 959 Community Toilet Complexes (741 CTCs by General Wing and 218 CTCs by Slum & JJ Wing, MCD) constructed under Yamuna Action Plan (Extended Phase). 611 Toilet Complexes of CSE Department and 393 CTCs of Slum & JJ Wing(including 141 prefab) which is being given to Second party by the First party for operation, maintenance and management on lease basis for a period of 30 years.

134. Relevant clauses in the terms and conditions at which the CTCs were to be given to Sulabh require to be considered in extenso and read as hereunder:

1) That the CTCs have been constructed by and on behalf of MCD at its own cost and as such MCD is the Absolute owner of these CTCs. That the little of interest, ownership and rights with regard to CTCs shall rest with the First party except that these will be operated and maintained by the Second party as agreed to in this Agreement.

(i) Before taking over CTCs, each CTC would be inspected by a joint team consisting of MCD Officials' and the representatives of Sulabh International Social Service Organisation to assess and record the condition of each CTC and

(ii) estimate the expenditure required for renovation/rectification and removing major defects/structural defects and providing of missing articles including water pumps, electric motors, metres and electric generators etc. will be borne by First Party. However the above work will be done by Second Party so that quality work is done and the second party does the work to its own satisfaction after the receipt of estimated cost involved from MCD.

(iii) Thereafter Sulabh International Social Service Organisation will not claim any expenditure for operation and maintenance of these CTCs. However, this clause will not be applicable in respect of CTCs already being maintained by Second Party.

135. Against the two year allocation to the other NGOs, the MCD agreed to hand over the CTCs to Sulabh for a period of thirty years. Not only was Sulabh not required to furnish any security or license fee, but under Clause 7 of the memorandum of understanding, Sulabh had the following rights:

Advertisement rights on all these CTCs will be given to the Second Party and the advertisement tax will be given by the Second Party. In addition a sinking fund equal to 10% of the advertisement tax up to a maximum of Rs. 100 lacs would be deposited with MCD to pay any electricity and water charges, in case the same are required to be met from outstanding amount. This amount shall be no way over and above Rs. 100 lacs, if any balance is remaining at the end of the contract period, the same shall be returned without interest to the Second Party.

No reason or justification for grant of these advertisement rights has been given by the respondents. No material or reason for the same is to be found anywhere on the record of the MCD. As to why the terms suggested as Model Agreement barely two years prior, required to be departed from has not been even touched upon by the MCD. The amount which would be earned from such rights is left to imagination by the MCD.

136. Against the liability of the NGOs to bear the charges of electricity and water connections, the MCD undertook the responsibility of providing permanent electricity connection as well as to arrange the borewells so far as Sulabh was concerned:

8)(a) While the expenses of monthly consumption charges for electricity and water shall be borne by the Second Party, the First Party shall assist Second Party in getting connections from concerned departments where these are not available as the CTCs are in the name of the First Party. Past liabilities in respect of water, electricity or any other item shall be exclusive liability of the First Party and the Second Party shall not be liable on any account.

(b) MCD will arrange permission of the appropriate authority for deep borewells wherever required. However, the expenses for the same will be borne by the Second Party.

137. So far as the NGOs were concerned, they were permitted to take only fixed charges only from the users. On the other hand, Sulabh was permitted to charges Rs. 1 for use of the toilets in the slum areas and Rs. 2 from toilet users in other areas with a right to increase the charges by 10% every year. Sulabh was also given the right to charge for "other purposes".

It has been pointed out that by the time the 30 year period is over, if the clause permitting enhancement of usage charges is implemented, so far as toilets in slum areas are concerned, Sulabh will be able to charge Rs. 16 per use while for usage of he CTCs in non-slum areas, it will be charging Rs. 32 for each toilet usage. The MCD has not even bothered to effect any assessment or calculation of the revenue which would be generated from such charges in respect of the CTCs in the slum and non-slum areas over the years. There is no quantification or calculation of even the numbers of the CTCs which are respectively located in the slum and the non-slum areas. No such information is forthcoming in any of the records placed before this Court not has been filed on any of the replies or affidavit even. There is force in the submission on behalf of the petitioners that the MCD has not considered any of these material factors before taking a decision which is stated to be in public interest.

138. As against the terms and conditions of allotment to the NGOs which underwent the scrutiny by a committee which considered all the pros and cons of the various modes of allotment prior to recommending

the 'model agreement', no such exercise was undertaken in finalizing the memorandum of understanding with Sulabh. No enquiry was undertaken nor estimation arrived at of the costs of suggesting and implementing of the proposed repair. There was no assessment of the loss of revenue which would occur on account of deprivation of the security amount as well as the license fees. No estimation or assessment undertaken with regard to the revenue which could be earned from permitting advertisement on the CTCs.

Certainly the decision to change the terms and conditions for allotment to Sulabh is not a considered decision based on any relevant material.

139. The petitioners have also pointed out that the MCD itself drew a distinction between day to day repairs and annual repairs in Clause 15 of the terms and conditions wherein it was so stated:

It is noteworthy that the nature of repairs pointed out relates to toilets being without doors, lack of tubewells and lack of boring, septic tank were also in certain places not connected to the toilets.

140. MCD has also strongly relied on its submission that under the previous modes of allocation and agreements, the responsibility towards the maintaining and operating the CTCs was dual and divided between the MCD and the operating and maintaining agency. Even though there was contracting out of the operation and maintenance work, yet some part of the responsibility continued to have been retained by the MCD such as cleaning of septic tank and the responsibility to supply electricity and water. It has been submitted that even the report of the Vishnu Sharma Committee constituted in September, 1999 identified this division of responsibilities as a key shortcoming in the existing agreements. It is submitted that this Committee gave suggestions regarding the model contract which was proposed to be entered into by the MCD in the future. MCD has clarified that dual responsibility is not what has been construed by the petitioners as that constituting construction being undertaken by one agency, while the operating and maintaining agency being another.

141. Even accepting the submission of the MCD, it is noteworthy that the MCD accepts that the model agreements proposed by the Vishnu Sharma Committee were so proposed after deliberations and consideration of the entire historical experience. Against this, the proposed MOU with Sulabh has been carved out on the basis of the demands made by the NGO alone without any assessment of the respective cost benefit analysis or the recommendations, based whereon the model agreement had been earlier suggested by the Vishnu Sharma Committee. There is not a whisper of an explanation for giving up its recommendations and putting up the draft agreement Along with the Commissioner's letter of 19th July, 2004.

Contentions raised on behalf of MCD

142. Defending the action of the MCD, Mr.Valmiki Mehta, learned senior counsel, has vehemently urged that the petitioners were all defaulters and had committed breaches of the terms and conditions of the license. Adverting to the specific stipulations in the license it has been contended that the assertions of the petitioners to the effect that the maintenance and repairs was to be effected by the MCD or that it committed any default of its responsibility are wholly incorrect. The MCD placed reliance on Clauses 15, 15.1, 16.1, 16.2 and 14.8 of the terms and conditions of the three years license given to the petitioners to operate the CTCs. It is contended that the petitioners miserably failed to pay the license fee and as such were gross defaulters. The MCD had, therefore, decided to terminate the same. Reliance was placed on Section 62 & 63 of the Contract Act in this behalf. Based on these statutory provisions it is also contended by learned senior counsel that the rights of the parties are governed by specific written contract and cannot be altered.

143. It has also been vehemently contended that the NGOs who were allotted the CTCs failed to point out any specific defects in the CTCs and that while some of the NGOs did point out general defects however no specific grievance was made by any NGO. It is in this behalf it has become necessary to notice the detailed submissions which were made in the joint meetings which were conducted under the chairmanship of the

Additional Commissioner of the Slum & JJ Wing wherein specific deficiencies were pointed out. The concerned executive engineers and the field monitors appointed by the MCD were required to look at the individual toilet complexes. These engineers expressed difficulties with regard to the refusal of the contractors to remove the deficiencies.

144. The other submission is that the contract was entered into by the petitioners with open eyes. The MCD could not be held bound to ensure profits to the contractors. In the event of dis-satisfaction with any situation it was open to the contractor to terminate the agreement and it cannot be permitted to contend that MCD was at fault yet they want to continue and still not to pay the contracted license fees. In this behalf reliance was placed on Nagubai Ammal and Ors. v. B.Sharma Rao and Ors. AIR 1968 SC 596(Para 4) Ningawwa v. Byrappa Shiddappa Hirenkrabar and Ors.; (at page 540) entitled New Bihar Bidi Leaves Co. and Ors. v. State of Bihar and Ors. and (paras 21 to 25 at page 108) Assistant Excise Commissioner and Ors. v. Issac Peter and Ors.

145. Mr. Mehta further submitted that where a contract, as in the instant case, is not specifically enforceable no injunction can be granted. (Re: Rajasthan Breweries Limited v. Stroh Brewery Company; (paras 21 to 25 at page 108)

Assistant Excise Commissioner and Ors. v. Issac Peter and Ors.)

Having accepted the terms of the contract, it is submitted that there can be no unilateral novation of a contract of the petitioners. (at page 16) entitled City Bank N.A v. Standard Chartered Bank and Ors.; Pallav Sheth v. Custodian and Ors.

Learned senior counsel for the MCD has contended that the petitioners had never objected to or pointed out any discrepancy in the CTCs. In this behalf it was argued that the petitioner in the W.P.(C) No. 12378/2004 being the Centre for Environmental and Social Development v. Commissioner of MCD and Ors. did not point out any civil or other deficiencies and did not pay any license fee whatsoever. Reference was made to the letter dated 6th August, 2002 written by this petitioner to MCD. It is alleged that the petitioner did not point out any civil or electrical deficiencies and a huge amount was due on account of license fee.

Similarly in WP(C) 14690/2004 Balmiki Development Society of India v. Commissioner, MCD and Anr., it is contended that none of the reasons for closure of the CTC were attributable to the MCD and that 100% of the license fee was due and payable.

In WP(C) 17123/2004 the petitioner, Delhi Sanitation Improvement Society, it is pointed out by learned senior counsel that out of the 20 CTCs allotted, 13 of the CTCs are functional and yet 100% of the license fee is due and payable.

146. Defending the decision taken by the MCD to allot all the CTCs to Sulabh, Mr. Valmiki Mehta learned senior counsel appearing for the MCD also placed reliance on the Sections 44, 45 and 65 of the Delhi Municipal Corporation Act. It is contended that the Standing Committee of the MCD is a statutory body and that it was empowered to appoint a Sub Committee in exercise of powers under Section 65 of the DMC Act. Troubled by the failure of the petitioners who were allotted the CTCs and faced with the responsibility to the Asian Development Bank which had advanced funds for construction of the CTCs, bearing in mind the imperative duty to ensure that open defaecation is brought to an end so that the River Yamuna is saved from further pollution, the MCD was constrained to explore an alternative for effective management and operation of the CTCs. It was thus contended that a Sub Committee was appointed which took extreme pains to collect material and examine the issue in detail. It examined the difficulties being faced by the MCD in the four types of contracts on which the operation and maintenance of CTCs had been given to different bodies. The problems being faced from duality of responsibility in operating and maintaining these CTCs in terms of repairs, maintenance etc. were examined in great detail by the sub committee which made several

recommendations. The proposal received from the Commissioner of the MCD was also examined and recommendations were made to the Standing Committee of the MCD. It has further been pointed out that the MCD had adopted an identical procedure prior to award of the contracts for operation of the CTCs when they were allotted to the petitioners. On that occasion, the Vishnu Sharma Sub-Committee had made a recommendation whose recommendations were adopted and the same procedure has been followed in taking the decision which has been impugned before this Court.

147. Learned senior counsel appearing for the MCD was at pains to point out that the decision taken by the MCD was an administrative decision and a policy matter and that the limits of judicial review into such a decision were circumscribed within narrow limits. It has been pointed out that the actual decision was not open to judicial review and this Court would examine only the decision making process. The same required this Court to satisfy its judicial conscience that the decision of the MCD was not arbitrary and that some material existed on the record to justify such decision on its part. It is contended that the quantum of the material or its merit was not open to judicial scrutiny. It is further contended that the MCD was bound to debar the defendants from the tendering process in the facts and circumstances of the instant case. The MCD was justified in taking a decision not to make commercial profits from its duty of sewage and salvage collection and provision of toilet facilities. In this behalf reliance was placed on the pronouncement of the Apex Court in 1995(Supp) 2 SCC 512(para 34) GD Zalani and Anr. v. Union of India and Ors. (Kasturi Lal Lakshmi Reddy and Ors. v. State of Jammu and Kashmir and Anr. M & T Consultants, Secunderabad v. S.Y. Nawab and

Anr.

Contentions raised on behalf of Sulabh

148. Mr. P.N. Lekhi, learned senior counsel, appearing for Sulabh has urged that the pleadings of the petitioners and the annexures enclosed clearly show that the petitioners have attempted to make out a case of contractual violations and that it is not for this Court in exercise of its extraordinary jurisdiction to go into the finer points of deficiencies and compliance of contractual matters. The judicial pronouncements in Bareilly Development Authority and Anr. v. Ajay Pal Singh and Ors. and 7 Moore's Indian Appeal 7 Ishaan Chander Singh v. Sham Charan were relied upon in this behalf.

149. Adverting to the facts in the instant case it has been pointed out that the allocation of the CTCs was based on tenders. The petitioners were successful in their bidding and were awarded the CTCs after entering into contracts. The entire writ petition is stated to be based on alleged deficiencies in the CTCs. It is further pointed out that the petitioners are avoiding to pay the contractual license fee on the allegation that the MCD had failed to abide by its contractual commitments. Therefore, it is urged that there is no element of public law and the matter is purely in the realm of private law. My attention has been drawn also to the provisions of Section 201 of the Delhi Municipal Corporation Act which provides the manner in which contracts shall be entered into by the MCD.

150. According to Mr. P.N. Lekhi, learned senior counsel for Sulabh, the petitioners have failed to make out any case against Sulabh. It is contended that the allegations against this organisation are totally malafide and baseless and deserve to be ignored for the purposes of adjudication of the present writ petition. It has been argued at length that Sulabh was not interested in award of the work and that it was in a class of its own. Placing reliance on its years of experience and standing in the area of provision of common toilet facilities, it is contended that there is no other organisation which is as experienced or possessed of the expertise as has been attained by Sulabh. It has also been urged that this organisation has developed its own engineering and that, as a matter of its policy and principle, Sulabh does not participate in any competitive bidding. It has further been urged that it is contesting the present writ petitions only for the reason that the petitioners have made wild and baseless allegations against this organisation and it is interested only in protecting its name.

151. Mr. P.N. Lekhi, learned senior counsel further contended that Section 42 of the DMC Act, 1957 sets out the obligatory functions of the MCD and that the provision of public latrines, urinals and similar conveniences is one of the obligatory functions of the MCD. It is, therefore, a statutory duty and any arrangement made for discharge of such obligatory function and statutory duty cannot be faulted on the grounds urged by the petitioners. Learned senior counsel placed reliance on the definition of " largesse"as given in the Oxford English Dictionary to read that the same means "liberality, bountifullness, munifesence."

It was urged at great length that therefore the decision impugned before this Court to award the operation and maintenance of the CTCs to Sulabh is not dispensation of " largesse" by the MCD or even in the realm of award of a contract by the MCD but is a policy decision taken by a statutory authority which is in the nature of a local self-governance. Placing reliance on Pearlman v. Keepers and Governors of Harrow School at 1979(1) All ER 365 (at page 372), it was urged that no court or tribunal has any jurisdiction to make any error of law on which the case decision depends and that a writ of certiorari would lie to correct such error if made.

Mr. Lekhi, learned senior counsel also placed reliance on 1974(II) All ER 156 Asher and Ors. v. Secretary of State for the Reinforcement and Anr. to urge that the Court should not interfere in decisions taken by authorities without good reason. Further placing reliance on the definition of 'policy' as given in the US Supreme Court report 115 Lawyers Edition 2nd Edition 410(at page 438), it was urged that the Court could not even examine the issue as to whether an authority had deviated from its own policy. Further elaborating this submission it was contended that the decision of the MCD had been taken in the paramount interest of the public at large and, therefore, it was in the larger interest of the country. In this behalf reliance was placed on the pronouncement in Usha Mehta and Ors. v. State of Maharashtra (at page 273 and 279).

It is, therefore, settled law that the Courts could interfere even in a matter relating to policy or a policy decision if the same has been taken malafide or has been taken arbitrarily or is discriminatory.

152. According to the learned senior counsel a policy decision can only be challenged on grounds of procedural impropriety, illegality or proportionality. It has been pointed out that all the petitions are similar in pleadings and that there are no statements of facts in the writ petitions as to how the Wednesbury principles have been violated. It is contended that none of the conditions laid down in entitled Indian Railway Construction Co. Ltd. v. Ajay Kumar have been satisfied in the instant case.

In this behalf reliance was also placed on 2005(2) All ER 192 (paras 28 & 29) Hall v. Wandsworth London Borough Council; 2005 (1) All ER 53 (para 59) National Car Parks Limited v. Baird (Valuation Officer) and Anr.; and 2004 (4) All ER 162 Mabkshad v. Howard De Walden Estates.

153. Objecting to the maintainability of the instant writ petitions, impugning the decision of the MCD, placing reliance on M.P. Oil Extraction v. State of M.P.

Balco Employees Union v. Union of India and Ors. Kumar v. UOI (128 para 28) and

, it was urged that the executive authority of the

State has to be held to be within its competence to frame a policy for the administration of the State unless the policy framed is absolutely capricious and not being informed by any reason whatsoever, it can be clearly held to be arbitrary and founded on the mere ipsi dixit of the executive functionaries thereby violating Article 14 of the Constitution or if such policy offends other constitutional provisions or comes into conflict with any statutory provision. Mr. Lekhi submits that this was not so in the present case.

154. It has been pointed out that Section 42(6) of the Delhi Municipal Corporation Act, 1957 requires the MCD to perform scavenging functions. On the other hand Section 43 sets out the discretionary functions of the MCD.

Placing reliance on the pronouncement of the Apex Court in Union of India v. S.B. Vohra, Mr. Lekhi learned senior counsel has contended that the Apex Court has recognised the distinction between discretionary power and obligatory duties and that, exercise of discretion in matters relating to policy, will depend upon the law which governs the field that is to say as to whether it is fundamental or ordinary law which is to be considered and that, at the first instance, the Courts would allow the statutory authorities to freely perform their functions.

155. It was contended that the MCD is an elected body elected by the representatives of the people. Article 243(R) of the Constitution was referred to and it was urged with all the vehemence at the command of learned senior counsel that interference by this Court in a policy decision of the MCD amounts to interference in the constitutional scheme.

It is contended that decisions are taken by majority of votes cast by members the MCD. In the instant case there can be no interference with a decision arrived at in a democratic manner in accordance with law by an elected body.

156. Mr. P.N. Lekhi, learned senior counsel has further urged that in view of the pronouncement of the Apex Court reported at Ramesh Mehta v. Sanwal Chand Singhvi and Ors. democracy at the grass root level was sought to be introduced by the 74th Constitutional Amendment in terms of Article 243R which was inserted to include the municipalities in the constitutional scheme. It has been contended that once the grass root democracy has been accepted, a pragmatic and purposive meaning to the provisions of the municipal enactment has to be given.

157. It is further submitted that the freedom of the action of the local authority cannot be curtailed and this principle was further recognised by the Court in Anugrah Narain Singh v. State of UP Lorry owners Association v. State of Bihar and 2003 (2) All ER 497 Sheldrake v. Director of Public Prosecution.

158. It was urged that under Section 487-488 of the DMC Act, 1957, only the Central Government has the power of superintendence over the wrong actions of the MCD. In this behalf reliance was placed on the pronouncement of the Apex Court in entitled MCD v. Birla Cotton and Spinning Mills.

159. The principal argument urged on behalf of Sulabh however was to the effect that none of the writ petitions contained any pleading establishing any of the ingredients necessary for laying a legally tenable challenge to the decision of the MCD. It was urged that there was no pleading or submission making out a case of bias or animus in the MCD or its Commissioner in taking the decision. Placing reliance on MP Special Police Establishment v. State of MP, it is urged that there were no grounds whatsoever for holding that there is likelihood or apparent bias or that the decision maker had any interest in the out come of the decision taken.

It has been contended that there is nothing in the pleadings of any of the petitioners making out any illegality, statutory or constitutional; procedural irregularity or dis-proportionality to support a case of a taint being attached to the MCD.

160. It has been vehemently urged that the petitioners have placed no pleadings whatsoever on record to show as to how the public law remedy is available to them. Placing reliance on (1988) 4 SCC 544 Bharat Singh v. State of Haryana, it is submitted that the petitioners have not laid any pleadings to bring out a case on violations of Article 14.

161. Before this Court, learned Counsel appearing for MCD and Sulabh have argued at great length that no fault can be found and the decision to allot the CTCs to Sulabh cannot be challenged for the reason that the decision-making process involved consideration of the entire relevant material; that the process was identical to the process involved in taking the decision to hand over the CTCs to the NGOs including the petitioner; and that the Committee appointed by the MCD as also the Full House of the MCD consisting of the elected representative examined the issues thread bare. Substantial case law on these issues has been cited.

162. Answering the allegations of mala fide, learned senior counsel cited the pronouncement of the Apex Court in Dharam Dutt v. Union of India AIR 2004 SC 1294 (para 16) to urge that motive is irrelevant. The observations of the Apex Court in entitled K.C. Gajapati Narayan Deo and Ors. v. State of Orissa are also to the same effect. It is urged that the action of the MCD in awarding the operation and maintenance of the CTCs to Sulabh is not malafide and no motive can be attributed to it.

163. It has been contended that the decision taken to award the work of operation and maintenance of toilets to the Sulabh is with the consent of Union of India and has been taken under the supervision and control of the Central Government in accordance with the provisions of Section 485 & 490 of the DMC Act. The decision cannot be impugned merely because MCD opted to get rid of the responsibility and that there is no malafide, irrationality or bias in the decision. The choice has been made by the MCD based on past performance and reputation which was after consideration of all relevant inputs and no direction can be given to change the decision. The principles laid down in the Wednesbury Corporation case are not attracted inasmuch as the decision under challenge is taken after detailed consideration by the sub-committee and all competent authorities and a decision of the Full House of the Delhi Municipal Corporation.

164. Appearing for Sulabh-respondent No. 4 in WP(C) 11865/2004 Himalayan Institute of Pollution Control & Social Economic Development v. Commissioner, MCD and Ors. Dr. A.M. Singhvi, learned senior counsel additionally urged that the conduct of the petitioners does not entitle them to exercise of any discretion in their favor. According to learned senior counsel, the petitioners participated in an open bid after inspection of the sites. Such a condition was incorporated in the advertisements dated 22nd November, 2001 and 22nd March 2002 issued by the MCD inviting applications. The petitioner in this writ petition quoted a price of Rs. 16/- per WC per month against a reserve price of Rs. 20/- per month. Such a bid was artificially exaggerated and, on the face of it, was not commercially viable. The petitioners submitted an unconditional bid without any caveat or reservation and having got allotment of the CTCs , the petitioners opted to selectively run only those toilets which were profit making and not to run those which were not profitable.

The petitioners reserved the CTCs by such exaggerated bids and thereby excluded other deserving parties. It is pointed out that the MCD, vide letter dated 22nd March, 2002, required the applicant to visit the CTCs. The petitioners in the writ petition have stated that they have opted to inspect the CTCs only after their allocation.

Learned senior counsel submits that the petitioners had an option to elect to run the CTCs shortly after the bid. The petitioners have no right whatsoever to elect not to operate the bad toilets and to operate only the good toilets.

On these facts Dr. Singhvi has submitted that the MCD invited tenders to which the petitioners responded. The tenders were accepted and CTCs allotted to the petitioner. Such an exercise miserably failed and that, the award to respondent No. 4 is a remedial measure in public interest and as such the argument of the petitioners of arbitrariness in the action of the MCD rendering it violative of Article 14 is not available to them. It is contended that the present matter not being a case of threshold tendering, cannot be challenged on grounds of violation of Article 14.

However justifying the choice of allotting the CTCs to Sulabh, it is contended that the MCD having tried the other NGOs, had miserably failed in their attempt to operate and maintain the CTCs; that Sulabh as a policy does not participate in bidding and all other awards in its favor by the MCD were not by tender.

165. Justifying the award of the contract for the period of thirty years, Dr. A.M. Singhvi learned senior counsel contended that by virtue of the terms on which the CTCs were decided to be awarded to Sulabh, the MCD stood absolved of all repairs, maintenance, staff expenses etc. Sulabh alone was to ensure functional toilets. MCD was placed in a situation where it was unable to provide civic amenities and as such, the decision to award the toilets to it could not be impugned on any legally justifiable grounds.

It has further been pointed out that under the scheme of allotment to the other NGOs, MCD was required to incur expenses of running into huge amounts of maintenance every three years; provide for loss of fixtures by theft or damage and it is submitted that the sub-committee appointed by the MCD had examined this matter in great detail. It was pointed out that all aspects of building maintenance, boosters, tubewells, gardening, rectification etc. were to be done by Sulabh.

As to why Sulabh had to be singled out, the justification placed before this Court is that this organisation had impeccable credentials and there was no history of any dispute in the 30 years contracts which MCD had entered into with Sulabh which was never black listed and all operational costs were to devolve on Sulabh.

Urging that Sulabh is an All India Level Organisation which has provided and is providing exemplary services in the arena of toilet facilities to the common man all over the country. Dr. Singhvi, learned senior counsel has submitted that its choice to operate and maintain the CTCs is the best and only option available to the MCD. Answering allegations of black listing and court proceedings in different High Courts against it, it was urged that an incorrect facts situation was placed before this Court and that the allegations against Sulabh were unjustified.

166. According to Dr.Singhvi, the decision to award the operation and maintenance of CTCs to Sulabh is a transparent and reasoned decision arrived at after application of mind to all relevant considerations. Irrelevant considerations were eschewed and there was no unreasonableness or perversity in such decision and, therefore, the principles on which the decision making process is to be tested as laid down by the Apex Court in 1994 (6) SCC 651 entitled Tata Cellular v. Union of India were not violated.

167. It was further contended that by the resolution No. 400, the motion to award the CTCs to Sulabh was carried by the Full House of the Corporation. There was no malafide in the collective decision. In answer to the argument that Sulabh had been given a favorable treatment by grant of the advertisement rights, it is contended that the contract was for 30 years and all operational and maintenance costs were to be incurred by Sulabh as such the grant of advertisement rights was not unfair.

168. According to Dr. Singhvi learned senior counsel, Sulabh has no sister concerns whatsoever; that Sulabh does not control any other NGO and has no responsibility for any of their actions. Merely because some organisations have adopted names similar to its name cannot by any means create any nexus or connection between them.

169. The principal submission was to the effect that the norm of a tender in a given situation can be departed from in public interest; to get rid of vested interests or to provide for inaccessible areas in public functions. Learned senior counsel has contended that in the instant case it cannot be disputed that the MCD had an unmitigated need for the best services. Repeated failure in the past in its object to provide public amenities, necessitated a departure from the norm of inviting open tenders and the MCD cannot be faulted for having taken a considered decision in this behalf. Reliance was placed on the pronouncements of the Apex Court in (1980) 4 SCC Kasturi Lal Lakshmi Reddy v. State of Jammu & Kashmir and Anr.

Sachidanand Pandey v. State of West Bengal and Ors. Netai Bagh and Ors. v. State of West Bengal and Ors.; M.P. Oil Extraction and Anr. v. State of M.P and Ors. and 1995(supp. 2) SCC 512 G.D. Zalani and Anr. v. Union of India and Ors.; and State of Gujarat and Ors. v. Meghji Pethraj Shah Charitable Trust and Ors. in support of these submissions.

170. On the other hand, on behalf of the respondents, placing reliance on K. Nagraj v. State of Andhra Pradesh and Ors. (2001) 2 SCC 330 State of Punjab v. V.K. Khanna Indian Railway Construction Company v. Ajay Kumar, it is urged that the burden of proof in matters of malafide is very high and that in the light of the vague assertions of the petitioners in the various writ petitions, the grounds for urging malafide had not been made out.

171. I have heard learned senior counsels on both sides at great length and have been carefully taken through the record and judicial pronouncements covering the different issues raised.

172. Article 14 of the Constitution of India imposes upon the State, the duty to act fairly, justly and reasonably. Before this Court lengthy arguments have been addressed on the objection that the petitioner are urging breach of contractual duties by the MCD while the MCD is alleging contractual violations by the petitioners. The respondents have challenged the maintainability of the writ petition urging that the petitioners have an alternate efficacious remedy available that the questions raised being in the nature of a policy decision and in the realm of contract, are wholly beyond the scope of consideration in writ proceedings. These issues overlap and deserve to be considered together. It is necessary to consider these objections first.

Maintainability of writ petition on issues of contract, policy decision and availability of alternative remedy.

173. An objection was taken on behalf of the respondents that the relationship between the parties and the contract between the parties was in the private law field and that there was no scope for applying the doctrine of arbitrariness or mala fides. It is submitted that the decision to allot to Sulabh is a policy decision of the MCD and hence beyond the scope of judicial review by way of a writ petition. It was urged that the validity of the respondent's action had to be tested on the basis of 'right' and not 'power'. The plea of arbitrariness/mala fides as being so gross cannot shift a matter falling in the private law field to the public law field. On behalf of the respondents, it was contended that permitting the same would result in an anomalous situation that whenever the state is involved, it would always be the public law field and that all redress against the state would fall in writ jurisdiction and not in suits before the civil courts.

Inasmuch as, before this Court as well, the Municipal Corporation of Delhi has so contended, it is necessary to consider in extenso the principles laid down by the Apex Court which directly rule the matter in issue.

174. It has been urged at great length by the respondents that the matters being raised by the petitioners arise out of contract and that they have more efficacious alternative remedies available which should be exhausted. The parameters within which the court will interfere in a writ petition under Article 226 of the Constitution of India in matters relating to contractual obligations of the state or its instrumentality or in matters relating to policy of the state or a statutory authority are well settled. In a plethora of judicial pronouncements, the Apex Court has laid down the parameters within which the High Courts shall entertain writ petitions raising such challenges and also the nature of the review by the court when administrative action is challenged under Article 226 of the Constitution of India. So far as the permissible limits within which the courts shall entertain writ petitions wherein such challenges have been laid are concerned, it would be useful to notice the principles laid down by the Apex Court in some of the celebrated pronouncements. Such judgments which have a bearing on the issues raised in the present case and have been referred to by both sides. Such binding judicial precedents are being noticed hereafter and the principles laid down reproduced in extenso.

175. Such a contention was rejected by the Apex Court in A.V. Venkateswaran v. Ramchand Sobhraj Wadhwani when it pithily laid down the applicable principles and stated them thus:

9. xxx We must, however, point out that the Rule that the party who applies for the issue of a high prerogative writ should, before he approaches the Court, have exhausted other remedies open to him under the law, is not one which bars the jurisdiction of the High Court to entertain the petition or to deal with it, but is rather a Rule which Courts have laid down for the exercise of their discretion.

10. The passages in the judgments of this Court we have extracted would indicate (1) that the two exceptions which the learned Solicitor-General formulated to the normal Rule as to the effect of the existence of an adequate alternative remedy were by no means exhaustive, and (2) that even beyond them a discretion vested in the High Court to have entertained the petition and granted the petitioner relief notwithstanding the existence of an alternative remedy. We need only add that the broad lines of the general principles on which

the Court should act having been clearly laid down, their application to the facts of each particular case must necessarily be dependent on a variety of individual facts which must govern the proper exercise of the discretion of the Court, and that in a matter which is thus pre-eminently one of discretion, it is not possible or even if it were, it would not be desirable to lay down inflexible Rules which should be applied with rigidity in every case which comes up before the Court.

176. Learned senior counsel appearing for the petitioners have strongly relied on Shri Anadi Mukta Sadguru Shree Muktajee

Vandasjiswami Suvarna Jayanti Mahotsav Smarak Trust and Ors. v. V.R. Rudani and Ors. In this case, the court was concerned with an objection raised by the respondents in a writ petition to the effect that the respondent was a trust which was not a statutory body and subject to writ jurisdiction of the High Court. In this behalf, the court observed thus:

14. If the rights are purely of a private character no mandamus can issue. If the management of the college is purely a private body with no public duty mandamus will not lie. These are two exceptions to Mandamus. But once these are absent and when the party has no other equally convenient remedy, mandamus cannot be denied. It has to be appreciated that the appellants-trust was manging the affiliated college to which public money is paid as Government aid. Public money paid as Government aid plays a major role in the control, maintenance and working of educational institutions. The aided institutions like Govoernment institutions discharge public function by way of imparting eduction to students. They are subject to the rules and regulations of the affiliating University. Their activities are closely supervised by the University authorities. m Employment in such institutions, therefore, is not devoid of any public character. (see The evolving Indian Administrative Law by M.P.Jain (1983) p.266). So are the service condititions of the academic staff. When the University takes a decision regarding their pay scales, it will be binding on the management. The service condititons of the academic staff are, therefore, not purely of a private character. It has super-added protection by University decisions creating a legal right-duty relationship between the staff and the management. When there is existence of this relationship, mandamus cannot be refused to the aggrieved party.

After so observing, the court considered the scope of Article 226 of the Constitution and further observed thus:

19. The term "authority" used in Article 226, in the context, must receive a liberal meaning unlike the term in Article 12. Article 12 is relevant only for the purpose of enforcement of fundamental rights under Article 32. Article 226 confers power on the High Courts to issue writs for enforcement of the fundamental rights as well as non-fundamental rights. The words "Any person or authority" used in Article 226 are, therefore, not to be confined only to statutory authorities and instrumentalities of the State. They may cover and other person or body performing public duty. The form of the body concerned is not very much relevant. What is relevant is the nature of the duty imposed on the body. The duty must be judged in the light of positive obligation owed by the person or authority to the affected party. No matter by what means the duty is imposed. If a positive obligation exists mandamus cannot be denied.

21. Here again we may point out that mandamus cannot be denied on the ground that the duty to be enforced is not imposed by the statute. Commenting on the development of this law, professor De Smith states: "To be enforceable by mandamus a public duty does not necessarily have to be one imposed by statute. It may be sufficient for the duty to have been imposed by charter, common law, custom or even contract."(Judicial Review of Adminstrative Act 4th Ed.P.540). We share this view. The judicial control over the fast expanding maze of bodies affectiving the rights of the people should not be put into water-tight compartment. It should remain flexible to meet the requirements of variable circumstances. mandamus is a very wide remedy which must be easily available 'to reach injustice wherever it is found'. Technicalities should not come in the way of granting that relief under Article 226. We, therefore, reject the contention urged for the appellants on the maintainability of the writ petition.

The Apex Court also explained the scope of mandamus in this judgment and had stated thus :

15. The law relating to mandamus has made the most spectacular advance. It may be recalled that the remedy by prerogative writs in England started with very limited scope and suffered from many procedural disadvantages. To overcome the difficulties, Lord Gardiner (the Lord Chancellor) in pursuance of Section 3(1)(e) of the Law Commission Act, 1965, requested the "Commission"to review the existing remedies for the judicial control of adminstrative acts and commissions with a view to evolving a simpler and more effective procedure." The Law Commission made their report in March 1976 (Law Com No. 73). It was implemented by Rules of Court (Order 53) in 1977 and given statutory force in 1981 by Section 31 of the Supreme Court Act 1981. It combined all the former remedies into one proceeding called judicial review. Lord Denning explains the scope of this "judicial review":

At one stroke the courts could grant whatever relief was appropriate. Not only certiorari and mandamus, but also declaration and injunction. Even damages. The procedure was much more simple and expeditious. Just a summons instead of a writ. NO formal pleadings. The evidence was given by affidavit. As a rule no cross-examination, no discovery, and so forth. But there were important safeguards. In particular, in order to qualify, the applicant had to get the leave of a judge.

The statute is phrased in flexible terms. It gives scope for development. It uses the words "having regard to". Those words are very indefinite. The result is that the courts are not bound hand and foot by the previous law. They are to 'have regard to' it. So the previous law as to who are - and who are not - public authorities, is not absolutely binding. Nor is the previous law as to the matters in respect of which relief may as to the matters in respect of which relief may be granted. This means that the judges can develop the public law as they think best. That they have done and are doing." (see- The Closing Chapter - by Rt.Hon Lord Denning p. 122).

177. In Mahavir Auto Stores and Ors. v. Indian Oil Corporation and Ors., the appellant had been carrying on business of sale and distribution of lubricants for 18 years. The respondent Indian Oil Corporation abruptly stopped supply of lubricants to the firm without any notice of the intimation. No query or clarification even was sought for and there was no adjudication as such. The petitioner impeached the action of the respondents contending that its decision was in exercise of administrative jurisdiction and impeachable on ground of arbitrariness and violation of Article 14 of the Constitution of India on any of the grounds available in the public law field. In this behalf, the court observed thus:

12. It is well settled that every action of the State or an instrumentality of the State in exercise of its executive power, must be informed by reason. In appropriate cases, actions uninformed by reason may be questioned as arbitrary in proceedings under Article 226 or Article 32 of the Constitution. Reliance in this connection may be placed on the observations of this Court in Radha Krishna Agarwal v. State of Bihar . It appears to us, at the outset, that in the facts and circumstances of the case, the respondent-company IOC is an organ of the state or an instrumentality of the State as contemplated under Article 12 of the Constitution. The State acts in its executive power under Article 298 of the Constitution in entering or not entering in contracts with individual parties. Article 14 of the Constitution would be applicable to those exercises of power. Therefore, the action of State organ under Article 14 can be checked. See Radha Krishna Agarwal V. State of Bihar at p. 462 (at SCC) : (at p. 1499-1500 of AIR) (supra), but Article 14 of the Constitution cannot and has not been construed as a charter for judicial review of State action after the contract has been entered into, to call upon the State to account for its actions in its manifold activities by stating reasons for such actions. In a situation of this nature certain activities of the respondent company which constituted State under Article 12 of the Constitution may be in certain circumstances subject to Article 14 of the Constitution in entering or not entering into contracts and must be reasonable and taken only upon lawful and relevant consideration, it depends upon facts and circumstances of a particular transaction whether hearing is necessary and reasons have to be stated. In case any right conferred on the citizens which is sought to be interfered, such action is subject to Article 14 of the Constitution, and must be reasonable and can be taken only upon lawful and relevant grounds of public interest. Where there is arbitrariness in State action of this type of entering or not entering into contracts,

Article 14 springs up and judicial review strikes such an action down. Every action of the State executive authority must be subject to rule of law and must be informed by reason. So, whatever be the activity of the public authority, in such monopoly or semi-monopoly dealings, it should meet the test of Article 14 of the Constitution. If a Governmental action even in the matters of entering or not entering into contracts, fails to satisfy the test of reasonableness, the same would be unreasonable. In this connection reference may be made to E.P. Royappa v. State of Tamil Nadu Maneka Gandhi V. Union of India , Ajay Hasia V. Khalid Mujib

Sehravardi R.D. Shetty v. International Airport

Authority of India . It appears to us that rule of

reason and rule against arbitrariness and discrimination, rules of fair play and natural justice are part of the rule of law applicable in situation or action by State instrumentality in dealing with citizens in a situation like the present one. Even though the rights of the citizens are in the nature of contractual rights, the manner, the method and motive of a decision of entering or not entering into a contract, are subject to judicial review on the touchstone of relevance and reasonableness, fair play, natural justice, equality and non-discrimination in the type of the transactions and nature of the dealings as in the present case.

13. The existence of the power of judicial review however depends upon the natural (of) and the right involved in the facts and circumstances of the particualr case, it is well settled that there can be "malice in law". Existence of such "malice in law" is part of the critical apparatus of a particular action in administrative law. Indeed "malice in law" is part of the dimension of the rule of relevance and reason as well as the rule of fair play in action.

178. The Apex Court in Mahavir Auto Store(supra) further held :

17. We are of the opinion that in all such cases whether public law or private law rights are involved, depends upon the facts and circumstances of the case. The dichotomy between rights and remedies cannot be obliterated by any straight jacket formula. It has to be examined in each particular case. Mr. Salve sought to urge that there are certain cases under Article 14 of arbitrary exercise of such "power" and not cases of exercise of a "right" arising either under a contract or under a Statute. We are of the opinion that that would depend upon the factual matrix.

18. Having considered the facts and circumstances of the case and the nature of the contentions and the dealing between the parties and in view of the present state of law, we are of the opinion that decision of the State/public authority under Article 298 of the Constitution, is an administrative decision and can be impeached on the ground that the decision is arbitrary or violative of Article 14 of the Constitution of India on any of the grounds available in public law field. It appears to us that in respect of corporation like IOC when without informing the parties concerned, as in the case of the appellant-firm herein on alleged change of policy and on that basis action to seek to bring to an end to course of transaction over 18 years involving large amounts of money is not fair action, especially in view of the monopolistic nature of the power of the respondent in this field. Therefore, it is necessary to reiterate that even in the field of public law, the relevant persons concerned or to be affected, should be taken into confidence. Whether and in what circumstances that confidence should be taken into consideration cannot be laid down on any strait-jacket basis. It depends on the nature of the right involved and nature of the power sought to be exercised in a particular situation. It is true that there is discrimination between power and right but whether the State or the instrumentality of a State has the right to function in public field or private field is a matter which, in our opinion, depends upon the facts and circumstances of the situation, but such exercise of power cannot be dealt with by the State or the instrumentality of the State without informing and taking into confidence, the party whose rights and powers are affected or sought to be affected, into confidence. In such situations most often people feel aggrieved by exclusion of knowledge if not taken into confidence.

179. So far as the termination of the relationship between the parties was concerned, the court in para 19 observed that in a situation of the transactions between the parties for nearly two decades, such procedure should be followed, which will be reasonable, fair and just, i.e., the procedure which normally be expected to be followed by an organ of the state and that process must be conscious and all those effected should be taken into confidence. Equality and fairness at least demands this much from an instrumentality of the state dealing with a right of the state not to treat the contract as subsisting.

In this background, the court directed that the case of the respondent put up to the appellant and the respondents considered the submissions made by the appellant formed afresh.

Thus, the Apex Court clearly held that even in matters relating to contract, the state or its instrumentality are required to satisfy the test of their action not being arbitrary or unreasonable.

180. In Shrilekha Vidyarthi (Kumari) v. State of U.P. it was clearly held by the Supreme Court that such requirement extends even in the sphere of contractual matters in which the state is concerned which would be amenable to judicial review:

20. xxx We have no hesitation in saying that the personality of the State, requiring regulation of its conduct in all spheres by requirements of Article 14, does not undergo such a radical change after the making of a contract merely because some contractual rights accrue to the other party in addition. It is not as if the requirements of Article 14 and contractual obligations are alien concepts, which cannot co-exist.

21. The Preamble of the Constitution of India resolves to secure to all its citizens Justice, social, economic and political; and Equality of status and opportunity. Every State action must be aimed at achieving this goal. Part IV of the Constitution contains 'Directives Principles of State Policy' which are fundamental in the governance of the country and are aimed at securing social and economic freedoms by appropriate State action which is complementary to individual fundamental rights guaranteed in Part III for protection against excesses of State action, to realise the vision in the Preamble. This being the philosophy of the Constitution, can it be said that it contemplates exclusion of Article 14 - non-arbitrariness which is basic to rule of law - from State actions in contractual field when all actions of the State are meant for public good and expected to be fair and just? We have no doubt that the Constitution does not envisage or permit unfairness or unreasonableness in State actions in any sphere of its activity contrary to the professed ideals in the Preamble. In our opinion, it would be alien to the constitutional scheme to accept the argument of exclusion of Article 14 in contractual matters. The scope and permissible grounds of judicial review in such matters and the relief which may be available are different matters but that does not justify the view of its total exclusion. This is more so when the modern trend is also to examine the unreasonableness of a term in such contracts where the bargaining power is unequal so that these are not negotiated contracts but standard form contracts between unequals.

22. There is an obvious difference in the contracts between private parties and contracts to which the State is a party. Private parties are concerned only with their personal interest whereas the State while exercising its powers and discharging its functions, acts indubitably, as is expected of it, for public good and in public interest. The impact of every State action is also on public interest. This factor alone is sufficient to import at least the minimal requirements of public law obligations and impress with this character the contracts made by the State or its instrumentality. It is a different matter that the scope of judicial review in respect of disputes falling within the domain of contractual obligations may be more limited and in doubtful cases the parties may be relegated to adjudication of their rights by resort to remedies provided for adjudication of purely contractual disputes. However, to the extent, challenge is made on the ground of violation of Article 14 by alleging that the impugned act is arbitrary, unfair or unreasonable, the fact that the dispute also falls within the domain of contractual obligations would not relieve the State of its obligation to comply with the basic requirements of Article 14. To this extent, the obligation is of a public character invariably in every case irrespective of there being any other right or obligation in addition thereto. An additional contractual obligation cannot divest the claimant of the guarantee under Article 14 of non-arbitrariness at the hands of the

State in any of its actions.

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24. The State cannot be attributed the split personality of Dr Jekyll and Mr Hyde in the contractual field so as to impress on it all the characteristics of the State at the threshold while making a contract requiring it to fulfill the obligation of Article 14 of the Constitution and thereafter permitting it to cast off its garb of State to adorn the new robe of a private body during the subsistence of the contract enabling it to act arbitrarily subject only to the contractual obligations and remedies flowing from it. It is really the nature of its personality as State which is significant and must characterize all its actions, in whatever field, and not the nature of function, contractual or otherwise, which is decisive of the nature of scrutiny permitted for examining the validity of its act. The requirement of Article 14 being the duty to act fairly, justly and reasonably, there is nothing which militates against the concept of requiring the State always to so act, even in contractual matters. There is a basic difference between the acts of the State which must invariably be in pubic interest and those of a private individual, engaged in similar activities, being primarily for personal gain, which may or may not promote public interest. Viewed in this manner, in which we find no conceptual difficulty or anachronism, we find no reason why the requirement of Article 14 should not extend even in the sphere of contractual matters for regulating the conduct of the State activity.

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27. Unlike a private party whose acts uninformed by reason and influenced by personal predilections in contractual matters may result in adverse consequences to it alone without affecting the public interest, any such act of the State or a public body even in this field would adversely affect the public interest. Every holder of a public office by virtue of which he acts on behalf of the State or public body is ultimately accountable to the people in whom the sovereignty vests. As such, all powers so vested in him are meant to be exercised for public good and promoting the public interest. This is equally true of all actions even in the field of contract. Thus, every holder of a public office is a trustee whose highest duty is to the people of the country and, therefore, every act of the holder of a public office, irrespective of the label classifying that act, is in discharge of public duty meant ultimately for public good. With the diversification of State activity in a Welfare State requiring the State to discharge its wide ranging functions even through its several instrumentalities, which requires entering into contracts also, it would be unreal and not pragmatic, apart from being unjustified to exclude contractual matters from the sphere of State actions required to be non-arbitrary and justified on the touchstone of Article 14.

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29. It can no longer be doubted at this point of time that Article 14 of the Constitution of India applies also to matters of governmental policy and if the policy or any action of the government, even in contractual matters, fails to satisfy the test of reasonableness, it would be unconstitutional. (See Ramana Dayaram Shetty v. International Airport Authority of India and Kasturi Lal Lakshmi Reddy v. State of Jammu and Kashmir). In Col. A.S. Sangwan v. Union of India while the discretion to change the policy in exercise of the executive power, when not trammelled by the statute or rule, was held to be wide, it was emphasised as imperative and implicit in Article 14 of the Constitution that a change in policy must be made fairly and should not give the impression that it was so done arbitrarily or by any ulterior criteria. The wide sweep of Article 14 and the requirement of every State action qualifying for its validity on this touchstone, irrespective of the field of activity of the State, has long been settled. Later decisions of this Court have reinforced the foundation of this tenet and it would be sufficient to refer only to two recent decisions of this Court for this purpose.

30. xxx In view of the wide ranging and, in essence, all-pervading sphere of State activity in discharge of its welfare functions, the question assumes considerable importance and cannot be shelved. The basic requirement of Article 14 is fairness in action by the State and we find it difficult to accept that the State can

be permitted to act otherwise in any field of its activity, irrespective of the nature of its functions when it has the uppermost duty to be governed by the rule of law. Non-arbitrariness, in substance, is only fair play in action. We have no doubt that this obvious requirement must be satisfied by every action of the State or its instrumentality in order to satisfy the test of validity.

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35. It is now too well settled that every State action, in order to survive, must not be susceptible to the vice of arbitrariness which is the crux of Article 14 of the Constitution and basic to the rule of law, the system which governs us. Arbitrariness is the very negation of the rule of law. Satisfaction of this basic test in every State action is sine qua non to its validity and in this respect, the State cannot claim comparison with a private individual even in the field of contract. This distinction between the State and a private individual in the field of contract has to be borne in the mind.

181. An objection to the maintainability of the writ petition on the ground of availability of the arbitration clause in the contract fell for consideration before the Apex Court in Harbanslal Sahnia v. Indian Oil Corpn. Ltd.

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7. So far as the view taken by the High Court that the remedy by way of recourse to arbitration clause was available to the appellants and therefore the writ petition filed by the appellants was liable to be dismissed is concerned, suffice it to observe that the rule of exclusion of writ jurisdiction by availability of an alternative remedy is a rule of discretion and not one of compulsion. In an appropriate case, in spite of availability of the alternative remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies: (i) where the writ petition seeks enforcement of any of the fundamental rights; (ii) where there is failure of principles of natural justice; or (iii) where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged. (See Whirlpool Corporation v. Registrar of Trade Marks). The present case attracts applicability of the first two contingencies. Moreover, as noted, the petitioners' dealership, which is their bread and butter, came to be terminated for an irrelevant and non-existent cause. In such circumstances, we feel that the appellants should have been allowed relief by the High Court itself instead of driving them to the need of initiating arbitration proceedings.

182. The same question was raised before the Apex Court in ABL International Ltd. and Anr. v. Export Credit

Guarantee Corporation of India Limited and Ors. Placing reliance on the principles laid down in the earlier judgments the court held that the Article 226 of the Constitution, depending on the fact situation is adequately empowered to grant the relief. The principles were so enunciated by the court:

8. As could be seen from the arguments addressed in this appeal and as also from the divergent views of the two courts below one of the questions that falls for our consideration is whether a writ petition under Article 226 of the Constitution of India is maintainable to enforce a contractual obligation of the State or its instrumentality, by an aggrieved party.

9. In our opinion this question is no more res integra and is settled by a large number of judicial pronouncements of this Court. In K.N. Guruswamy v. The State of Mysore and Ors. this Court held:

The next question is whether the appellant can complain of this by way of a writ. In our opinion, he could have done so in an ordinary case. The appellant is interested in these contracts and has a right under the laws of the State to receive the same treatment and be given the same chance as anybody else. We would therefore in the ordinary course have given the appellant the writ he seeks. But owing to the time which this matter has taken to reach us (a consequence for which the appellant is in no way to blame, for he has done all he could to

have an early hearing), there is barely a fortnight of the contract left to go.... A writ would therefore be ineffective and as it is not our practice to issue meaningless writs we must dismiss this appeal and leave the appellant content with an enunciation of the law.

10. It is clear from the above observations of this Court in the said case though a writ was not issued on the facts of that case, this Court has held that on a given set of facts if a State acts in an arbitrary manner even in a matter of contract, an aggrieved party can approach the court by way of writ under Article 226 of the Constitution and the court depending on facts of the said case is empowered to grant the relief. This judgment in K.N. Gurusway v. The State of Mysore and Ors. (supra) was followed subsequently by this Court in the case of The D.F.O. South Kheri and Ors. v. Ram Sanehi Singh wherein this Court held:

By that order he has deprived the respondent of a valuable right. We are unable to hold that merely because the source of the right which the respondent claims was initially in a contract, for obtaining relief against any arbitrary and unlawful action on the part of a public authority he must resort to a suit and not to a petition by way of a writ. In view of the judgment of this Court in K.N. Guruswamy's case , there can be no doubt that the

petition was maintainable, even if the right to relief arose out of an alleged breach of contract, where the action challenged was of a public authority invested with statutory power.

11. In the case of Gujarat State Financial Corporation v. Lotus Hotels Pvt. Ltd. 1983 AIR SC 848 this Court following an earlier judgment in R.D. Shetty v. International Airport Authority of India held:

The instrumentality of the State which would be 'other authority' under Article 12 cannot commit breach of a solemn undertaking to the prejudice of the other party which acted on that undertaking or promise and put itself in a disadvantageous position. The appellant Corporation, created under the State Financial Corporation Act, falls within the expression of 'other authority' in Article 12 and if it backs out from such a promise, it cannot be said that the only remedy for the aggrieved party would be suing for damages for breach and that it could not compel the Corporation for specific performance of the contract under Article 226.

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17. The above judgment of Smt. Gunwant Kaur and Ors. v. Municipal Committee Bhatinda and Ors. 1970 AIR SC 802 finds support from another judgment of this Court in the case of Century Spinning and Manufacturing Company Ltd. and Anr. v. The Ulhasnagar Municipal Council and Anr. wherein this Court held:

Merely because a question of fact is raised, the High Court will not be justified in requiring the party to seek relief by the somewhat lengthy, dilatory and expensive process by a civil suit against a public body. The questions of fact raised by the petition in this case are elementary.

18. This observation of the Court was made while negating a contention advanced on behalf of the respondent-Municipality which contended that the petition filed by the appellant-company therein apparently raised questions of fact which argument of the Municipality was accepted by the High Court holding that such disputed question of fact cannot be tried in the exercise of the extraordinary jurisdiction under Article 226 of the Constitution. But this Court held otherwise.

19. Therefore, it is clear from the above enunciation of law that merely because one of the parties to the litigation raises a dispute in regard to the facts of the case, the court entertaining such petition under Article 226 of the Constitution is not always bound to relegate the parties to a suit. In the above case of Smt. Gunwant Kaur (supra), this Court even went to the extent of holding that in a writ petition, if facts required, even oral evidence can be taken. This clearly shows that in an appropriate case, the writ court has the jurisdiction to entertain a writ petition involving disputed questions of fact and there is no absolute bar for entertaining a writ

petition even if the same arises out of a contractual obligation and or involves some disputed questions of fact.

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22. We do not think the above judgment in VST Industries Ltd. (supra) supports the argument of the learned Counsel on the question of maintainability of the present writ petition. It is to be noted that VST Industries Ltd. against whom the writ petition was filed was not a State or an instrumentality of a State as contemplated under Article 12 of the Constitution, hence, in the normal course, no writ could have been issued against the said industry. But it was the contention of the writ petitioner in that case that the said industry was obligated under the concerned statute to perform certain public functions, failure to do so would give rise to a complaint under Article 226 against a private body. While considering such argument, this Court held that when an authority has to perform a public function or a public duty if there is a failure a writ petition under Article 226 of the Constitution is maintainable. In the instant case, as to the fact that the respondent is an instrumentality of a State, there is no dispute but the question is : Was first respondent discharging a public duty or a public function while repudiating the claim of the appellants arising out of a contract ? Answer to this question, in our opinion, is found in the judgment of this Court in the case of Kumari Shri Lekha Vidyarthi and Ors. v. State of U.P. and Ors.

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23. It is clear from the above observations of this Court, once State or an instrumentality of State is a party to the contract, it has an obligation in law to act fairly, justly and reasonably which is the requirement of Article 14 of the Constitution of India. Therefore, if by the impugned repudiation of the claim of the appellants the first respondent as an instrumentality of the State has acted in contravention of the above said requirement of article 14 then we have no hesitation that a writ court can issue suitable directions to set right the arbitrary actions of the first respondent.

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28. However, while entertaining an objection as to the maintainability of a writ petition under Article 226 of the Constitution of India, the court should bear in mind the fact that the power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provisions of the Constitution. The High Court having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. The Court has imposed upon itself certain restrictions in the exercise of this power [See : Whirlpool Corporation v. Registrar of Trade Marks, Mumbai and Ors. . And this plenary right of the High Court to issue a prerogative writ will not normally be exercised by the Court to the exclusion of other available remedies unless such action of the State or its instrumentality is arbitrary and unreasonable so as to violate the constitutional mandate of Article 14 or for other valid and legitimate reasons, for which the court thinks it necessary to exercise the said jurisdiction.

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52. On the basis of the above conclusion of ours, the question still remains why should we grant the reliefs sought for by the appellant in a writ petition when a suitable efficacious alternate remedy is available by way of a suit. The answer to this question in our opinion, lies squarely in the decision of this Court in the case of Shri Lekha Vidyarthi xxx"

53. From the above, it is clear that when an instrumentality of the State acts contrary to public interest, unfairly, unjustly and unreasonably, in its contractual, constitutional or statutory obligations, it really acts contrary to the constitutional guarantee found in Article 14 of the Constitution.

183. The scope of judicial review on these grounds in matters which may be in the realm of contract is best described by the Apex Court in its recent pronouncement reported at of India v.

Flight Cadet Ashish Rai:

6. There should be judicial restraint while making judicial review in administrative matters. Where irrelevant aspects have been eschewed from consideration and no relevant aspect has been ignored and the administrative decisions have nexus with the facts on record, there is no scope for interference. The duty of the court is (a) to confine itself to the question of legality; (b) to decide whether the decision-making authority exceeded its powers; (c) committed an error of law; (d) committed breach of the rules of natural justice; and (e) reached a decision which no reasonable tribunal would have reached; or (f) abused its powers. Administrative action is subject to control by judicial review in the following manner:

(i) Illegality: this means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.

(ii) Irrationality, namely, Wednesbury unreasonableness.

(iii) Procedural impropriety.

11. The principles which have to be applied in judicial review of administrative decisions, especially those relating to acceptance of tender and award of contract, have been considered in great detail by a three-Judge Bench in Tata Cellular v. Union of India1. It was observed that the principles of judicial review would apply to the exercise of contractual powers by government bodies in order to prevent arbitrariness or favoritism. However, it must be clearly stated that there are inherent limitations in exercise of that power of judicial review. Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the Government. But, the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down. (See para 85 of the Report, SCC para 70.)

12. After an exhaustive consideration of a large number of decisions and standard books on administrative law, the Court enunciated the principle that the modern trend points to judicial restraint in administrative action. The court does not sit as a court of appeal but merely reviews the manner in which the decision was made. The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise, which itself may be fallible. The Government must have freedom of contract. In other words, fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principles of reasonableness but also must be free from arbitrariness not affected by bias or actuated by mala fides. It was also pointed out that quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure. (See para 113 of the Report, SCC para 94.)

13. In Sterling Computers Ltd. v. M & N Publications Ltd.2 it was held as under: (SCC p. 458, paras 18-19)

18. While exercising the power of judicial review, in respect of contracts entered into on behalf of the State, the court is concerned primarily as to whether there has been any infirmity in the 'decision-making process'. ? By way of judicial review the court cannot examine the details of the terms of the contract which have been entered into by the public bodies or the State. Courts have inherent limitations on the scope of any such enquiry. But at the same time ? the courts can certainly examine whether 'decision-making process' was

reasonable, rational, not arbitrary and violative of Article 14 of the Constitution.

19. If the contract has been entered into without ignoring the procedure which can be said to be basic in nature and after an objective consideration of different options available taking into account the interest of the State and the public, then court cannot act as an appellate authority by substituting its opinion in respect of selection made for entering into such contract.

14. In Raunaq International Ltd. v. I.V.R. Construction Ltd.3 it was observed that the award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision, considerations which are of paramount importance are commercial considerations, which would include, inter alia, the price at which the party is willing to work, whether the goods or services offered are of the requisite specifications and whether the person tendering is of the ability to deliver the goods or services as per specifications.

15. The law relating to award of contract by the State and public sector corporations was reviewed in Air India Ltd. v. Cochin International Airport Ltd.4 and it was held that the award of a contract, whether by a private party or by a State, is essentially a commercial transaction. It can choose its own method to arrive at a decision and it is free to grant any relaxation for bona fide reasons, if the tender conditions permit such a relaxation. It was further held that the State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision-making process, the court must exercise its discretionary powers under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the court should interfere.

184. From the foregoing, it is well settled that even in matters relating to award of contracts, there is no absolute prohibition to the maintainability of the writ petition. The action of the authority is amenable to judicial review and is to be tested on the touchstone of arbitrariness on the principles laid down above. It now become necessary to examine the next question which has also been urged at great length. The principles which can be culled out from these decisions are set down thereafter.

Scope of challenge on grounds of violation under Article 14 of the Constitution

185. Learned senior counsels on both sides have placed arguments and extensive case law on the parameters for testing the action of the authority on the touchstone of arbitrariness under Article 14 of the Constitution. This issue has arisen before the Apex Court repeatedly in a variety of situations and the principles which would govern its consideration are well settled. Amongst the several pronouncements on this aspects, the judgment in Panda v. State of Orissa authoritatively lays down the applicable principles. The Government of Orissa was concerned with a scheme of sale of Kendu leaves. It took a decision to invite only those individuals who had carried out the contracts satisfactorily in the previous year without default. This action was challenged by those left out. In its judgment, the court laid down the principles as follows:

17. Validity of the schemes adopted by the Government of Orissa for sale of Kendu leaves must be adjudged in the light of Article 19(1)(g) and Article 14. Instead of inviting tenders the Government offered to certain old contractors the option to purchase Kendu leaves for the year 1968 on terms mentioned therein. The reason suggested by the Government that these offers were made because the purchasers had carried out their obligations in the previous year to the satisfaction of the Government is not of any significance. From the affidavit filed by the State Government it appears that the price fetched at public auctions before and after January 1968, were much higher than the prices at which Kendu leaves were offered to the old contractors. The Government realised that the scheme of offering to enter into contracts with the old licensees and to renew their terms was open to grave objection, since it sought arbitrarily to exclude many persons interested in the trade. The Government then decided to invite offers for advance purchases of Kendu leaves but

restricted the invitation to those individuals who had carried out the contracts in the previous year without default and to the satisfaction of the Government. By the new scheme instead of the Government making an offer, the existing contractors were given the exclusive right to make offers to purchase Kendu leaves. But insofar as the right to make tenders for the purchase of Kendu leaves was restricted to those persons who had obtained contracts in the previous year the scheme was open to the same objection. The right to make offers being open to a limited class of persons it effectively shut out all other persons carrying on trade in Kendu leaves and also new entrants into that business. It was ex facie discriminatory, and imposed unreasonable restrictions upon the right of persons other than existing contractors to carry on business. In our view, both the schemes evolved by the Government were violative of the fundamental right of the petitioners under Article 19(1)(g) and Article 14 because the schemes gave rise to a monopoly in the trade in Kendu leaves to certain traders, and singled out other traders for discriminatory treatment.

18. The classification based on the circumstance that certain existing contractors had carried out their obligations in the previous year regularly and to the satisfaction of the Government is not based on any real and substantial distinction bearing a just and reasonable relation to the object sought to be achieved i.e. effective execution of the monopoly in the public interest. Exclusion of all persons interested in the trade, who were not in the previous year licensees is ex facie arbitrary, it had no direct relation to the object of preventing exploitation of pluckers and growers of Kendu leaves, nor had it any just or reasonable relation to the securing of the full benefit from the trade to the State.

19. Validity of the law by which the State assumed the monopoly to trade in a given commodity has to be judged by the test whether the entire benefit arising there from is to ensure to the State, and the monopoly is not used as a cloak for conferring private benefit upon a limited class of persons. The scheme adopted by the Government first of offering to enter into contracts with certain named licensees, and later inviting tenders from licensees who had in the previous year carried out their contracts satisfactorily is liable to be adjudged void on the ground that it unreasonably excludes traders in Kendu leaves from carrying on their business. The scheme of selling Kendu leaves to selected purchasers or of accepting tenders only from a specified class of purchasers was not "integrally and essentially" connected with the creation of the monopoly and was not on the view taken by this Court in Akadasi Padhan case protected by Article 19(6)(ii): it had therefore to satisfy the requirement of reasonableness under the first part of Article 19(6). No attempt was made to support the scheme on the ground that it imposed reasonable restrictions on the fundamental rights of the traders to carry on business in Kendu leaves. The High Court also did not consider whether the restrictions imposed upon persons excluded from the benefit of trading satisfied the test of reasonableness under the first part of Article 19(6). The High Court examined the problem from the angle whether the action of the State Government was vitiated on account of any oblique motive, and whether it was such as a prudent person carrying on business may adopt.

186. The same issue arose and a challenge was laid to the manner in which the Government dispensed its largesse on grounds of violation of Article 14 in Ramana Dayaram Shetty v. International Airport Authority of India . The oft quoted findings of the Apex Court upon an elaborate consideration of the matter read thus:

10. xxx It is indeed unthinkable that in a democracy governed by the rule of law the executive Government or any of its officers should possess arbitrary power over the interests of the individual. Every action of the executive Government must be informed with reason and should be free from arbitrariness. That is the very essence of the rule of law and its bare minimal requirement. And to the application of this principle it makes no difference whether the exercise of the power involves affectation of some right or denial of some privilege.

11. xxxThe discretion of the Government has been held to be not unlimited in that the Government cannot give or withhold largessee in its arbitrary discretion or at its sweet will. It is insisted, as pointed out by Prof. Reich in an especially stimulating article on "The New Property" in 73 Yale Law Journal 733, "that Government action be based on standards that are not arbitrary or unauthorised". The Government cannot be permitted to say that it will give jobs or enter into contracts or issue quotas or licenses only in favor of those

having grey hair or belonging to a particular political party or professing a particular religious faith. The Government is still the Government when it acts in the matter of granting largessee and it cannot act arbitrarily. It does not stand in the same position as a private individual.

12. We agree with the observations of Mathew, J., in V. Punnan Thomas v. State of Kerala that:

The Government, is not and should not be as free as an individual in selecting the recipients for its largessee. Whatever its activity, the Government is still the Government and will be subject to restraints, inherent in its position in a democratic society. A democratic Government cannot lay down arbitrary and capricious standards for the choice of persons with whom alone it will deal.

The same point was made by this Court in Erusian Equipment and Chemicals Ltd. v. State of West Bengal where the question was whether blacklisting of a person without giving him an opportunity to be heard was bad? Ray, C.J., speaking on behalf of himself and his colleagues on the Bench pointed out that blacklisting of a person not only affects his reputation which is, in Poundian terms, an interest both of personality and substance, but also denies him equality in the matter of entering into contract with the Government and it cannot, therefore, be supported without fair hearing. It was argued for the Government that no person has a right to enter into contractual relationship with the Government and the Government, like any other private individual, has the absolute right to enter into contract with any one it pleases. But the Court, speaking through the learned Chief, Justice, responded that the Government is not like a private individual who can pick and choose the person with whom it will deal, but the Government is still a Government when it enters into contract or when it is administering largessee and it cannot, without adequate reason, exclude any person from dealing with it or take away largessee arbitrarily. The learned Chief Justice said that when the government is trading with the public, "the democratic form of Government demands equality and absence of arbitrariness and discrimination in such transactions.... The activities of the Government have a public element and, therefore, there should be fairness and equality. The State need not enter into any contract with anyone, but if it does so, it must do so fairly without discrimination and without unfair procedure". This proposition would hold good in all cases of dealing by the Government with the public, where the interest sought to be protected is a privilege. It must, therefore, be taken to be the law that where the Government is dealing with the public, whether by way of giving jobs or entering into contracts or issuing quotas or licenses or granting other forms of largessee, the Government cannot act arbitrarily at its sweet will and, like a private individual, deal with any person it pleases, but its action must be in conformity with standard or norms which is not arbitrary, irrational or irrelevant. The power or discretion of the Government in the matter of grant of largessee including award of jobs, contracts, quotas, licenses, etc. must be confined and structured by rational, relevant and non-discriminatory standard or norm and if the Government departs from such standard or norm in any particular case or cases, the action of the Government would be liable to be struck down, unless it can be shown by the Government that the departure was not arbitrary, but was based on some valid principle which in itself was not irrational, unreasonable or discriminatory.

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20. Now, obviously where a corporation is an instrumentality or agency of Government, it would, in the exercise of its power or discretion, be subject to the same constitutional or public law limitations as Government. The rule inhibiting arbitrary action by Government which we have discussed above must apply equally where such corporation is dealing with the public, whether by way of giving jobs or entering into contracts or otherwise, and it cannot act arbitrarily and enter into relationship with any person it likes at its sweet will, but its action must be in conformity with some principle which meets the test of reason and relevance.

24. xxxx We fail to see how this observation can help the contention of the respondents. It does not say that the Government can enter into contract with anyone it likes arbitrarily and without reason. On the contrary, it postulates that the Government may reject a higher tender and accept a lower one only when there is valid

reason to do so, as for example, where it is satisfied that the person offering the lower tender is on an overall consideration preferable to the higher tenderer. There must be some relevant reason for preferring one tenderer to another, and if there is, the Government can certainly enter into contract with the former even though his tender may be lower but it cannot do so arbitrarily or for extraneous reasons.

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34. It is, therefore, obvious that both having regard to the constitutional mandate of Article 14 as also the judicially evolved rule of administrative law, Respondent 1 was not entitled to act arbitrarily in accepting the tender of Respondents 4, but was bound to conform to the standard or norm laid down in para 1 of the notice inviting tenders which required that only a person running a registered IInd Class hotel or restaurant and having at least 5 years' experience as such should be eligible to tender. It was not the contention of the appellant that this standard or norm prescribed by Respondent 1 was discriminatory having no just or reasonable relation to the object of inviting tenders, namely, to award the contract to a sufficiently experienced person who would be able to run efficiently a IInd Class restaurant at the airport. Admittedly the standard or norm was reasonable and

non-discriminatory and once such a standard or norm for running a IInd Class restaurant should be awarded was laid down, Respondent 1 was not entitled to depart from it and to award the contract to Respondents 4 who did not satisfy the condition of eligibility prescribed by the standard or norm. If there was no acceptable tender from a person who satisfied the condition of eligibility, Respondent 1 could have rejected the tenders and invited fresh tenders on the basis of a less stringent standard or norm, but it could not depart from the standard or norm prescribed by it and arbitrarily accept the tender of Respondents 4. When Respondent 1 entertained the tender of Respondents 4 even though they did not have 5 years' experience of running a IInd Class restaurant or hotel, it denied equality of opportunity to others similarly situate in the matter of tendering for the contract. There might have been many other persons, in fact the appellant himself claimed to be one such person, who did not have 5 years' experience of running a IInd Class restaurant, but who were otherwise competent to run such a restaurant and they might also have competed with Respondents 4 for obtaining the contract, but they were precluded from doing so by the condition of eligibility requiring five years' experience. The action of Respondent 1 in accepting the tender of Respondents 4, even though they did not satisfy the prescribed condition of eligibility, was clearly discriminatory, since it excluded other persons similarly situate from tendering for the contract and it was also arbitrary and without reason. The acceptance of the tender of Respondents 4 was, in the circumstances, invalid as being violative of the equality clause of the Constitution as also of the rule of administrative law inhibiting arbitrary action.

187. In Union of India and Ors. v. Dinesh Engineering Corporation and Ors., the court was called upon to consider the decision by the railway boards to procure certain spare parts from a particular supplier on the assumption that there was no other party to supply such spare with the requisite degree of sophistication, complexity and decision. In this case, it is noteworthy that only the writ petitioner, a supplier of such parts to railways for 17 long years and only competitor to its rival being EDC, had submitted its tenders. The court found that the policy of the board proceeded on the hypothesis that there was no other supplier competent enough to supply the required spares which hypothesis was arrived at without taking into consideration the facts that the petitioners had been supplying these spare parts for the last 17 years to various divisions of the Indian Railways which would established by the writ petitioner from the material before the courts. It was held that this clearly established the fact that the decision of the board suffer from vice of non-application of mind.

188. The courts have noticed that in matters relating to policy, the court would not ordinarily interfere. But this did not mean that the courts have to abrogate their rights to scrutinise whether the policy in question is formulated keeping in mind the relevant facts and whether the said policy can be held to be beyond the pale of discrimination or unreasonableness on the basis of material on record. Any decision, be it an administrative decision or a policy decision, if taken without considering the relevant facts can only be termed as an arbitrary

decision and violative of the mandate of Article 14 of the Constitution. It was held that it was open to the railways, if it comes to a genuine conclusion that the spare parts manufactured by the writ petitioner are not acceptable on the grounds of the sophistication, complexity and high degree of decision then certainly it is for the railways of that matter, if the terms of offer are not acceptable for any justifiable reason, it was open to the railways to reject the offer of the writ petitioner. But none of the above form the basis for creating the monopoly in favor of the EDC which was thus unreasonable and arbitrary.

So far as the absolute power of the railways to reject a tender in its absolute discretion was concerned, in the Dinesh Engineering case (supra) the court held thus:

16. But then as has been held by this Court in the very same judgment that a public authority even in contractual matters should not have unfettered discretion and in contracts having commercial element even though some extra discretion is to be conceded in such authorities, they are bound to follow the norms recognised by courts while dealing with public property. This requirement is necessary to avoid unreasonable and arbitrary decisions being taken by public authorities whose actions are amenable to judicial review. Therefore, merely because the authority has certain elbow room available for use of discretion in accepting offer in contracts, the same will have to be done within the four corners of the requirements of law, especially Article 14 of the Constitution. In the instant case, we have noticed that apart from rejecting the offer of the writ petitioner arbitrarily, the writ petitioner has now been virtually debarred from competing with EDC in the supply of spare parts to be used in the governors by the Railways, ever since the year 1992, and during all this while, we are told the Railways are making purchases without any tender on a proprietary basis only from EDC which, in our opinion, is in flagrant violation of the constitutional mandate of Article 14. We are also of the opinion that the so-called policy of the Board creating monopoly of EDC suffers from the vice of non-application of mind, hence, it has to be quashed as has been done by the High Court.

189. Mr. Jayant Bhushan, learned senior Advocate appearing for some of the petitioners has placed reliance on a judgment dated 6th August, 2004 of the Division Bench of this Court referred in Writ Petition(Civil) 4466/2003 titled PSJ Communications Limited v. Bharat Sanchar Nigam Limited. In this case, a challenge had been laid to a new eligibility condition which had been incorporated in a tender enquiry by the Bharat Sanchar Nigam Limited on ground of irrationality and arbitrariness. After a close examination of the record which was produced before the court, the court held thus:

21. From the above narration of material nothings on the file, it is evident that the entire emphasis was on the quality of the cable to be supplied. We are unable to appreciate the co-relation or the nexus between the quality and the quantum of the commercial order, particularly when to ensure quality the twin conditions of valid Type Approval Certificate from Department of Telecom and possession of ISO Certificate have been retained as a pre-requisite for a valid tender. It is also pertinent to note that though the afore-noted criteria/condition was finalised on the basis of the recommendations of the Board of Management of BSNL but a further condition of being an established supplier, as suggested in the note dated 16th June 2003 and the impugned criteria of successful execution of commercial order of Rs. One Crore, not even suggested in any of the notes, was added, without referring the same to the Board of Management. It is also pertinent to note that the reason for insertion of the impugned eligibility condition as stated in the reply affidavit of the BSNL, namely, non-fulfillment of contractual obligations by several manufacturers, is not borne out from the record, wherein, as noticed above, the reason is the quality of the cable. There is no material or any discussion as to how and why the impugned criteria would be in the larger public interest, or subserve the objects of BSNL. Likewise, in the records no objective material is available to support such a criteria. Hence, the explanations offered by BSNL in their affidavits cannot be accepted. As observed by their Lordships of the Supreme Court in Mohinder Singh Gill and Anr. v. The Chief Election Commissioner and Ors. , the validity of the imugned insertion has to be judged by the reasoning in the afore-mentioned notes and this cannot be supplemented by fresh reasons in the shape of an affidavit or otherwise.

190. On the other hand, Mr. P.N. Lekhi, learned senior counsel appearing for Sulabh International placing reliance on the pronouncement of the Apex Court in Uggar Sugar Works Limited v. Delhi Administration has urged that no writ petition would lie to examine or adjudicate on the nature of the challenge laid in the instant case.

It was submitted that it was not for the court to enter into the province of policy and that the Government was entitled to take its own decisions including the decision to enter into a contract with a particular party only. This case relates to a challenge to the policy of the Government in fixing a lower MSF requirement stands in the previous years. The challenge was laid on the ground that the policy suffered from injustice, unfairness or unreasonability and amounted to an invitation to the court to prescribe MSF requirements in exercise of its powers of judicial review. In view of the well settled principles of the parameters of permissible judicial review into executive policy, the court held that the challenge was not within the parameters of the courts jurisdiction. In this behalf, the Apex Court observed thus:

14. In Har Shankar v. Dy. Excise and Taxation Commr. Chandrachud, J. (as the learned Chief Justice then was) in para 53 of the judgment opined: (SCC p. 758)

53. In our opinion, the true position governing dealings in intoxicants is as stated and reflected in the Constitution Bench decisions of this Court in Balsara case, Cooverjee case, Kidwai case, Nagendra Nath case, Amar Chakraborty case and the R.M.D.C. case, as interpreted in Harinarayan Jaiswal case and Nashirwar case. There is no fundamental right to do trade or business in intoxicants. The State, under its regulatory powers, has the right to prohibit absolutely every form of activity in relation to intoxicants - its manufacture, storage, export, import, sale and possession. In all their manifestations, these rights are vested in the State and indeed without such vesting there can be no effective regulation of various forms of activities in relation to intoxicants. In American Jurisprudence, Vol. 30 it is stated that while engaging in liquor traffic is not inherently unlawful, nevertheless it is a privilege and not a right, subject to governmental control (p. 538). This power of control is an incident of the society's right to self-protection and it rests upon the right of the State to care for the health, morals and welfare of the people. Liquor traffic is a source of pauperism and crime (pp. 539, 540, 541).

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19. In T.N. Education Deptt. Ministerial and General Subordinate Services Assn. v. State of T.N. noticing the jurisdictional limitations to analyze and fault a policy, this Court opined that: (SCC p. 102, para 16)

The court cannot strike down a GO, or a policy merely because there is a variation or contradiction. Life is sometimes contradiction and even consistency is not always a virtue. What is important is to know whether mala fides vitiates or irrational and extraneous factor fouls.

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24. The argument that since MSF laid down for the year 1994-1995 were not changed till 1998-99, there was no need to increase MSF requirements in 1999-2000 or to further increase the same in the year 2000-2001 for the lowest price tag brand of liquor from 60,000 cases (7.2 lakh bottles) to 75,000 cases (9 lakh bottles) for the current year, suffers from the basic infirmity that it invites the court to enter into an area of testing the executive policy, not on grounds whether it is "just, fair and reasonable", but whether the object could not have been achieved by fixing a lower MSF requirement. In other words the court is being invited to prescribe MSF requirements in exercise of its power of judicial review. That is not permissible and we must decline the invitation to enter that area. It is not within the province of this Court to lay down that the executive policy must always remain static, even if its revision is "just, fair and reasonable". What is relevant is to find out whether the executive action is mala fide, unreasonable or irrational as a criterion. As already observed the court in exercise of its power of judicial review cannot sit in judgment over the policy of administration

except on the limited grounds already noted. Each State is empowered to formulate its own liquor policy keeping in view the interest of its citizens. Determination of wide-scale acceptability of a particular brand of liquor, on the basis of National Sales Figures, does not strike us as being unreasonable, much less irrational. The basis for determination is not only relevant but also fair. No direction can be given or expected from the court regarding the "correctness" of an executive policy unless while implementing such policies, there is infringement or violation of any constitutional or statutory provision. In the present case, not only is there no such violation but on the other hand, the State in formulating its policy has exercised its statutory powers and applied them uniformly.

191. On behalf of the respondent, reliance is also placed on Association of Registration Plates v. Union of India. In this case, the respondent had effected selection of a single manufacturer through an open tendering process. Elaborate reasons were also given by the state authority for justification of selection of such manufacturer as well as for the length of the duration of the contract. The court noticed the reasons given observing thus:

26. The learned Counsel appearing for the Union of India, the State authorities and counsel appearing for the contesting manufacturers, in their replies, have tried to justify the manner and implementation of the policy contained in Rule 50. On behalf of the Union of India, learned Additional Solicitor General submitted that under Rule 50 read with the statutory Order of 2001 issued under Section 109(3) of the Act, the State Governments are legally competent to formulate an appropriate policy for choosing a sole or more manufacturers in order to fulfill the object of affixation of security plates. The registration plates have to be issued and affixed on the premises of the registering authority and with its permission. It is submitted that the scheme contained in Rule 50 read with the statutory Order of 2001 leaves it to the discretion of the State concerned to even choose a single manufacturer for the entire State or more than one manufacturer regionwise. Such a selection cannot be said to confer any monopoly right by the State on any private individual or concern. It is just like selection of an appropriate person for grant of a contract or largessee by the State on laid-down criteria of experience and technical qualifications. A fair process of selection may eliminate persons or parties who may not be found technically, financially, and on the basis of past experience sound, to be awarded the contract. Reliance is placed on Krishnan Kakkanth v. Govt. of Kerala, Ugar Sugar Works Ltd. v. Delhi Admn. and M.R.F. Ltd. v. Inspector Kerala Govt.

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28. It is submitted that the tender conditions are formulated keeping in account the public interest consideration and aspects of high security. The States do not possess the requisite resources of their own to implement the scheme. Each State has, therefore, to search and select a dependable manufacturer. It is submitted that the tender conditions specifically require the manufacturer to conform to the technical specifications of high security registration plates. It should be able to prove existence of requisite financial resources to integrate a large number of RTOs in the State on an on-line platform. The manufacturer should have a permanent technical partner to the venture so that technology support is assured for the entire period of contract. The manufacturer to be selected should have access to the requisite technology and should be in a position to upgrade, expand and upscale the operation on a continuous and sustainable basis. It is necessary to have a long-term contractual relationship so that the State can fix liability on the manufacturer and make him answerable for damages or any defects in the registration plates or for improper implementation of the project. The requirement of the Rule that registration number and plates will be issued on the premises of the RTO, is to maintain secrecy and security. For the above purpose, selection of one single manufacturer would ensure security aspects instead of more than one manufacturers operating from different points.

29. With regard to 15 years' long-term contract, it is submitted that it is also in public interest. The manufacturer who has to stake the money would have to make huge investment by installing high-technology-based networking at each RTO's office. A short-term contract would not, therefore, attract an experienced and reliable manufacturer. Long-term contracts with a fixed price for the entire 15 years' period is

beneficial to the customers as there would be no price increase for the stipulated period, irrespective of inflation. Fifteen years' period has been chosen in proportion to the average roadworthy life of a vehicle in India.

30. Looking to the huge vehicular population of the country, the capacity of the manufacturer has to be as great because plates are to be fitted to a very large number of existing vehicles within the first two years. Thereafter, every year about one lakh vehicles in each State would be required to be fitted with the plates. If the bulk of the contract is exhausted in the first two years, fresh manufacturers would not come forward to undertake the remaining work as it would not be cost-effective. A long-term contract was necessitated for various reasons such as necessity of huge investment for building infrastructure, uninterrupted supply of plates in the first two years and thereafter every year and the investment of such infrastructure requiring recovery over a long duration by way of supply. If the contract period is lowered, the cost of plate might go up as the huge investment will have to be recovered in a shorter period.

31. Justifying the selection of a single manufacturer for a region or an entire State, to ensure security considerations, the following factors have been highlighted as subserving the public interest:

1. That it would not be possible to implement the scheme since the scheme provides that the approved manufacturer would use the premises of the State RTO and lay down V-Sat links so that the entire State is networked on a common platform.

2. It would be impossible for the State to provide all the TAC-holders space and infrastructure in the RTO premises.

3. It would be difficult for the State to identify the source of any counterfeiting in case there are multiple manufacturers. This would severely compromise the security considerations involved in the scheme.

4. Different manufacturers would lead to variations in price between different manufacturers.

5. The State is at a disadvantage since all the manufacturers would prefer to concentrate on supplying only in Kolkata and would not go to the other far-flung RTOs where he would not recover the returns on his investment.

6. In case more than one manufacturer operates within the State, it will lead to discrepancy and non-uniformity in price structure prevailing in different regions.

7. Difficulty in assimilation of data from more than one manufacturer would lead to disaggregated and confusing database signals. Such sensitive and security-related business must be governed by uniform database management processes and unified standardised coding practices.

8. Different manufacturers would mean that there would be variation in quality of the material and in terms of workmanship.

9. Possible duplication of registration plates due to competition between manufacturers of different regions and lack of aggregated security-controlled database management systems.

10. Non-conformity of data of different manufacturers would lead to confusion and integration of data from the State RTOs.

11. Difficulty in fixing up the answerability on any one manufacturer for not following the prescribed procedure.

12. Confidentiality of the public database would be severely compromised.

13. Provision of training of RTO personnel by each manufacturer would be a logistic nightmare and would lead to confusion and further lead to the system being compromised severely.

14. It is also important to note that each registration plate has a unique number, and consequently, all the RTOs are required to be electronically connected to each other; if the vendors are allowed to proliferate, this connection would not be possible, and would lead to complete chaos.

32. By highlighting the above factors, it is submitted that if multiple manufacturers are involved in implementation of the policy, it is not likely to work satisfactorily. It is submitted that a single selected manufacturer would not just be marketing, servicing and providing a new product but would engage in assisting the State in fulfillment of statutory obligations to grant the high security registrations to owners of motor vehicles in accordance with the provisions of the Act and the Rules. It is submitted that tender conditions are suitably formulated for performance guarantee, experience and understanding of business, financial strength, and capacity of creating and installing the entire infrastructure and networking. Finally, it is submitted that the eligibility criteria prescribed by the State is commensurate not only with the scale of operation and size of network to be created by the operator but also with the statutory requirement of the States' continued delivery of its obligations to vehicle-owners without any interruption. It is contended that through open tender, identifying and selecting an approved manufacturer to discharge statutory duty of RTO is not an act of the State creating any monopoly in favor of any private party. The grievance of infringement of the fundamental rights under Article 19(1)(g) of the Constitution is misconceived. Reliance is placed on Air India Ltd. v. Cochin International Airport Ltd. and Asia Foundation & Construction Ltd. v. Trafalgar House Construction (I) Ltd.

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43. Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work. Article 14 of the Constitution prohibits the Government from arbitrarily choosing a contractor at its will and pleasure. It has to act reasonably, fairly and in public interest in awarding contract. At the same time, no person can claim a fundamental right to carry on business with the Government. All that he can claim is that in competing for the contract, he should not be unfairly treated and discriminated, to the detriment of public interest. Undisputedly, the legal position which has been firmly established from various decisions of this Court, cited at the Bar (supra) is that government contracts are highly valuable assets and the court should be prepared to enforce standards of fairness on the Government in its dealings with tenderers and contractors.

192. It was in these circumstances that the court held that the process and selection of the manufacturer did not suffer from arbitrariness and that there was any violation of Article 14 of the Constitution of India. It is certainly not so in the instant case.

193. In the Association of Registration Plates (supra), the selected manufacturers had to undertake large scale investments in addition, the respondent had given an opportunity to other persons to participate in the tendering process. None of the criterion which were before the Apex Court in this case are satisfied in the present matter. In the judgment, the Apex Court also noticed thus:

41. The fifteen years' contract period has also been supported by the Union of India and State authorities. We find great substance in the submissions made on the data supplied as a justification for awarding the contract for a long period of 15 years. There would be a huge investment required towards the infrastructure by the selected manufacturer and the major return would be expected in initial period of two years although he would be bound down to render his services for future vehicles periodically for a long period. Looking to the huge investment required and the nature of the job which is most sophisticated, requiring network and

infrastructure, a long-term contract, if thought viable and feasible, cannot be faulted by the court. If there are two alternatives available of giving a short-term or a long-term contract, it is not for the court to suggest that the short-term contract should be given. On the subject of business management, expertise is available with the State authorities. The policy has been chalked out and the tender conditions have been formulated after joint deliberations between authorities of the State and the intending manufacturers. A contract providing for technical expertise, financial capability and experience qualifications with a long term of 15 years would serve the dual purpose of attracting sound parties to stake their money in undertaking the job of supply and safeguard the public interest by ensuring that for a long period the work of affixation of security plates would continue uninterrupted in fulfillment of the object of the scheme contained in Rule 50. Our considered opinion, therefore, is that none of the impugned clauses in the tender conditions can be held to be arbitrary or discriminatory deserving their striking down as prayed for on behalf of the petitioners.

42. There is no material on record to infer any mala fide design on the part of the tendering authority to favor parties having foreign collaborations and to keep out of the fray indigenous manufacturers. The high security plate is a sophisticated article - new for a manufacturer in India. It is being introduced for the first time under the scheme contained in Rule 50 of the Rules and the Act. At the time of issuance of notices of tender, technical know-how for manufacture of plates and its further development was undoubtedly outside the country. Only a few concerns in India having collaboration with foreign parties possessed the expertise and were available in the market. The terms of the notice inviting tender were formulated after joint deliberations of Central and State authorities and the available manufacturers in the field. The terms of the tender prescribing quantum of turnover of its business and business in plates with fixation of long-term period of the contract are said to have been incorporated to ensure uninterrupted supply of plates to a large number of existing vehicles within a period of two years and new vehicles for a long period in the coming years. It is easy to allege but difficult to accept that terms of the notices inviting tenders which were fixed after joint deliberations between State authorities and intending tenderers were so tailored as to benefit only a certain identified manufacturers having foreign collaboration. Merely because a few manufacturers like the petitioners do not qualify to submit the tender, being not in a position to satisfy the terms and conditions laid down, the tender conditions cannot be held to be discriminatory.

194. The judicial pronouncement reported at Director of Education and Ors. v. Educomp Datamatics Ltd., was placed by the respondent before this Court. Perusal of this judgment shows that even in this case, the court also recognised the existence and limitations on the power of judicial review in the matters relating to award of contracts by the Government or its genuineness. The limitation thereon were reiterated when the court observed as follows:

9. It is well settled now that the courts can scrutinise the award of the contracts by the Government or its agencies in exercise of their powers of judicial review to prevent arbitrariness or favoritism. However, there are inherent limitations in the exercise of the power of judicial review in such matters. The point as to the extent of judicial review permissible in contractual matters while inviting bids by issuing tenders has been examined in depth by this Court in Tata Cellular v. Union of India. After examining the entire case-law the following principles have been deduced: (SCC pp. 687-88, para 94)

94. The principles deducible from the above are:

(1) The modern trend points to judicial restraint in administrative action.

(2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

(3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

In this judgment also, the court recognised that the court would interfere in judicial review if the decision of the Government was actuated by mala fide, was arbitrary or discriminatory.

195. The Apex Court had occasion to consider the nature of a review by a court when administrative action is challenged before it. The nature of the challenge and the principles thereof were considered in a judgment reported at (2001) 2 SCC 386 Om Kumar v. Union of India wherein the court noticed that the challenge to the action could be either on grounds of discrimination or on grounds of arbitrariness. The Supreme Court held that a challenge to the administrative action on the ground of discrimination is tested on the touchstone of proportionality as a primary review. Here the courts deals with the balancing act of the administrator as a primary reviewing authority to consider the correctness of the level of discrimination applied and whether it is excessive and does it have a nexus with the objective intended to be achieved by the administrator. However if the challenge is on grounds of arbitrariness, i.e. as to whether the action of the administrative authority is rational or reasonable, the courts are then confined to a secondary role and have to apply the Wednesbury test. In such role, the courts have to be confined to the secondary role to see whether the administrator discharged his primary role or not.

In this behalf, the court held thus:

58. Initially, our courts, while testing legislation as well as administrative action which was challenged as being discriminatory under Article 14, were examining whether the classification was discriminatory, in the sense whether the criteria for differentiation were intelligible and whether there was a rational relation between the classification and the object sought to be achieved by the classification. It is not necessary to give citation of cases decided by this Court where administrative action was struck down as being discriminative. These are numerous.

(ii) Arbitrariness test under Article 14

59. But, in E.P. Royappa v. State of T. N. Bhagwati, J laid down another test for purposes of Article 14. It was stated that if the administrative action was "arbitrary", it could be struck down under Article 14. This principle is now uniformly followed in all courts more rigorously than the one based on classification. Arbitrary action by the administrator is described as one that is irrational and not based on sound reason. It is also described as one that is unreasonable.

(b) If, under Article 14, administrative action is to be struck down as discriminative, proportionality applies and it is primary review. If it is held arbitrary, Wednesbury applies and it is secondary review

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61. When does the court apply, under Article 14, the proportionality test as a primary reviewing authority and when does the court apply the Wednesbury rule as a secondary reviewing authority? From the earlier review of basic principles, the answer becomes simple. In fact, we have further guidance in this behalf.

62. In the European Court, it appears that administrative action can be challenged under Article 14 of the Convention (corresponding to Article 14 of our Constitution) as being discriminatory and be tested by applying the principle of "proportionality". Prof. Craig refers to the judgment of the European Court under Article 14 in Lithgow v. UK as follows:

The differential treatment must not only pursue a legitimate aim. It had to be proportionate. There had to be relationship of proportionality between the means employed and the aim sought to be realised

63. Similarly, in the European law, in relation to discrimination on ground of sex, the principle of proportionality has been applied and it has been held that the State has to justify its action. In EU Law and Human Rights by Lammy Betten and Nicholas Grief, (1998 at p. 98), it is stated:

If indirect discrimination were established, the Government would have to show 'very weighty reasons' by way of objective justification, bearing in mind that derogations from fundamental rights must be construed strictly and in accordance with the principle of proportionality. [Johnston v. Chief Constable of the RUC ECR (para 38.51)].

64. In the context of Article 14 of the English Act, 1998, (which is similar to our Article 14) Prof. Craig refers to the above principle. (See Administrative Law, Craig 4th Edn. 1999, p. 652.) Thus, it would appear that under Article 14 of the European Convention, principle of proportionality is invoked where questions of discrimination are involved and the court is a primary reviewing authority. According to Prof. Craig, this is likely to be the position under Article 14 of the English Act, 1998.

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66. It is clear from the above discussion that in India where administrative action is challenged under Article 14 as being discriminatory, equals are treated unequally or unequals are treated equally, the question is for the Constitutional Courts as primary reviewing courts to consider correctness of the level of discrimination applied and whether it is excessive and whether it has a nexus with the objective intended to be achieved by the administrator. Here the court deals with the merits of the balancing action of the administrator and is, in essence, applying "proportionality" and is a primary reviewing authority.

67. But where an administrative action is challenged as "arbitrary" under Article 14 on the basis of Royappa (as in cases where punishments in disciplinary cases are challenged), the question will be whether the administrative order is "rational" or "reasonable" and the test then is the Wednesbury test. The courts would then be confined only to a secondary role and will only have to see whether the administrator has done well in his primary role, whether he has acted illegally or has omitted relevant factors from consideration or has taken irrelevant factors into consideration or whether his view is one which no reasonable person could have taken. If his action does not satisfy these rules, it is to be treated as arbitrary. [In G.B. Mahajan v. Jalgaon Municipal Council (SCC at p. 111).] Venkatachaliah, J. (as he then was) pointed out that "reasonableness" of the administrator under Article 14 in the context of administrative law has to be judged from the stand point of Wednesbury rules. In Tata Cellular v. Union of India (SCC at pp. 679-80), Indian Express Newspapers Bombay (P) Ltd. v. Union of India (SCC at p. 691), Supreme Court Employees' Welfare Assn. v. Union of India (SCC at p. 241) and U.P. Financial Corporation v. Gem Cap (India) (P). Ltd. (SCC at p. 307) while judging whether the administrative action is "arbitrary" under Article 14 (i.e. otherwise then being discriminatory), this Court has confined itself to a Wednesbury review always.

68. Thus, when administrative action is attacked as discriminatory under Article 14, the principle of primary review is for the courts by applying proportionality. However, where administrative action is questioned as "arbitrary" under Article 14, the principle of secondary review based on Wednesbury principles applies.

Thus, the action of an authority may be challenged on grounds of discrimination, intelligible criterion and purpose sought to be achieved. If these fail, then the challenge to the action would lie on ground of arbitrariness. The last challenge would be on the test of Wednesbury reasonableness.

196. Article 226 of the Constitution provides for the power of the High Courts to issue certain writs. It enables the High Court to issue to any person or authority (including in appropriate cases any govt) orders or writs for the enforcement of any of the rights conferred by part 3 of the constitution and "for any other purpose" i.e. for the enforcement of any other legal right. Thus, all the High Courts have very wide powers under Article 226 and these powers confer discretion of a most extensive nature on the High Courts.

The scope of this article has been explained by Subba Rao, J., in Dwarkanath v. ITO thus:

This article is couched in comprehensive phraseology and it exfacie confers a wide powers on the High Courts to reach injustice wherever it is found. The Constitution designedly used a wide language in describing the nature of the power, the purpose for which and the person or authority against whom it can be exercised. It can issue writs in the nature of prerogative writs as understood in England; but the scope of those writs also is widened by the use of the expression "nature", for the said expression does not equate the writs that can be issued in India with those in England, but only draws an analogy from them. That apart, High Courts can also issue directions, orders or writs other than the prerogative writs. It enables the High Court to mould the reliefs to meet the peculiar and complicated requirements of this country. Any attempt to equate the scope of the power of the High Court under Article 226 of the Constitution with that of the English courts to issue prerogative writs is to introduce the unnecessary procedural restrictions grown over the years in a comparatively small country like England with a unitary form of government into a vast country like India functioning under a federal structure. Such a construction defeats the purpose of the article itself.

197. The scope of proceedings before the writ court also fell for consideration before the Apex Court in 1966 II Company Law Journal 151 (at page 157), Barium Chemicals Limited and Anr. v. The Company Law Board and Ors., the court held thus:

In our opinion in a proceeding under Article 226 of the Constitution the normal rule is , as pointed out by this Court in The State of Bombay v. Purshottam Jog Naik, to decide disputed questions on the basis of affidavits and that it is within the discretion of the High Court whether to allow a person who has sworn an affidavit before it-as indeed Mr.Krishnamachari and Mr.Dutt have-to be cross-examined or not to permit it. In exercise of its discretion the High Court has refused permission to cross-examine them. In such a case it would not be appropriate for this Court while hearing an appeal by Special Leave to interfere lightly with the exercise of that discretion.

198. In Smt. Gunwant Kaur and Ors. v. Municipal Committee, Bhatinda and Ors., the Supreme Court held that the High Court is not deprived of its jurisdiction to entertain a petition under Article 226 merely because in considering the petitioner's right to relief, disputed questions of fact may fall to be determined. In a petition under Article 226, the High Court has jurisdiction to try issues, both of fact and law. The exercise of the jurisdiction is, it is true, discriminatory but the discretion must be exercised on sound judicial principles.

199. These judgments were cited with approval in a recent pronouncement of the Apex Court reported in 109(2004) DLT 415 (SC) ABL International Ltd. v. Export Credit Guarantee Corporation of India Ltd. and Ors. wherein the court held thus:

17. The above judgment of Smt.Gunwant Kaur (supra), finds support from another judgment of this Court in the case of Century Spinning and Manufacturing Company Ltd. and Anr. v. The Ulhasnagar Municipal Council and Anr., , wherein this Court held:

Merely because a question of fact is raised, the High Court will not be justified in requiring the party to seek relief by the somewhat lengthy, dilatory and expensive process by a civil suit against a public body. The questions of fact raised by the petition in this case are elementary.

18. This observation of the Court was made while negating a contention advanced on behalf of the respondent-Municipality which contended that the petition filed by the appellant-company therein apparently raised questions of fact which argument of the Municipality was accepted by the High Court holding that such disputed question of fact cannot be tried in the exercise of the extraordinary jurisdiction under Article 226 of the Constitution. But this Court held otherwise.

19. Therefore, it is clear from the above enunciation of law that merely because one of the parties to the litigation raises a dispute in regard to the facts of the case, the Court entertaining such petition under Article 226 of the Constitution is not always bound to relegate the parties to a suit. In the above case of Smt.Gunwant Kaur (supra), this Court even went to the extent of holding that in a writ petition, if facts required, even oral evidence can be taken. This clearly shows that in an appropriate case, the writ Court has the jurisdiction to entertain a Writ petition involving disputed questions of fact and there is no absolute bar for entertaining a writ petition even if the same arises out of a contractual obligation and/or involves some disputed questions of fact.

Policy decision not amenable to Judicial Review

200. It has been argued by Mr. P.N. Lekhi, learned senior counsel that the decision to allot the CTCs to Sulabh was a policy decision which was not amenable to judicial review. My attention has been drawn to 115 L. Ed. 2D 410, 438 wherein"Policy" is defined as "define course or method selected (as by a Government institution, group or individual) from among alternatives and in the light of given conditions to meet and usually determine present and future decisions".

201. The Supreme Court was called upon to consider the industrial policy of 1979 in its judgment M.P. Oil Extraction v. State of M.P . In para 41 at page 610, the Apex Court held that the executive authority of the State must be held to be within its competence to frame a policy for the administration of the State. Unless the policy framed is absolutely capricious and not being informed by any reason whatsoever, can be clearly held to be arbitrary and founded on the mere ipse dixit of the executive functionaries thereby offending Article 14 of the Constitution or other constitutional provisions or comes into conflict with any statutory provision, the Court cannot and should not out step its limit and tinker with the policy decision. The caution and restraint in exercise of the power of judicial review by the Courts was reiterated so that the supremacy of three organs of the State i.e. the legislature, executive and the judiciary in their respective areas of operation is maintained.

202. It is settled law that Courts are not experts in policy and public administration and hence should not step beyond their institutional capacity. In 2004(1) SCC 15(para 31) Union of India v. S.P.Vohra, the court again emphasised the need for restraint. It was observed that it is if courts step out side the area of their institutional competence, the Government may react by getting the Parliament to legislate to oust the jurisdiction of the courts altogether.

203. Strong reliance was placed on the decision of the Apex Court in Balco Employees Union v. Union of India. There can be no dispute that the proposition of law laid down binds this Court. I find that the Apex Court also drew a distinction between a policy decision which formed the economic policy of the country to disinvest from certain public sector undertakings which was implemented by the Government and the decision taken pursuant to such policy. It was an exercise of its administrative power to effectuate such economic

policy which resulted in the decision to disinvest in Balco.

204. In the instant case the MCD had evolved a policy of requiring NGOs to assist it in the operation and maintenance of the CTCs and administrative decisions were taken as to the manner in which these obligatory functions were to be assigned to these NGOs. The MCD took the decision not to maintain or operate the CTCs by itself. This decision on its part is the decision which falls clearly in the realm of "policy" making by the Corporation. This part of MCD's decision is akin to the policy decision of the Government of India to disinvest from certain public sector undertakings.

Having so decided, the MCD took several decisions including the decision to initially award CTCs to such NGOs by entering into 30 year contracts and then decided to allot the CTCs by auctioning the same and awarding the same by contracts for three years period to different NGOs. It is the last decision taken by MCD to withdraw all the CTCs from all the NGOs and to assign the same to the only one NGO i.e. SISSO which has been impugned before this Court.

In my view, the judgment of the Apex Court in Balco's case (supra) is of no assistance. The MCD had taken a decision not to operate and maintain the CTCs by itself but to contract them out to provide operators i.e. the NGOs. It is this decision which would constitute a policy decision. This decision is not in challenge in these writ petitions. It is the decision taken pursuant to such policy, to withdraw the CTCs from different private parties i.e. several NGOs and to award the same to only one NGO i.e. Sulabh which is in issue. Such decision is clearly outside the realm of policy making.

There is no dispute with the proposition that courts are not expert in matters of policy or public administration and should not step beyond their institutional capacity and it needs no elaboration. In my view, there is no challenge in these writ petitions on any such ground which could be considered as an attempt to tinker with any policy of the authorities.

205. Thus, the legal position in regard to the maintainability of writ petitions under Article 226 despite availability of an alternative remedy and in contractual matters or on the ground that it lays a challenge to a policy decision is no longer res integra as has been concisely stated in the afore-noticed decisions where the law laid down emerges as follows:

(i)Rule of exclusion of writ jurisdiction by availability of an alternative remedy is a rule of discretion and not one of compulsion.

(ii)Rule that the party who applies for the issue of a writ should, before he approaches the Court, have exhausted other remedies open to him under the law, is not a rule which bars the jurisdiction of the High Court to entertain the petition, but is a rule which Courts have laid down for the exercise of their discretion.

(iii)In spite of availability of the alternative remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies:

(a)Where the writ petition seeks enforcement of any of the fundamental rights:

(b)Where there is failure of principles of natural justice; or

(c)Where the orders of proceedings are wholly without jurisdiction of the vires of an Act is challenged.

(iv)The requirement of Article 14 being the duty to act fairly, justly and reasonably, there is nothing that militates against the concept of requiring the State always to so act, even in contractual matters. There is no reason why the requirement of Article 14 should not extend even in the sphere of contractual matters for regulating the conduct of the State activity.

(v)If a State acts in an arbitrary manner even in a matter of contract or is a policy decision, an aggrieved party can approach the court by way of writ under Article 226 of the Constitution and the court depending on facts of the said case is empowered to grant the relief.

(vi)Merely because the source of the right which the respondent claims was initially in a contract, does not mean that for obtaining relief against any arbitrary and unlawful action on the part of a public authority he must resort to a suit and not to a petition by way of a writ.

(vii)Once the State or an instrumentality of the State is a party of the contract, it has an obligation in law to act fairly, justly and reasonably, which is the requirement of Article 14 of the Constitution of India. Therefore in case of contravention of Article 14 a writ court can issue suitable directions to set right the arbitrary actions.

(viii). So far as the objection as to the maintainability of the instant writ petition on the ground of availability of an alternative remedy is concerned, it is well settled that diverting a party to an alternative remedy is a rule of convenience and is not an absolute power to the maintainability of the writ petition.

206. In the present case the petitioners have challenged the decisions and action of the MCD on grounds of discrimination as well as on the grounds that they are arbitrary, unreasonable and in violation of principles of natural justice.

In my view, therefore, all objections to the maintainability of the writ petition on the grounds of availability of an alternative remedy; that the same relate to contractual disputes or for the reason that they raise disputed questions of fact must fail.

207. Before this Court, on behalf of the petitioners, Mr. Jayant Bhushan, senior advocate has contended that the case raises two aspects. The first relates to cancellation of the contracts of the NGOs while the second related to award of the same to Sulabh International. These two issues are inseparably and inextricably linked. A decision to rescind the contracts of the petitioner and award the same to Sulabh was a composite one and no challenge can be laid to the second issue without challenging the first.

208. Both parties have placed strong reliance on the landmark pronouncement in Associated Provincial pictures v. Wednesbury Corporation reported at 1947 All England Report 680.

The principles laid down in this judgment have been followed in several pronouncements of the Supreme Court. The oft cited pronouncement and most relied judgment of the Supreme Court in this behalf has been reported at 1994 (6) SCC 651 entitled Tata Cellular v. Union of India which has been noticed hereinabove.

209. It is trite therefore that the decision to award contracts by the state and statutory authority are subject to judicial review. The parameters of judicial review are, however, narrow. The decision must be free from the vice of discrimination and malafide and must be just, fair and reasonable. The decision would be tested on the principles of Wednesbury unreasonableness. The decision making process would require to withstand judicial scrutiny. The decision must be based on relevant criterion, rational considerations and not on any extraneous considerations.

However, there is no absolute prohibition as has been urged on behalf of the respondents before this Court to judicial scrutiny of a policy decision or to award of a contract by the state or the statutory authority.

Whether the action of the MCD in allotting CTCs amounted to dispensation of largesee?

210. An objection has been taken by Mr. P.N. Lekhi, learned senior counsel, that construction, operation and maintenance of CTCs was an obligatory function of the MCD and hence their allotment was not dispensation of largesse. It is urged that, therefore, the decisions of MCD could not be tested on the tests laid down for

violation of Article 14 or on ground of unreasonableness.

211. The expression "largesse" is not defined by any statute. The same has been used in connection with dispensation of several kinds by the Government and by statutory authorities.

212. As per 'The New Oxford American Dictionary' the word 'largesse' has been defined as "generosity in bestowing money or gifts upon others; money or gifts given generously"

In Webster's New Collegiate Dictionary 'largesse' means "liberal giving to or as if to an inferior; excessive or ostentatious gratitutes; an inmate generosity of mind or spirit"

In Chamber's Dictionary 'largesse' is defined as "bestowal or distibution of gifts; generosity"

In New Websters Dictionary and Thesaurus 'largesse' means "the giving of bounty by a suprerior to an inferior; generosity on a big scale"

Wikepedia Encyclopedia online defines 'largesse' as "liberality in bestowing gifts, especially in a lofty or condescending manner; generosity of spirit or attitude"

Rogets The New Thesaurus defines 'largesse' as "a material favor or gift, usually money, given in return for service"

Mr. Lekhi, learned senior counsel, has pointed out that "largesse" is defined as "bountifulness, munifesence"

213. Some light is thrown as to what would constitute largesse in the observations of the Apex Court in various pronouncements. In Association of Registration Plates Manufacturers v. Union of India, while observing on the contemplated contract observed that "it is just like selection of an appropriate person for award of a contract or largesse by the state on laid down criteria of experience and technical qualifications."

214. In Ramanna Daya Ram Shetty v. International Airport Authority of India, the Apex Court held thus:

11. Today the Government in a welfare State, is the regulator and dispenser of special services and provider of a large number of benefits, including jobs, contracts, licenses, quotas, mineral rights, etc. The Government pours forth wealth, money, benefits, services, contracts, quotas and licenses. The valuables dispensed by Government take many forms, but they all share one characteristic. They are steadily taking the place of traditional forms of wealth.

These valuables which derive from relationships to Government are of many kinds. They comprise social security benefits, cash grants for political sufferers and the whole scheme of State and local welfare. Then again, thousands of people are employed in the State and the Central Governments and local authorities. licenses are required before one can engage in many kinds of businesses or work. The power of giving licenses means power to withhold them and this gives control to the Government or to the agents of Government on the lives of many people. Many individuals and many more businesses enjoy largessee in the form of Government contracts. These contracts often resemble subsidies. It is virtually impossible to lose money on them and many enterprises are set up primarily to do business with Government. Government owns and controls hundreds of acres of public land valuable for mining and other purposes. These resources are available for utilisation by private corporations and individuals by way of lease or license. All these mean growth in the Government largessee and with the increasing magnitude and range of governmental functions as we move closer to a welfare State, more and more of our wealth consists of these new forms. Some of these forms of wealth may be in the nature of legal rights but the large majority of them are in the nature of privileges. But on that account, can it be said that they do not enjoy any legal protection? Can they be regarded as gratuity furnished by the State so that the State may withhold, grant or revoke it at its pleasure? Is

the position of the Government in this respect the same as that of a private giver? We do not think so. The law has not been slow to recognise the importance of this new kind of wealth and the need to protect individual interest in it and with that end in view, it has developed new forms of protection. Some interests in Government largesse, formerly regarded as privileges, have been recognised as rights while others have been given legal protection not only by forging procedural safeguards but also by confining/structuring and checking Government discretion in the matter of grant of such largesse.

215. In this country, the involvement of the state and the statutory authorities is all pervasive. The same is to be found in areas imperative for development of the community which include infrastructure as roads, highways, tele-communications etc as also in areas of health, education etc. Contracts running into huge amounts are awarded by the Government and authorities.

216. Therefore even grant of largesse as munifescence on the part of the State as has been urged by Mr. P.N. Lekhi, learned senior counsel however the grounds thereof would have to satisfy the test of non-arbitrariness, non-discrimination and reasoning and its award can only be by the procedure which is just and fair.

217. In the instant case, undoubtedly while providing the facility of the CTCs may be these prime reason for construction of these CTCs and provision of the facilities, however, the MCD itself had carved out an area where it could expect to generate and make reasonable profits which was by advertisement on the CTCs. Apart from such a source of revenue, the MCD was aware and had generated funds from the usercharges even while running the CTCs on a `no profit no loss basis'. Conscious of such source, MCD had permitted Sulabh the right to periodically enhance these charges of the CTCs. The MCD itself had given a go by to the decision of the Standing Committee that the CTCs should be permitted to be used on a free of charge basis while permitting Sulabh to charge for the same.

Consequently, the submission that allotment of the CTCs was not in the nature of dispensation of largesse by the MCD and that it could deal with it in its absolute discretion therefore has to be rejected.

218. The CTCs are public property urged to have been constructed in discharge of an obligation, statutory duty. The same are to be allotted by MCD to private parties, that is, the NGOs.

219. Therefore, it cannot possibly be urged that award of such contracts, because they include an element of essentials in society are not dispensation of largesse by the authorities. This is more so, as has been pointed out by Mr. Vikas Singh, learned senior counsel that where many parties are interested in undertaking the work and some method of selection is to be adopted to select one or several persons from amongst those interested in doing the duty and function of the corporation, there is a huge element of profits and revenue in the nature of advertising rights.

220. Grave responsibility is conferred on an authority which is administering public money. Certainly, the revenue which is generated and enured to the Municipal Corporation of Delhi is public money. In the light of the principles laid down by the Apex Court in the ONGC matter, it is evident that the MCD is bound to multiply generation of its revenue which is utilized for the social and public justice and good and such funds have to be expended carefully. The MCD was bound to take into consideration the amounts which it was earning from the license fee from the existing arrangement with the NGOs including the petitioners.

221. It was equally important for it to consider the revenues which could have been generated from the advertisements which it could permit on the CTCs. It would be useful to advert to the following passage in Wade's Administrative Law (6th Edition) Page 426 wherein the learned author says:

The idea that runs through these cases is that public money must be administered with responsibility and without extravagance. This appears to mean that it is not available for charity.

The generosity of local authorities, in particular, is restrained by the doctrine that they owe a fiduciary duty to their ratepayers analogous to that of trustees. This means that, in deciding upon the expenditure, they must hold a balance fairly between the recipients of the benefit and the ratepayers who have to bear the costs.

222. At this stage, it is necessary to notice the contradiction in the stand taken by MCD before this Court. W.P.(C) NO.16106/2004 was filed by Urbo Rural Integrated Development v. MCD and W.P.(C) No. 16108/2004 was filed by Rural Development Environment. It is pointed out that these petitioners were allotted CTCs to operate and maintain them under the thirty year contracts which commenced from different dates in 1993 and therefore would end in or around the year 2018. No license fee was payable by the NGOs who were operating and maintaining these CTCs and consequently there was no question of any default by these persons. These CTCs were also constructed by the MCD and no complaint whatsoever have been made by any of the user. No illegality by the petitioner in working these contracts was brought to the notice of any authority and there was no material to this effect before either the Commissioner or any of the authorities who took the decision noticed herein.

223. In these proceedings, on a statement made behalf of MCD, the following orders were recorded on 9th March, 2005:

Learned senior counsel for the respondents on instructions submitted that so far no action has been taken or is proposed against the petitioner in this petition. It is submitted that in the event of the respondents contemplating any action against the petitioner, it shall act in accordance with the terms of the contract between the parties and in accordance with law.

It is, therefore, submitted that the apprehension of the petitioner that the MCD can take coercive measures or withdraw the CTC allotted to the petitioner is without basis.

In view of the statement made by the respondents, counsel for the petitioner does not press this petition.

The petition is, accordingly, dismissed as withdrawn. It shall be open to the petitioner to impugn any action taken by the respondents against it, if it is aggrieved in future, in accordance with law.

224. Again on 22nd August, 2005, the following statement made on behalf of MCD in the remaining petitions:

Learned Counsel for the respondent/MCD, on instructions, submits that so far as NGOs, who have been awarded CTCs for 30 years are concerned, MCD does not propose to take action till the expiry of this period. It is further submitted that the event of the respondents contemplating any action against the NGO, it shall act in accordance with the terms of the contract between the parties and in accordance with law. It is, therefore, submitted that the apprehension of such NGOs that the MCD can take coercive measures or withdraw the CTC allotted to them is without basis. Needless to say it shall be open to NGO concerned to impugn any action taken by the respondents against it, if it is aggrieved thereby in future, in accordance with law.

225. It is noteworthy that in the answer given by MCD to a query by Mr. Vijendra Gupta, member of the Sub-committee, the reason given by MCD for effecting repairs was that certain complexes were more than 15-20 years old and hence required repairs.

Before this Court, in answer to the challenge of cancellation of their contract which was for 30 years by the petitioners in W.P.(C) NO.16106/2004 Urbo Rural Integrated Development & W.P.(C) No. 16108/2004, the MCD has urged that it did not propose to cancel these contracts.

The petitioners point out that though these statements have been made in court however the decisions taken by MCD have not been varied or modified and no decision by a competent authority modifying the impugned

decisions has been placed before this Court.

Thus a mutually destructive and contradictory stand has been adopted by the MCD. Just as adhoc and piecemeal measures have been taken, self defeating pleas have been advanced to serve the purpose of the moment.

226. Both Mr. V.P. Choudhary and Mr. Jayant Bhushan, learned senior counsels representing some of the writ petitioners before this Court have submitted that actually the decision already stood taken by the MCD on 3rd January, 2004, the scope whereof was widened on 30th April, 2004. These decisions crystalised in the letter dated 19th July, 2004 written by the Commissioner, MCD and even the terms and conditions on which Sulabh International Social Service Organisation was to take over the operation and maintenance of the CTCs had been arrived at and a Memorandum of Understanding drawn up. It is only reasons to support these decisions which were carved out in the later action of the MCD after the writ petitions were filed. Thus, though the MCD may appear to have technically complied with the prescribed procedure in decision making, however the decision was clearly already taken before such procedure followed.

227. Mr. Vikas Singh, learned senior counsel appearing for the petitioners in W.P.(C) Nos. 7855/2005 & 8067/2005, has also urged that in the instant case, the decision to award the CTCs to Sulabh was not taken because the NGOs had committed breaches of any agreement. On the other hand, it was because the MCD had decided to award the CTCs to Sulabh that the contracts with the NGO were cancelled. In this behalf, it is urged that the decision of the MCD to rescind the agreement with the petitioners and cancel the same is in violation of not only the terms of the contract which provided a notice but is also in violation of the principles of natural justice inasmuch as grave allegations having been levelled against the petitioners without giving them an opportunity to meet the same.

Placing reliance on the pronouncement of the Apex Court in E.P. Royappa v. State of Tamil Nadu it is urged that the MCD cannot act at its whim and caprice. In fact the petitioners were entitled to an equal opportunity to operate and maintain the CTCs on the terms as those on which the same have been offered to Sulabh. Thereby, the MCD has denied the petitioners the right to consideration for the award of work without consideration of the expertise and capability.

Whether the MCD could have allotted the CTCs without adopting an open competitive process

228. The petitioners have assailed the action of the respondents on grounds of unfairness and unreasonableness for the reason that the MCD did not adopt the accepted method of allocation of the CTCs by open competitive bidding. However, justifying the action on behalf of the respondents, both the Municipal Corporation of Delhi and the Sulabh International have contended that failure to call a public tender before allocating all the CTCs of Sulabh International does not invalidate the action of the MCD and that an authority is adequately empowered to not call public tenders in a given case. It has been contended that the CTCs were required to be urgently operated and maintained efficiently and the decision to allot the CTCs to Sulabh without open tendering was wholly in public interest. Several pronouncements of the Apex Court have been relied upon in support of this contention which deserve to be noticed.

229. Strong reliance was placed by learned senior counsel for the respondents on the principles laid down by the Apex Court as back as in M/s Kasturilal Laxmi Reddy represented by its

official Shri Kasturilal v. State of Jammu and Kashmir and Anr. In this case, the Government of Jammu and Kashmir by its impugned order awarded a contract to the second respondents for tapping of 10 to 12 blazes annually for extract of resin from inaccessible chir forests in the state for a period of 10 years. In accordance with the Government policy of industrialisation of the State, it was agreed upon that a part of the resin so extracted would be delivered to the state for running a state owned industry and the rest would be retained by the second respondents for establishing and running of its own factory in the state. There was a prohibition on

the second respondent that the extracted resin which was allowed to remain with them shall be utilised only in the plant set up by them in the state and shall not be removed outside the state. There were other restrictions which were of benefit to the state including a clause for delivery of the resin to the state factory, no transportation charges were allowed. The order placed on the second respondent was the subject matter of the Supreme Court under Article 32 of the Constitution. The Court rejected the following challenge:

9. There were in the main three grounds on which the validity of the order was assailed on behalf of the petitioners. They were as follows:

(A) That the order is arbitrary, mala fide and not in public interest, inasmuch as a huge benefit has been conferred on the 2nd respondents at the cost of the State.

(B) The order creates monopoly in favor of the 2nd respondents who are a private party and constitutes unreasonable restriction on the right of the petitioners to carry on tapping contract business under Article 19(1)(g) of the Constitution.

(C) The State has acted arbitrarily in selecting the 2nd respondents for awarding tapping contract, without affording any opportunity to others to compete for obtaining such contract and this action of the State is not based on any rational or relevant principle and is, therefore, violative of Article 14 of the Constitution as also of the rule of administrative law which inhibits arbitrary action by the State.

We shall examine these grounds in the order in which we have set them out, but, before we do so, we may preface what we have to say by making a few preliminary observations in regard to the law on the subject.

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230. In this judgment, the Apex Court examined the entire case law on the subject including the principles laid down in the Ramanna Daya Ram Shetty v. International Airport Authority of India (supra). It was noticed that with the growth of the welfare state, new forms of property in the shape of Government largessee are developing since the Government was increasingly assuming the role of regulator and dispenser of social services and proprietor of a large number of benefits which included contracts, licenses etc and that more and more of our wealth consists of these new firms of property in order to protect recognised the importance of this new kind of wealth that new forms of protection have been evolved. Some interest in Government largessee, which were formerly regarded as privileges, have been recognised as rights, while others have been given legal protection not only by forging procedural safeguards, also by confining, structuring and checking government discretion in the matter of grant of such largess. It was held that the limitation which structures and control the discretion of the government in regard to grant of largesse by it is in the terms at which the largesse may be granted and the other is in regard to the person who may be recipients of such largesse.

As regards the first limitation, it is imperative that if the government awards a contract or leases out or otherwise deals with its property or grants any other largesse, it would be liable to be tested for the validity of its action on the touchstone of reasonableness and public interest and if it fails to satisfy either test, it would be unconstitutional and invalid. The state action can arbitrarily capriciously or in an unprincipled manner.

Thus, though ordinarily, a private individual would be guided by economic considerations of self gain in any action taken by him, it is always open to him under the law to act contrary to his self interest or to oblige another in entering into a contract or dealing with his property. But the Government is certainly not free to and as it likes in granting largesse such as awarding a contract. It has thus been repeatedly held that whatever be its activity, the government is still the government and is subject to restraints inherent in its position. An award of a contract by a government would be liable to be tested for its validity on the touchstone of unreasonableness and pubic interest and if it fails to satisfy either test, it would be unconstitutional and invalid.

So far as the concept of reasonableness is concerned, it was laid down by the Apex Court that the interaction of Article 14, 19 and 21 shows that the requirement of reasonableness runs like a golden thread through the entire fabric of fundamental rights in the constitution.

The directive principles concretise and give shape to the concept of unreasonableness envisaged under Article 14, 19 and 21 and other articles enumerating the fundamental rights. Any action taken by the Government with a view to giving effect to anyone or more of the directive principles would ordinarily, subject to any constitutional or legal inhibitions or other overriding considerations, qualify for being regarded as unreasonable while an action which is inconsistent with or runs counter to a directive principle would prima facie incur the reproach of being unreasonable.

231. So far as the concept of public interest is concerned, the Apex Court clearly stated in principle that it must, as far as possible receive its orientation from the directive principles. If, therefore, any governmental action is calculated to implement or give effect to a directive principle, it would ordinarily, subject to any other overriding considerations be equated with public interest.

14. Where any governmental action fails to satisfy the test of reasonableness and public interest discussed above and is found to be wanting in the quality of reasonableness or lacking in the element of public interest, it would be liable to be struck down as invalid. It must follow as a necessary corollary from this proposition that the government cannot act in a manner which would benefit a private party at the cost of the State; such an action would be both unreasonable and contrary to public interest. The government, therefore, cannot, for example, give a contract or sell or lease out its property for a consideration less than the highest that can be obtained for it, unless of course there are other considerations which render it reasonable and in public interest to do so. such considerations may be that some directive principle is sought to be advanced or implemented or that the contract or the property is given not with a view to earning revenue but for the purpose of carrying ut a welfare scheme for the benefit of a particular group or section of people deserving it or that the person who has offered a higher consideration is not otherwise fit to be given the contract or the property. We have referred to these considerations only illustratively, for there may be an infinite variety of considerations which may have to be taken into account by the government in formulating its policies and it is on a total evaluation of various considerations which have weighed with the government in taking a particular action, that the court would have to decide whether the action of the government is reasonable and in public interest. But one basic principle which must guide the court in arriving at its determination on this question is that there is always a presumption that the governmental action is reasonable and in public interest and it is for the party challenging its validity to show that it is wanting in reasonableness or is not informed with public interest. This burden is a heavy one and it has to be discharged to the satisfaction of the court by proper and adequate material. The court cannot lightly assume that the action taken by the government is unreasonable or without public interest because, as we said above, ,there are a large number of policy considerations which must necessarily weigh with the government jin taking action and therefore the court would not strike down governmental action as invalid on this ground, unless it is clearly satisfied that the action is unreasonable or not in public interest. But there it is so satisfied, it would be the plainest duty of the court under the Constitution to invalidate the governmental action. This is one of the ;most important functions of the court and also one of the most essential for preservation of the rule of law. It is imperative in a democracy governed by the rule of law that governmental action must be kept within the limits of the law and if there is any transgression, the court must be ready to condemn it. It is a matter of more and more powers and since it is not an uncommon phenomenon in some countries that the legislative check is getting diluted, it is left to the court as the only other reviewing authority ;under the Constitution to be increasingly vigilant to ensure observance with the rule of law and in this task, the court must not flinch or falter. It may be pointed out that this ground of invalidity, namely, that the governmental action is unreasonable or lacking in the quality of public interest, is different from that of mala fides though it may, in a given case, furnish evidence of mala fides.

15. The second limitation on the discretion of the government in grant of largesse is in regard to the persons to whom such largesse may be granted. It is now well settled as a result of the decision of this Court in Ramana

D. Shetty v. International Airport Authority of India, that the government is not Shetty v. International Airport Authority of India, that the government is not free like an ordinary individual, in selecting the recipients for its largesse and it cannot choose to deal with any person it pleases in its absolute and unfettered discretion. The law is now well established that the government need not deal with anyone, but if it does so, it must do so fairly without discrimination and without unfair procedure. Where the government is dealing with the public whether by way of giving jobs or entering into contracts or granting other forms of largesse, the government cannot act arbitrarily at its sweet will and, like a private individual, deal with any person it pleases, but its action must be in conformity with some standard or norm which is not arbitrary, irrational or irrelevant. The governmental action must not be arbitrary or capricious, but must be based on some principle which meets the test of reason and relevance. This rule was enunciated by the court as a rule of administrative law and it was also validated by the court as an emanation flowing directly from the doctrine of equality embodied in Article 14. The court referred to the activist magnitude of Article 14 as evolved in E.P. Royappa v. State of Tamil Nadu and Maneka Gandhi case and observed that it must follow as a necessary corollary from the principle of equality enshrined in Article 14 that though the State is entitled to refuse to enter into relationship with anyone, yet if it does so, it cannot arbitrarily choose any person it likes for entering into such relationship and discriminate between persons similarly circumstanced, but it must act in conformity with some standard or principle which meets that test of reasonableness and non-discrimination and any departure from such standard or principle would be invalid unless it can be supported or justified on some rational and non-discriminatory ground. (SCC p. 512, para 21)

This decision has reaffirmed the principle of reasonableness and non-arbitrariness in governmental action which lies at the core of our entire constitutional scheme and structure.

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232. In this background the Apex Court considered the reasons disclosed by the State for passing the impugned order thus:

19. It is clear from the backdrop of the facts and circumstances in which the impugned Order came to be made and the terms and conditions set out in the impugned Order that it was not a tapping contract simpliciter which was intended to be given tot he second respondents. The second respondents wanted to be assured of regular supply of raw material in the shape of resin before they could decide to set up a factory within the State and it was for the purpose of ensuring supply of such raw material that the impugned Order was made giving tapping contract to the second respondents. It was really by way of allocation of raw material for running the factory that the impugned Order was passed. The terms of the impugned Order show beyond doubt that the second respondents were under an obligation to set up a factory within the State and that 3500 metric tonnes of resin which was permitted to be retained by the second respondents out of the resin extracted by them was required to be utilised in the factory to be set up by them and it was provided that no part of the resin extracted should be allowed to be re3moved outside the4 States. The whole object of the impugned Order was to make available 3500 metric tonnes of resin to the second respondents for the purpose of running the factory to be set up by them. The advantage to the State was that a new factory for manufacture of rosin, turpentine oil and other derivatives would come up within its territories offering more job opportunities to the people of the Stat4e increasing their prosperity and augmenting the State revenues and in addition the State would be assured of a definite supply of at least 1500 metric tonnes of resin for itself without any financial involvement or risk and with this additional quantity of resin available to it, it would be able to set up another factory creating more employment opportunities and, in fact, as the counter affidavit of Ghulam Rasul, Under-Secretary to the Government filed on behalf of the State shows the government lost no time in taking steps to set up a public sector resin distillation plant in a far-flung area of the State, namely, Sundarbani, in Rajouri District. Moreover, the State would be able to secure extraction of resin from these inaccessible areas on the best possible terms instead of allowing them to remain unexploited or given over at ridiculously low royalty. We cannot accept the contention of the petitioners that under the impugned Order a buge benefit was conferred on the second respondents at the cost of the State. It is clear from the terms of the impugned Order

that the second respondents would have to extract at least 5000 metric tonnes of resin from the blazes allotted to them in order to be entitled to retain 3500 metric tonnes. The counter-affidavit of Ghulam Rasul on behalf of the first respondent and Guran Devaya on behalf of the second respondents show that the estimated cost of extraction and collection of resin from these inaccessible areas would be at the least Rs. 175 per quintal, though according to Guran Devaya it would be in doubt that the State must endeavor to obtain the highest price subject, of course, to any other overriding considerations of public interest and in that event, its action in giving resin to a private individual at a lesser price would be arbitrary and contrary to public interest. But, where the State has, as a matter of policy, stopped selling resin to outsiders and decided to allot it only to industries set up within the State for the purpose of encouraging industrialisation, there can be no scope for complaint that the State is giving resin at a lesser price than that which could be obtained in the open market. The yardstick of price in the open market would be wholly inept, because in view of the State policy, there would be no question of any resin being sold in the open market. The object of the State in such a case is not to earn revenue from sales of resin, but to promote the setting up of industries within the State. Moreover, the prices realised at the auctions held in December 1978, January 1979 and April 1979 did not reflect the correct and genuine price of resin, because by the time these auctions came to be held, it had become known that the State had taken a policy decision to ban export of resin from its territories with effect from 1979-80 and the prices realised at the auctions were therefore scarcity prices. In fact, the auction held in April 1979 was the last auction in the State and since it was known that in future no resin would be available for sale by auction in the open market to outsiders, an unduly high price of Rs. 700 per quintal was offered by the factory owners having their factories outside the State, so that they would get as much resin for the purpose of feeding their industrial units for some time. The counter-affidavits show that, in fact,t he average sale price of resin realised during the year 1978-79 was only Rs. 433 per quintal and as compared to this price, the 2nd respondents were required to pay price or royalty at a higher rate of Rs. 474 per quintal for 3500 metric tonnes of resin to be retained by them ;under the impugned Order. It is in the circumstances impossible to see how it can at all be said that any benefit was conferred on the second respondents at the cost of the State. The first head of challenge against the impugned Order must, therefore, be rejected.

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21. The third and last ground of challenge is also difficult to sustain. We fail to see how the action of the State in making the impugned Order in favor of the 2nd respondents could be said to be arbitrary or unreasonable. It is clear from the facts we have narrated above and we need not repeat those facts again, that the States was not unjustified in excluding 11,85,414 blazes situate in the inaccessible areas of Reasi, Ramban and Poonch divisions from the auctions, since the past experience showed that even on the basis of royalty without load, it was difficult to attract bidders and the maximum that could be obtained, and that too only in one solitary year, was Rs. 2.55 per blaze without load, which was an absurdly low return and it was, therefore, felt quite justifiably, that it would be futile to include these blazes in the auctions for tapping on wage-contract basis. The State royalty with or without ;load, because, as a matter of policy, with a view to encouraging industrialisation, the State did not want resin to go outside its encouraging industrialisation, the State did not want resin to go outside its territories but wanted it to be used only for the purpose of feeding industries set up within the State and even if a condition could legitimately be imposed on the contractor that he should sell the resin extracted and retained by him only to industries within the State, it would be difficult to ensure observance of such condition and moreover the object of the State to make resin available to the local industries at a reasonable prices might be frustrated, because the contractor taking advance of scarcity in supply of resin, might, and in all probability would, try to extract a must higher price from the industries needing resin. It was thus found to be an impracticable proposition to tap these blazes either on wages-contract basis or on the basis of royalty with or without load.

22. Now the 2nd respondents had made an offer for putting up a modern plant for manufacture of rosin, turpentine oil and other derivatives within the State provided they were assured a definite supply of resin every year. But having regard to the commitments already made by it, it was not possible for the State to make any definite allocation of resin to the 2nd respondents and a proposal was therefore mooted that 11,85,414

blazes in inaccessible areas of Reasi, Ramban and Poonch Devisions could be allocated to the 2nd respondents for tapping on certain terms and conditions so that the 2nd respondents could tap these blazes and out of the resin extracted, obtain for themselves an assured supply for running the factory to be set up by them and make the balance quantity available to the State for its own purpose. The 2nd respondents were agreeable to this proposal and they accordingly put forward an alternative proposal on these lines for the consideration of the State and eventually, the impugned Order came to be made in favor of the 2nd respondents. We have already discussed that the impugned Order was unquestionable and without doubt, in the interest of the State and even with a microscopic examination we fail to see anything in it which could possibly incur the reproach of being condemned as arbitrary or irrational. It is true that no advertisements were issued by the State inviting tenders for award of tapping contract in respect of these blazes or stating that tapping contract would be given to any party who is prepared to put up a factory for manufacture of rosin, turpentine oil and other derivatives within the State, but it must be remembered that it was not a tapping contract simpliciter which was being given by the State. The tapping contract was being given by way of allocation of raw material for feeding the factory to be set up by the 2nd respondents. The predominant purpose of the transaction was to ensure setting up of a factory bu the 2nd respondents as part of the process of industrialisation of the State and since the 2nd respondents wanted assurance of a definite supply of resin as a condition of putting up the factory, the State awarded the tapping contract to the 2nd respondents for this purpose. If the State were giving tapping contract simpliciter there can be no doubt that the State would have to auction or invite tenders for securing the highest price, subject, of course, to any other relevant overriding considerations of public weal or interest, but in a case like this where the State is allocating resources such as water, power, raw materials etc. for the purpose of encouraging setting up of industries within the State we do not think the State is bound to advertise and tell the people that it wants a particular industry to be set up within the State and invite those interested to come up with proposals for the purpose. The State may choose to do so, if it thinks fit and in a given situation, it may even turn out to be advantageous for the State to do so, but if any private party comes before the State and offers to set up an industry, the State would not be committing breach of any constitutional or legal obligation if it negotiates with such party and agrees to provide resources and other facilities for the purpose of setting up the industry. The State is not obliged to tell such party : "Please wait I will first advertise, see whether any other offers are forthcoming and then after considering all efforts, decided whether I should let you set up the industry stop."It would be most unrealistic to insist on such a procedure, particularly in an area like Jummu & Kashmir which on account of historical, political and other reasons, is not yet industrially developed and where entrepreneurs have to be offered attractive terms in order to persuade them to set up an industry. The State must be free in such a case to negotiate with a private entrepreneur with a view to inducing him to set up an industry within the State and if the State enters into a contract with such entrepreneur for providing resources and other facilities for setting up an industry, the contract cannot be assailed as invalid so long as the State has acted bona fide, reasonably and in public interest. If the terms and conditions of the contract or the surrounding circumstances show that the State has acted mala fide or out of improper or corrupt motive or in order to promote the private interests of someone at the cost of the State, the court will undoubtedly interfere and strike down State action as arbitrary, unreasonable or contrary to public interest. But so long as the State action is bona fide and reasonable, the court will not interfere merely on the ground that no advertisement was given or publicity made or tenders invited. Here, the 2nd respondents approached the State for the purpose of setting up a modern factory for manufacture of rosin, turpentine oil and other derivatives and asked for allocation of resin and the State, with a view to offering an incentive to the 2nd respondents to set up the factory, made the impugned Order awarding the tapping contract in respect of these blazes to the 2nd respondents as a part of package deal. We have already pointed out and we need not repeat again, that the impugned Order was reasonable and in the interest of the State and in the circumstances, we are clearly of the view that it cannot be assailed as invalid merely because no advertisements were issued inviting offers for setting up a factory and taking the tapping contract as an integral part of the transaction.

233. From the perusal of the above, it is apparent that the court held that if a contract simplicit for mere tapping of resin was being given, then undoubtedly, recourse to invitation of tenders or a public auction to secure a highest price would be essential. However, in the light of the given situation and for the factors explained by the State, it was necessary and advantageous for the state to adopt the procedure which had been

adopted.

In the instant case, the Municipal Corporation of Delhi had not only allocated all the CTCs to Sulabh International but had enabled it to derive commercial profits there from by advertisement and had also agreed to bear the huge cost and investment of moulding the CTCs to the requirements of Sulabh International. The action of the MCD, therefore would not draw any parity or comparison with the action of the state of Jammu and Kashmir which was concerned with considerations of public interest, involving allocation of resources such as water, power, raw materials etc for the purposes of encouraging setting up of industries within the state. The allocation involved considerations of providing employment opportunities as well and also entrepreneurs were required to be offered directive terms in order to persuade them to set up industry in admittedly hard and inaccessible terrain. The Apex Court also noticed that the sole reason for assailing the action of the state was the fact that no advertisements were issued for the purposes of inviting tenders.

234. Dr. Abhishek Manu Singhvi, learned senior counsel appearing for the Sulabh International has placed strong reliance on the pronouncement of the Apex Court in Sachidanand Pandey and Anr. v. State of West Bengal. In this case, the court was concerned with a public interest litigation challenging the construction of a five star hotel in the vicinity of the zoological garden. The petitioners had challenged the cabinet decision of the State Government to lease part of the zoo land so far used for fodder cultivation, burial ground, hospital etc for animals, to a leading hotel company. After a close examination of the entire matter, the court found that the decision was taken openly after due application of mind to all relevant considerations including the ecology, providing of alternative facilities to the zoo and all other implications etc. It was found that the decision, which was of a commercial nature, was taken by the State Government after a process of protected discussions, consultations, negotiations and consideration of various aspects, covering about 2 years and that the same was taken openly after a consideration of also all objections raised against the project, the public interest litigation at the instance of some persons having vested interest was frivolous and did not deserve to be entertained. The court also considered any such background as to when negotiation, interest of public auction or tender was more appropriate and the principles for determination thereof. The court found that the present case was not one of those cases where the evidence is first gathered and a decision is later arrived at which is incorporated in a recent order but was a case where discussions had necessarily stretched over a long period of time, several factors were independently and separately made out and considered and the decision and the reasons therefore could be gathered by looking at the entire course of events and circumstances stretching over the period from the initiation of the proposal to the taking of the final objection. The decision of the Government was not one of those misleading decisions taken in the shrouded secrecy of the procedural chamber but was taken openly without any attempt at secrecy. The court found that the Government was alive to the various considerations requiring thought and deliberations. The court had arrived at a conscious decision after taken them into account which was bereft of any malafide. The transaction bore a commercial though public character which could be settled only after such prolonged discussion, clarification and consultations with all concerned persons. Reiterating that state owned or public owned property is not to be dealt with at the absolute discretion of the executive, the court emphasised that public interest is the paramount consideration. One of the methods of securing the public interest, when it is considered necessary to dispose of a property, is to sell it off by public auction or by inviting tenders. Though this is the ordinary rule, it is not an invariable rule. There may be situations where there are compelling reasons necessitating departure from the rule but then the reason for the departure have to be rational and not 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.

In this case, the very location of the land, nature of the required construction and the establishment of the five star hotel was indicative of the requirement of expertise and sound financial position on the part of those who might offer to construct and establish them. It was in the absence of any other leading hoteliers apart from the ITDC and the Taj group coming forward, that direct negotiations were held with those who had come forward with the proposal and that the same was without doubt, the most reasonable and rational way of proceeding in the matter rather than inviting tenders or holding public auction. Tenders and auction were most impractical in

the circumstances. It is noteworthy that the Taj group had agreed to keep the hotel as a low rise structure so that the building would not come within the trajectory of birds flying into the lake in the zoo as well as special care in the matter of illumination of the hotel so that the birds and the animals in the zoo are not effected or disturbed in any manner. The group had also undertaken to construct the alternative facilities for the zoo under provision of the committee of the state.

In these circumstances, the court noticed the submissions on behalf of the writ petitioner and answered the same thus:

31. One of the arguments strenuously pressed by Dr. Singhvi was that, even if it was assumed that the government had the power to transfer the land, the government did not have the power to deal with the land in any manner that they liked. Certain norms and procedures had to be observed and nothing could be done which would result in loss to the public exchequer. the Bengal Land Manual prescribed the procedure to be followed in the matter of transferring land belonging to the government. That procedure had to be observed. In any case, it was necessary either to hold a public auction or to invite tenders at least from the limited class of persons interested in utilising the land for the purpose for which the land was proposed to be transferred. The learned Counsel invited our attention to several decisions of the court : Rashbihari Panda v. State of Orissa, R.D. Shetty v. International Airport Authority, Kasturi Lal Lakshmi Reddy v. State of J. & K., State of Haryana v. Jage Ram, Ram & Shyam Co. v. State of Haryana, and Chenchu Rami Reddy v. Government of A.P.

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40. On a consideration of the relevant cases cited at the bar the following propositions may be taken as well established : State-owned or public-owned property is not to be dealt with at the absolute discretion of the executive. Certain precepts and principles have to be observed. Public interest is the paramount consideration. One of the methods of securing the public interest, when it is considered necessary to dispose of a property, is to sell the property by public auction or by inviting tenders. Though that is the ordinary rule, it is not an invariable rule. There may be situations wheres there are compelling reasons necessitating departure from the rule but then the reason 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 appearances of bias, jobbery or nepotism.

235. At this stage, it would be useful to consider the pronouncement of the Apex Court reported at 1995 (Supp. 2) SCC 512 G.D. Zalani and Anr. v. Union of India and Ors. In this case, the court was concerned with a challenge to the method adopted by the respondents in respect of acquisition of advance technology by a Government of India company (Hindustan Antibiotics Limited) for improvement of its production. Negotiations were made with leading foreign companies and a memorandum of understanding for technological tie up of the Indian company with a foreign company, being a world leader of leasing out its plant for an annual rental to a proposed joint venture company which was to be formed by the two companies was entered into. This MOU was challenged on grounds inter alia of malafide or extraneous considerations on the part of the managing director; promotion of the facilities being unfair of and violative of Article 14 and failure to resort to auction or tender rendering the same illegal as well as on grounds of violation of principles of natural justice. In this behalf, the court noticed thus:

30. There is yet another fact. Most of these companies keep their processes and technology a guarded secret. More better the technology, more fervently it is guarded. And HAL needed a technology superior to the one it was already having. Not only was it producing only 55% of its installed capacity, its cost of production was far higher than what it ought to be. It is true, cost of production could have been reduced to some extent by rationalising and streamlining the working methods (as pointed out by the Sub-Committee in its report) but the more important need was to increase the yield from the strains and achieve full capacity production. On account of efforts made over the years, production had increased to some extent but it was till way behind its

installed capacity, i.e., full capacity production. Thus, it was not a case of merely leasing out a government company but a case where the government company was trying to obtain the best possible technology. In such matters, sights have to be set far into the future and arrive at a reasonable prognosis keeping in mind the best interests of the Company. Floating of tenders may not have been a proper method to adopt in these circumstances. In any event, among the available technologies, not only has the GB the best technology, it was the only source available, the other having been rejected as already stated. Probably it is for this reason that the Government of India gave the directive on 20-6-1994. In the above circumstances and, on the present material, we cannot say that Shri Basu was either actuated by mala fides or that he was acting out of extraneous reasons.

34. We must reiterate that this was not a simple cse of granting of lease of a government company, in which case the court would have been justified in insisting upon the authorities following a fair method consistent with Article 14, i.e. by calling for tenders. We agree that while selling public property or granting its lease, the normal method is auction or calling for tenders so that all intending purchasers/lessees should have an equal opportunity of submitting their bids/tenders. Even there, there may be exceptional situations where adopting such a course may not be insisted upon. Be that as it may, the case here is altogether different. HAL was trying to improve not only the quantum of production but also its quality and for that purpose looking for an appropriate partner. They went in for the best. It must be remembered that this technology is not there for the mere asking of it. All the leading drug companies keep their processes and technology a guarded secret. Bing businessman, they like to derive maximum profit for themselves. It is ultimately a matter of bargain. In such cases, all that need be ensured is that the Government or the authority, as the case may be, has acted fairly and has arrived at the best available arrangement in the circumstances.

Again, this judgment was rendered in the peculiar facts and circumstances of the case. After a close consideration of the reasons, the court held that the deviation from the normal rule of adopting the process of public auction and tender was valid.

236. The judgment of the Apex Court in M.P. Oil Extraction v. State of M.P. was also rendered in the peculiar facts of the case. The State Government of Madhya Pradesh framed an industrial policy in 1979 and thereafter revised the same from time to time to the felt need. The Apex Court found that there was no material on record on which it could be reasonably held that the same was not informed by any reason whatsoever. In any case, the policy had been considered on an earlier occasion by not only the Apex Court but also the High Court of M.P. in a legal proceeding and the industrial policy had not been found to be arbitrary or capricious. The State of M.P. took a policy decision with regard to distribution of state largesse in the form of sal seeds and thereby adopted a protective measure for selected industrial units. Thereby, the State decided to give different treatment to unequals. An agreement was entered into by the State with selected industrial units who were commissioned on the invitation of the state to undertake oil extraction operations, for an assured supply of sal seeds at concessional rates to them. Such agreement was made as a protective measure based on an industrial policy. One of the units selected was on the basis of its geographical situation as it was situated in a backward tribal area and the other was selected on the basis of a review by a high powered committee during pendency of arbitration proceedings initiated by it on termination of its agreement by the State.

The appellants who challenged these agreements with the selected industries were old industrial units within the state and having not been selected for the agreement, challenged the same on grounds of the same being violative of Article 14. In this behalf, the Apex Court held that distinctive features between the industrial units set up at the instance of the State Government with whom the agreement had been entered into and the old existing units as the appellants were based on an objective criteria. The industrial units who were commissioned on the invitation of the state to undertake oil extraction operations on the assurance of the supply of sal seeds by the state stood on a separate footing. Therefore, the said two classes of industries were not similarly circumstanced. Article 14 prohibits discrimination amongst equals but it had an inbuilt flexibility and also permitted different treatment to unequals. The classification of the industries on the basis of geographical situation has a rational basis and has been recognised by the Apex Court. Consequently, the

agreement could not be per se held to be illegal or arbitrary.

So far as the challenge to the renewal clause in the agreement was concerned, the court held that it was a matter of decision by the State Government and unless such decision is patently arbitrary, interference by the court is not called of. The court held that in the case in hand, keeping in view these facts, the decision of the State Government to extend the protection for a further period could not be held to be per se irrational, arbitrary or capricious warranting judicial review of such policy decision.

In this background, the court observed thus:

41. After giving our careful consideration to the facts and circumstances of the case and to the submissions made by the learned Counsel for the parties, it appears to us that the Industrial Policy of 1979 which was subsequently revised from time to time cannot be held to be arbitrary and based on no reason whatsoever but founded on mere ipse dixit of the State Government of M.P. The executive authority of the State must be held to be within its competence to frame a policy for the administration of the State. Unless the policy framed is absolutely capricious and, not being informed by any reason whatsoever, can be clearly held to be arbitrary and founded on mere ipse dixit of the executive functionaries thereby offending Article 14 of the Constitution or such policy offends other constitutional provisions or comes into conflict with any statutory provision, the Court cannot and should not outstep its limit and tinker with the policy decision of the executive functionary of the State. This Court, in no uncertain terms, has sounded a note of caution by indicating that policy decision is in the domain of the executive authority of the State and the Court should not embark on the unchartered ocean of public policy and should not question the efficacy or otherwise of such policy so long the same does not offend any provision of the statute or the Constitution of India. The supremacy of each of the three organs of the State i.e. legislature, executive and judiciary in their respective fields of operation needs to be emphasised. The power of judicial review of the executive and legislative action must be kept within the bounds of constitutional scheme so that there may not be any occasion to entertain misgivings about the role of judiciary in out stepping its limit by unwarranted judicial activism being very often talked of in these days. The democratic set-up to which the policy is so deeply committed cannot function property unless each of the three organs appreciate the need for mutual respect and supremacy in their respective fields.

237. Even the decision of the Supreme Court in Netai Bag and Ors. v. State of West Bengal was rendered in the facts and circumstances of the case. In this case, certain lands were acquired by the state after compliance with the provisions of the Land Acquisition Act, 1894 for a public purpose. An unutilised surplus portion of such land was sold to the respondents. This land was sold to the respondents for constructing the abattoir. The sale was challenged by the appellants, four of whom were stated to be the erstwhile owners interested only to get back the lands legally acquired from them, while some others were those who were advocating vegetarianism. The appellants challenged the action of the respondents solely on the ground of arbitrariness and violation of Article 14 and also though no allegations of mala fides had been made against anyone of the respondents, however before the Supreme Court, the appellants contended that though not actual but legal mala fides were discernible from the pleadings of the parties and the record produced by them.

Noticing that despite best efforts, the State Government could not set up any project on the surplus land and being unsuccessful in securing any buyer for the abattoir which had been set up at Durgapur; on being invited by the State Government, the respondent No. 5 had agreed to take over the Durgapur project and also to set up the abattoir on the surplus land. It was found that amongst the considerations which weighed with the Government in giving the lease of the surplus land to respondent No. 5 was the object of setting up an industry in the state of West Bengal which was likely to generate employment to more than 300 persons and earned foreign exchange worth more than Rs. 50 crores. After the government had failed in its efforts for the purposes of transferring the Durgapur project, and establishment of Mourigam, the State Government wrote to some Bombay based firms, reputed in the field, to salvage the two projects. Positive response was received from some firms of which respondent No. 5 was found, on merits, to be preferable to others.

In these circumstances, the court held that in the absence of any pleadings in the writ petition before the High Court or any specific allegations of mala fides against any of the respondents, it could not be said that mere violation of some alleged statutory provisions which safeguards has felt out by the Apex Court would render the state action to be arbitrary in all cases. In these facts, the court held thus:

19. Though the State cannot escape its liability to show its actions to be fair, reasonable and in accordance with law, yet wherever challenge is thrown to any of such action, initial burden of showing the prima facie existence of violation of the mandate of the Constitution lies upon the person approaching the court. We have found in this case, that the appellants have miserably failed to place on record or to point out to any alleged constitutional vice or illegality. Neither the High Court nor this Court would have ventured to make a rowing inquiry particularly in a writ petition filed at the instances of the erstwhile owners of the land, whose main object appeared to get the land back by any means as, admittedly, with the passage of time and development of the area, the value of the land had appreciated manifold. It may be noticed that in the year 1961 the erstwhile owners were paid about Rs. 5.5 lakhs and the State Government assessed the market value of the property which was paid by Respondent 5 at Rs. 71,59,820. The appellants have themselves stated that the value of the land round about the time, when it was leased to Respondent 5 was about Rs. 11 crores. There cannot be any dispute with the proposition that generally when any State land is intended to be transferred or the State largesse decided to be conferred, resort should be had to public auction or transfer by way of inviting tenders from the people. That would be a sure method of guaranteeing compliance with the mandate of Article 14 of the Constitution. Non-floating of tenders or not holding of public auction would not in all cases be deemed to be the result of the exercise of the executive power in an arbitrary manner. Making an exception to the general rule could be justified by the State executive, if challenged in appropriate proceedings. The constitutional courts cannot be expected to presume the alleged irregularities, illegalities or unconstitutionality nor the courts can substitute their opinion for the bona fide opinion of the State executive. The Courts are not concerned with the ultimate decision but only with the fairness of the decision-making process.

20. The Government is entitled to make pragmatic adjustments and policy decision which may be necessary or called for under the prevalent peculiar circumstances. The court cannot strike down a policy decision taken by the Government merely because it feels that another decision would have been fairer or wiser or more scientific or logical. In State of M.P;.v. Nandlal Jaiswal it was held that the policy decision can be interfered with by the court only if such decision is shown to be patently arbitrary, discriminatory or mala fide. In the matter of different modes, under the rule of general application made under the M.P. Excise Act, the Court found that the four different modes, namely, tender, auction, fixed license fee or such other manner were alternative to one another and any one of them could be resorted to. In Sachidanand Pandey v. State of W.B, it was held that as regards the question of propriety of private negotiation with an individual or corporation, it should be borne in mind that State-owned or public-owned property is not to be dealt with at the absolute discretion of the executive. Certain percepts and principles have to be observed, public interest being the paramount consideration. One of the methods of securing the public interest when it is considered necessary to dispose of the property is to sell the property by public auction or by inviting tenders. But such a rule is not an invariable rule. there may be situations where there are compelling reasons necessitating departure from the rule. As and when a departure is made from the general rule, it must be shown that such an action was rational and not suggestive of discrimination.

Thereupon the court considered the facts of the case to ascertain as to whether the action of the State Government was illegal, arbitrary or mala fide. The lease to the respondent No. 5 was for setting up an integrated food processing unit with an abattoir in a semi rural area which was a low lying land where the Government was unable to set up any project despite best efforts. Its newspaper advertisement had failed to get buyers for the Durgapur project. The State Government had considered the standing of the respondent No. 5 and the work it had already done in the field in question. In the peculiar facts and circumstances of the case, the court held that it was not possible to held that the action of the respondent No. 5 was unreasonable, legal, arbitrary or actuated by extraneous consideration. The challenge was negated in these circumstances.

238. Similarly in 5 M.T. Consultants Secundarabad v. S.Y. Nawab, the Apex Court had occasion to consider the decision of the Municipal Corporation of Hyderabad to allot as a pilot project on experimental basis permission to the appellant for erecting street sign boards at certain specified places. The Municipal Corporation of Hyderabad had an idea for erecting for the use and benefit of the public, road direction boards on various thorough fares in the twin cities of Hyderabad and Secundarabad for some time. But due to financial restraints, it could not take any step for its realisation. In September, 1993, the appellant approached the corporation with a proposal formulated by on an in-depth study, in the form of a scheme and project for rationalisation of the house numbering in the twin cities. Other details and also erection of the street sign boards indicating the name of the locality, the street number, details of house numbers etc. were also suggested and it offered to take up that project. It was after detailed re-inspection of the samples of the appellant's work, the examination of the various design and revised design etc and after satisfaction of the corporation authorities the corporation decided to undertake the work as a pilot project on experimental basis and gave permission in September, 1994 to the appellant for erecting the street sign boards at certain specified places. The terms and conditions of the work had been specified. The entire cost of the work was to be borne by the appellant and not by the corporation which was to pay only a nominal cost of Rs. 5/- and it was open to the corporation to impose on the appellant advertising fee and ground rent if the maintenance was poor or advertising space was more than what the stipulation in the agreement or any other terms and conditions were not violated. The letter permitted the appellant to lay out the space provided for advertising purpose to any of the appellants client at the appellant's terms and conditions for 15 years from the date of the letter. Ultimately, the installations had to be left at the property of the corporation. The corporation also published in several newspapers a notice calling upon private advertisers to participate in a meeting to be held at a specified time and place and to avail of an opportunity to undertake project of a similar nature. No private advertisers evinced any interest to give any concrete proposal. The respondent who was the writ petitioner did not even attend the meeting called by the corporation. The respondent filed a writ petition before the High Court challenging the permission granted to the appellant by the corporation as an ultravires of the Hyderabad Municipal Corporation Act and Article 14 of the Constitution inter alia alleging that he had approached the corporation for the permission to erect arches on main roads and junctions at his own cost and to display thereon as per the rules but the corporation had refused such permission. The respondent laid several other such unproved allegations as well before the court. The single Judge dismissed the writ petition however the Division Bench, in the appeal assailing the order of the Single Judge, directed termination of the contract and making of an exercise afresh for the purpose. In the appeal, assailing the decision of the Division Bench after a detailed consideration of the facts, the court held thus:

16. The materials on record substantiated the absolute need and necessity to undertake works of the nature executed by the appellant, in furtherance of great public interest and for larger public and common good. The admitted dire financial position of the Corporation and their inability to undertake such a project at the cost of the Corporation and the fact that the venture was long overdue apparently made the Corporation authorities to avail of the project as unfolded and volunteered by the appellant, subject, of course, to further revisions, modifications and suggestions in the best interests of the Corporation. When it was undertaken as a pilot project on a trial basis there might not have been much certainty about the profitability of the scheme as a business venture for the private party concerned and the appellant was prepared to undertake the said risk and executed the works to the satisfaction of the authorities and appreciation of the public as well. The risk involved is not only in recouping the investments to be made for installations and constructions but to maintain them in good, proper and working condition without also sacrificing the beauty of the installations throughout the duration of 15 years. Conditions imposed on the appellants involve great responsibilities and obligations and necessarily certain concessions had to be shown to keep the project working and maintain them in good shape. Not only the Municipal Corporation had no financial commitments in getting such works by any expenditure therefore, which were to be executed by the appellant only on self-financing basis generating the required funds for installation and continued maintenance and their upkeep from sponsors by collecting premiums for giving them the privilege to avail of the space permitted by the Corporation for advertisements but ultimately the whole works have to be left with the Corporation and it is not to be removed by the appellant. As rightly observed by the learned Single Judge the venture cannot be considered to be the

grant of a largessees or lease or contract in the conventional sense. The provisions in the Municipal Corporation Act cannot be said to envisages situations of the nature, when enacted. This appears to be a project more akin to the one considered by this Court in G.B. Mahajan case. The fact that no other private advertising agencies, including the writ petitioner could offer to undertake such a venture in the other available areas when their participation was sought for belies the tall claims of the writ petitioner now made, after finding the project to have become successful and apparently fruitful - more perhaps than it could have been thought of initially by everyone. Perhaps irked by this only the interests of the writ petitioner seem to have gained momentum, to try in desperateness for the "Shylock's pound of flesh", to ruin the very project, unmindful of any concern for the Corporation, the public good and the appellant.

17. A careful and dispassionate assessment and consideration of the materials placed on record does not leave any reasonable impression, on the peculiar facts and circumstances of this case, that anything obnoxious which requires either public criticism or condemnation by courts of law had taken place. It is by now well settled that non-floating of tenders or absence of public auction or invitation alone is no sufficient reason to castigate the move or an action of a public authority as either arbitrary or unreasonable or amounting to mala fide or improper exercise or improper abuse of power by the authority concerned. Courts have always leaned in favor of sufficient latitude being left with the authorities to adopt their own techniques of management of projects with concomitant economic expediencies depending upon the exigencies of a situation guided by appropriate financial policy in the best interests of the authority motivated by public interest as well as in undertaking such ventures.

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The Commissioner or other authorities of the Corporation, who seem to have undertaken this at a point of time when there is no concrete scheme/project or sufficient funds with the Corporation, appear to have embarked upon this venture in good faith, keeping in view not only the public good but also in an earnest endeavor to secure such a novel project executed without any financial commitments or expenditure whatsoever either for the installations or subsequent upkeep and maintenance for at least 15 years. Merely because as an ultimate outcome in the long range, the appellant is able to make some more profit than what was envisaged itself could not render the exercise undertaken or scheme executed vulnerable for being challenged to be either as one in improper abuse of powers or by means of any reprehensible/condemnable conduct, calling for interference at the hands of court of law.

239. So far as the judgments relied upon by the petitioners are concerned, in State of Haryana and Ors. v. Jageram, the court was concerned with a re-auction of liqour vends which was to be conducted under the provisions of the Punjab Liqour license Rules, 1956 and non-compliance thereof. Therefore, strictly this judgment would have no application in the instant case.

240. Similarly, in Ram and Shyam Company v. State of Haryana and Ors., the court was concerned with grant of lease to a person other than the highest bidder i.e. the respondent No. 4 under the Mines and Minerals (Regulation and Development) Act. This grant was challenged by the appellant who was the highest bidder. It was noticed by the court that respondent No. 4 was not selected for any special purpose or to satisfy any directive principle of state policy. He surreptitiously ingratiated himself by a back door entry giving a minor raise in the bid and in the process usurped the most undeserved benefit which was exposed to the hilt in the court. The court observed that only the blind could refuse to perceive such action. In this case, an objection was raised to the writ petition that the appellant had an alternative remedy of the normal statutory appeal available to him.

Rejecting this contention, the Apex Court observed thus:

9. Before we deal with the larger issue, let me put out of the way the contention that found favor with the High Court in rejecting the writ petition. The learned Single Judge as well as the Division Bench recalling the

observations of this Court in Assistant Collector of Central Excise v. Jainson Hosiery Industries rejected the writ petition observing that 'the

petitioner who invokes the extraordinary jurisdiction of the court under Art. 226 of the Constitution must have exhausted the normal statutory remedies available to him.' We remain unimpressed. Ordinary it is true that the court has imposed a restraint in its own wisdom on its exercise of jurisdiction under Art. 226 where the party invoking the jurisdiction has an effective, adequate alternative remedy. More often, it has been expressly stated that the rule which requires the exhaustion of alternative remedies is a rule of convenience and discretion rather than rule of law. At any rate it does not oust the jurisdiction of the Court. In fact in the very decision relied upon by the High Court in the State of Uttar Pradesh v. Mohammad Nooh 1958 SCR 595 : AIR 1958 SC 86 it is observed 'that there is no rule, with regard to certiorari as there is with mandamus, that it will lie only where there is no other equally effective remedy.' It should be made specifically clear that where the order complained against is alleged to be illegal or invalid as being contrary to law, a petition at the instance of person adversely affected by it, would lie to the High Court under Art. 226 and such a petition cannot be rejected on the ground that an appeal lies to the higher officer or the State Government. An appeal in all cases cannot be said to provide in all situations an alternative effective remedy keeping aside the nice distinction between jurisdiction and merits. Look at the fact situation in this case. Power was exercised formally by the authority set up under the Rules to grant contract but effectively and for all practical purposes by the Chief Minister of the State. To whom do you appeal in a State administration against the decision of the Chief Minister? The clichf appeal from Caesor to Caesor's wife can only be bettered by appeal from one's own order to oneself. Therefore this is a case in which the High Court was not at all justified in throwing out the petition on the untenable ground that the appellant had an effective alternative remedy. The High Court did not pose to itself the question, who would grant relief when the impugned order is passed at the instanced of the Chief Minister of the State. To whom did the High Court want the appeal to be filed over the decision of the Chief Minister? There was no answer and that by itself without anything more would be sufficient to set aside the judgment of the High Court.

241. The other main contention relating to the merits of the controversy with regard to grant of the lease to a person who was not the highest bidder is concerned, the court placing reliance on the earlier pronouncement in Ramanna Daya Ram Shetty (supra) and Kasturi Lal Laxmi Reddy v. State of Jammu & Kashmir (supra) held thus:

12. Let us put into focus the clearly demarcated approach that distinguishes the use and disposal of private property and socialist property. owner of private property may deal with it in any manner he likes without causing injury to any one else. But the socialist or if that word is jarring to some, the community or further the public property has to be dealt with for public purpose and in public interest. The marked difference lies in this that while the owner of private property may have a number of considerations which may permit him to dispose of his property for a song. On the other hand, disposal of public property partakes the character of a trust in that in its disposal there should be nothing hanky panky and that it must be done at the best price so that larger revenue coming into the coffers of the State administration would serve public purpose viz. The welfare State may be able to expand its beneficent activities by the availability of larger funds. This is subject to one important limitation that socialist property may be disposed at a price lower than the market price or even for a token price to achieve some defined constitutionally recognised public purpose, one such being to achieve the goals set out in Part IV of the Constitution. But where disposal is for augmentation of revenue and nothing else, the State is under an obligation to secure the best market price available in a market economy. An owner of private property need not auction it nor is he bound to dispose it of at a current market price. Factors such as personal attachment, or affinity, kinship, empathy, religious sentiment or limiting the choice to whom he may be willing to sell, may permit him to sell the property at a song and without demur. A welfare State as the owner of the public property has no such freedom while disposing of the public property. A welfare State exists for the largest good of the largest number more so when it proclaims to be a socialist State dedicated to eradication of poverty. All its attempt must be to obtain the best available price while disposing of its property because the greater the revenue, the welfare activities will get a fillip and shot in the

arm. Financial constraint may weaken the tempo of activities. Such an approach serves the larger public purpose of expanding welfare activities primarily for which the Constitution envisages the setting up of a welfare State. In this connection we may profitably refer to Ramana Dayaram Shetty v. The International Airport Authority of India

13. Approaching the matter from this angle, can there be any doubt that the appellant whose highest bid was rejected by the Government should have no opportunity to improve uponhis bid more so when his bid was rejected on the ground that it did not represent adequate market consideration for the concession to extract minor mineral. A unilateral offer, secretly made, not correlated to any reserved price made by the fourth respondent after making false statement in the letter was accepted without giving any opportunity to the appellant either to raise the bid or to point out the falsity of the allegations made by the fourth respondent in the letter as also the inadequacy of his bid. The appellant suffered an unfair treatment by the State in discharging its administrative functions thereby violating the fundamental principle of fairplay in action. When we gave the highest bid, he could not have been expected to raise his own bid in the absence of a competitor. Any expectation to the contrary betrays a woeful lack of knowledge of auction process. And then some one surreptitiously by a secret offer scored a march over him. No opportunity was given to him either to raise the bid or to controvert and correct the erroneous statement.

14. What happened in this case must open the eyes both of the Government as well as the people at large. How an uncontrolled exercise of executive power to deal with socialist property in which entire community's interest was sacrificed so as to cause huge loss to the public exchequer would have gone unnoticed but for the vigilance of the appellant who no doubt is not altruistic in its approach but its business interests goaded it to expose the unsavoury deal. Conceding that on weighty and valid considerations, the highest bid can be rejected by the State, one such consideration which can be foreseen is that the highest bid does not represent the adequate market price of the concession, yet before giving up the auction process and accepting a private bid secretly offered, the authority must be satisfied that such an offer if given in open would not be outmatched by the highest bidder. In the absence of such satisfaction, acceptance of an offer secretly made and sought to be substantiated on the allegations without the verification of the truth, which was not undertaken, would certainly amount to arbitrary action in the matter of distribution of State largessee which by the decisions of this Court is impermissible. Even though repeatedly, this Court has said that the State is not bound to accept the highest bid, this proposition of law has to be read subject to the observation that it can be rejected on relevant and valid considerations, one such being that the concession is to be given to a weaker section of the society who could not outbid the highest bidder.

242. It is noteworthy that the court noticed that the government would be under no obligation to accept the highest bid and that no right accrued to the bidder merely because his bid happened to be the highest. The court also observed that the government had the right, for good and sufficient reason, not to accept the highest bid but even to prefer a tenderer other than the highest bidder (Ref Trilochan Mishra v. State of Orissa of Uttar Pradesh v. Vijay

Bahadur Singh; State of Orissa v. Hari Narayan Jaiswal) but held that the rejection of the highest bid can only be on grounds that are neither irrelevant nor extraneous.

243. In Ram and Shyam Company v. State of Haryana(supra), the court further held that the respondents had placed reliance on the letter by the 4th respondent who had indulged in levelling allegations, the truth of which was not verified or asserted. The highest bidder whose bid was rejected on the ground that the bid did not represent the marked price, was not given an opportunity to raise his own bid when privately the higher offer was received. The court held that if the allegations made in the letter influenced the jurisdiction of the Chief Minister, fair play in action demanded that the appellant should have been given an opportunity to counter and correct the same. It was held that application of the minimum principles of natural justice in such a situation must be read in the statute and held to be obligatory. When it is said that "even in administrative action, the authority must act fairly, it ordinarily open in accordance with the principles of natural justice

variously describe as fairplay in action. That having not been done, the grant in favor of the 4th respondent must be quashed.

244. In a Constitutional Bench pronouncement of the Apex Court reported at K.N. Guruswamy v. State of Mysore, commenting on the maintainability of the writ petition at the instance of the highest bidder, the court noticed that the case, there was no notification and the furtive method was adopted of settling a matter of this moment, behind the backs of those interested and anxious to compete was unjustified. Apart from the interest of the petitioner who challenged such action, deeper considerations were also at stake, namely, the elimination of favortism and nepotism and corruption him to permit what had occurred in the case would leave the door wide open to the very evils which the legislature in its wisdom had endeavored to avoid.

245. In this behalf, the approach to be taken by the state must follow the principles laid down in K.N. Guruswamy v. State of Mysore. In that case, the appellant and the fourth respondent were rival liquor contractors for the sale of the liquor contract for the year 1953-54 in the State of Mysore. The contract was auctioned by the Deputy Commissioner under the authority conferred upon him by the Mysore Excise Act, 1901. The appellant's bid was the highest and the contract was knocked down in his favor subject to formal confirmation by the Deputy Commissioner. The fourth respondent was present at the auction but did not bid. Instead of that he went direct to the Excise Commissioner and made a higher offer. The Excise Commissioner cancelled the sale in favor of the appellant and directed the Deputy Commissioner to take action under the relevant rule. The latter accepted the tender of the respondent. The appellant moved the High Court for a writ of mandamus which was dismissed. In appeal by the certificate, it was urged on behalf of the State that the Deputy Commissioner acted within the ambit of his powers under the relevant rule which gave him an absolute discretion either to re-auction or to act otherwise and no fetters are placed upon the "otherwise" method. The court negatived this contention observing that arbitrary improvisation of an ad hoc procedure to meet the exigencies of a particular case is ruled out. Therefore, the grant of the contract to the fourth respondent was wrong. The Constitutional Bench repelling the contention that a writ petition at the instance of the appellant would not be maintainable, the Constitution Bench observed as under:

The next question is whether the appellant can complain of this by way of a writ. In our opinion, he could have done so in an ordinary case. The appellant is interested in these contracts and has a right under the laws of the State to receive the same treatment and be given the same chance as anybody else. Here we have Thimmappa who was present at the auction and who did not bid - not that it would make any difference if he had, for the fact remains that he made no attempt to outbid the appellant. If he had done so it is evident that the appellant would have raised his own bid. The procedure of tender was not open here because there was no notification and the furtive method adopted of setting a matter of this moment behind the back of those interested and anxious to compete is unjustified. Apart from all else, that in itself would in this case have resulted in a loss to the State because, as we have said, the mere fact that the appellant has pursued this writ with such vigour shows that he would have bid higher. But deeper considerations are also at stake, namely, the elimination of favoratism and nepotism and corruption: not that we suggest that that occurred here, but to permit what has occurred in this case would leave the door wide open to the very evils which the legislature in its wisdom has endeavored to avoid. All that is part and parcel of the policy of the legislature. None of it can be ignored. We would therefore in the ordinary course have given the appellant the writ he seeks.

246. So far as the action of the state to reject the highest bid and give the benefit of the concession to someone else is concerned, in Nand Kishore Sarah v. State of Rajasthan, the court has held that the benefit of the concession was given to a cooperative society formed by the weaker sections of the society thereby serving the public purpose as set out in Article 41 of the directive principles of state policy. For this reason the grant of the concession was held to be justifying.

247. Pressing the issue of judicial interference in administrative action and its scope, in Fertilizer Corporation Kamgar Union (Registered) Sindri v. Union of India, Krishna Iyer, J speaking for himself and Bhagwati, J observed thus : (at page 353)

we certainly agree that judicial interference with the administration cannot be meticulous in a montesquien system of separation of powers. The court cannot usurp or abdicate and the parameters of judicial review must be clearly defined and never exceeded. If the directorate of a Government company has acted fairly, even if it has faltered in its wisdom, the court cannot, as a super auditor take he board of directors to task. This function is limited to testing whether the administrative action has been fair and free from the taint of unreasonableness and has substantially complied with the norms of procedure set for it by rules of public administration.

In a concurring opinion Chandrachud, CJ observed that sales of public property, when the intention is to get the best price, ought to take place publically.

248. Again in Chenchu Rani Reddy and Anr. v. Government of Andhra Pradesh and Anr., the court was considering a challenge to the permission of the government of the sale of land belonging to a charitable endowment by private negotiations instead of public auction. In this case the action of the government was deprecated. The court observed thus:

6. We cannot conclude without observing that property of such institutions or endowments must be jealously protected. It must be protected, for, a large segment of the community has been beneficial interest in it (that is the raison d'etre of the Act itself). The authorities exercising the powers under the Act must not only be most alert and vigilant in such matters but also show awareness of the ways of the present day world as also the ugly realities of the world of today. They cannot afford to take things at their face value or make a less than the closest and best attention approach to guard against all pitfalls. The approving authority must be aware that in such matters the trustees, or persons authorized to sell by private negotiations, can, in a given case, enter into a secret or invisible underhand deal or understanding with the purchasers at the cost of the concerned institution. Those who are willing to purchase by private negotiations can also bid at a public auction. Why would they feel shy or be deterred from bidding at a public auction? Why then permit sale by private negotiations which will not be visible to the public eye and may even give rise to public suspicion unless there are special reasons to justify doing so? And care must be taken to fix a reserve price after ascertaining the market value for the sake of safeguarding the interest of the endowment. With these words of caution we close the matter.

249. In Haji T.M. S. Rawther v. Kerela Financial Corporation, the court rejected the challenge to a sale of the property of a debtor by the financial corporation. The court noticed the principle laid down in the various judicial pronouncements and reiterated the principles already laid down. It was noticed that the Apex Court has been insisting upon the rule that not only to get the highest price for property but also to ensure fairness in the activities of the state and public authorities, that the public property owned by the state or instrumentalities of the state should be generally sold by public auction or by inviting tenders. The authority should undoubtedly act fairly and their action should be legitimate, their dealings should be above board. Their transactions should be without aversion or affection and nothing should be suggestive of discrimination. Nothing should be done by them which gives the impression of bias, favoritism or nepotism. These factors would ordinarily be absent if the matter is brought to public auction or sale by tenders and for this reason it has been repeatedly reiterated that the state owned properties are required to be disposed of publically. However, the court also observed that "though it is the ordinary rule it is not an invariable rule". There may be situations necessitating departure from the rule, but then such instances must be justified by compulsions and not by compromise. It must be justified by compelling reasons and not by just convenience.

250. These principles were reiterated by the Apex Court in Food Corporation of India v. Kamdhenu Cattle Food Industries.

In this case,the court was concerned with a challenge to the action of the petitioners who had invited tenders for sale of damaged food grains. The tenders received were highly deficient and inadequate. The respondents tender was conditional and the full amount of the earnest money required by the terms was also not deposited. The respondents bid was admittedly the highest as was found on opening the tenders but the appellant was not

satisfied about the adequacy of the amount offered in the highest tender for purchase of the stocks. Therefore, instead of accepting any of the tender submitted, it invited all the tenderers to participate in negotiations which were held on 9th June, 1998. The respondent refused to revise the rates offered in its tender which was Rs. 245/- per quintal for sending lots of the stock. The highest offer received by the appellant during the course of negotiation was Rs. 275.72 per quintal. In these circumstances, the appellant decided to award the contract to the person who had made the highest offer in the negotiations to which even the respondent had been invited.

This action was impugned by the respondent byway of a writ petition before the High Court contending that the action of the appellant in rejecting the highest tender was arbitrary and not subsistence, therefore violative of Article 14 of the Constitution. Inasmuch as the words of the Apex Court are extremely instructive, it becomes necessary to notice them in extenso:

7. In contractual sphere as in all other State actions, the State and all its instrumentalities have to conform to Article 14 of the Constitution of which non-arbitrariness is a significant facet. There is no unfettered discretion in public law: A public authority possesses powers only to use them for public good. This imposes the duty to act fairly and to adopt a procedure which is 'fairplay in action'. Due observance of this obligation as a part of good administration raises a reasonable or legitimate expectation in every citizen to be treated fairly in his interaction with the State and its instrumentalities, with this element forming a necessary component of the decision-making process in all State actions. To satisfy this requirement of non-arbitrariness in a State action, it is, therefore, necessary to consider and give due weight to the reasonable or legitimate expectations of the persons likely to be affected by the decision or else that unfairness in the exercise of the power may amount to an abuse or excess of power apart from affecting the bona fides of the decision in a given case. The decision so made would be exposed to challenge on the ground of arbitrariness. Rule of law does not completely eliminate discretion in the exercise of power, as it is unrealistic, but provides for control of its exercise by judicial review.

8. The mere reasonable or legitimate expectation of a citizen, in such a situation, may not by itself be a distinct enforceable right, but failure to consider and give due weight to it may render the decision arbitrary, and this is how the requirement of due consideration of a legitimate expectation forms part of the principle of non-arbitrariness, a necessary concomitant of the rule of law. Every legitimate expectation is a relevant factor requiring due consideration in a fair decision-making process. Whether the expectation of the claimant is reasonable or legitimate in the context is a question of fact in each case. Whenever the question arises, it is to be determined not according to the claimant's perception but in larger public interest wherein other more important considerations may outweigh what would otherwise have been the legitimate expectation of the claimant. A bona fide decision of the public authority reached in this manner would satisfy the requirement of non-arbitrariness and withstand judicial scrutiny. The doctrine of legitimate expectation gets assimilated in the rule of law and operates in our legal system in this manner and to this extent.

xxx xxx xxx

10. From the above, it is clear that even though the highest tenderer can claim no right to have his tender accepted, there being a power while inviting tenders to reject all the tenders, yet the power to reject all the tenders cannot be exercised arbitrarily and must depend for its validity on the existence of cogent reasons for such action. The object of inviting tenders for disposal of a commodity is to procure the highest price while giving equal opportunity to all the intending bidders to compete. Procuring the highest price for the commodity is undoubtedly in public interest since the amount so collected goes to the public fund. Accordingly, inadequacy of the price offered in the highest tender would be a cogent ground for negotiating with the tenderers giving them equal opportunity to revise their bids with a view to obtain the highest available price. The inadequacy may be for several reasons known in the commercial field. Inadequacy of the price quoted in the highest tender would be a question of fact in each case. Retaining the option to accept the highest tender, in case the negotiations do not yield a significantly higher offer would be fair to the tenderers besides protecting the public interest. A procedure wherein resort is had to negotiations with the tenderers for

obtaining a significantly higher bid during the period when the offers in the tenders remain open for acceptance and rejection of the tenders only in the event of a significant higher bid being obtained during negotiations would ordinarily satisfy this requirement. This procedure involves giving due weight to the legitimate expectation of the highest bidder to have his tender accepted unless outbid by a higher offer, in which case acceptance of the highest offer within the time the offers remain open would be a reasonable exercise of power for public good.

After so observing, the court held that the respondents highest tender was superceded only by a significantly higher bid made during negotiation with all tenderers giving them equal opportunity to compete by revising their bids. The fact that it was a significantly higher bid obtained by adopting this course is sufficient in the facts of the present case to demonstrate that the action of the appellant was requirement of non-arbitrariness and it was taken for the cogent reason of inadequacy of the price offered in the highest tender, which reason was evident to all tenderers invited to participate in the negotiation and to revise their bids.

In these circumstances, the action of the appellant was proved by the Apex Court.

251. In Sterling Computers Limited v. M.N. Publications Limited and Ors., the court once again emphasised the restriction on the court while exercising the power of judicial review in respect of contracts entered into on behalf of the state. The Apex Court reiterated that in judicial review the court was concerned primarily as to whether there had been any infirmity in the jurisdiction making process. By way of judicial review, the court cannot examine the details of the terms of the contract which had been entered into by the public bodies or the state. The court had inherent limits on the scope of such enquiry. The court held that the scope of enquiry could relate to examination as to whether "decision making process" was reasonable, rational not arbitrary and violative of Article 14 of the Constitution. If the contract had been entered into without ignoring the basic procedure which can be said to be basic in industry and after an objective consideration of different options available, taking into account the interest of the state and the public, then the court cannot act as a appellate authority by substituting its opinion in respect of selection made for entering into such a contract. But, once the procedure adopted by an authority for the purpose of entering into the contract is held to be against the mandate of Article 14 of the Constitution, the court cannot ignore such action saying that the authorities concerned must be such latitude or liberty in contractual matters and non-interference by the court amounts to encouragement on the exclusive right of the executive to take such decision.

In this case, the MTNL had awarded a contract to the contractors to print directories who had the right to collect the revenue from the advertisement in the directory. The contractor was to print the directories and supply the same from all cost to the MTNL for its subscribers and had to pay royalty to the MTNL in connection with the printing of such directories. Tenders for publication of the directories were invited and the contract was granted for publication of directories for five years (1987 - 1991). the royalty to be paid by the contractor to the MTNL was fixed at Rs. 20.16 crores. The contractor miserably failed to publish the directories. The board of MTNL considered the default made by the contractor in publishing the directories, took the note of the fact that the contractor (difficulties relating to finances) into financial and cash flow. The banks who had advanced the loans to them had not yet receive back the payments. Paper mills were not willing to supply paper on credit. The printing presses were also not prepared to print the directories without getting advance payments. In these circumstances, the board of directors considered the three options as follows:

The Board considered the three options (i) to invoke the penalty clause and print the Directory by the MTNL at the risk and cost of the contractor, (ii) to provide the necessary loan secured or unsecured to print the directories, (iii) to terminate the contract and award the work to some other contractor. However considering the fact that if the contract was terminated and a decision was taken to go in for a fresh tender the following problems may arise (i) contractor may put legal obstacles in retendering, (ii) the response for printing and delivering the directories free of cost and also paying royalty may be poor from the parties, considering the failure of the present experiment and prohibitive increase in the cost of paper and printing,(iii) the concept of

the yellow pages may suffer a big set back and may make it unattractive to the advertisers because of the loss of confidence the Board entered into a supplemental agreement with the contractor. Under the supplemental agreement the original contract was extended and work of publishing directories for 5 more years was given to the contractor. The additional royalty to be paid by the contractor was only Rs. 10 crores.

In these facts, the court held that the supplement agreement was really a fresh agreement with fresh terms and conditions which has been entered to benefit the parties who are admittedly defaulters. The MTNL has applied the "irrelevant considerations" doctrtine while granting a fresh contract for a period of five years through the supplemntal agreement because it has failed to observe the rule of inviting tenders while granting the contract for a further period of five years on fresh terms and conditions and has for executing supplemental agreement taken into account irrelevant considerations. The "decision making process" before the supplemental agreement was entered into canot be said to be consistent with the requirement of Art. 14 of the Constitution. In such a situation there is no scope for argument that any interference by Court shall amount to an intervention like a Court of appeal. Once the process, through which the supplemental agreement was executed, is held to be against the mandate of Art. 14 of the Constitution, the supplemental agreement shall be deemed to be void. It would be useful to notice the observations of the Apex Court in para 29 of the judgment which went into the consideration of the constitutional validity of the action of the MTNL which reads thus:

29. Philanthropy is no part of the management of an undertaking, while dealing with contractor entrusted with the execution of a contract. The supply of the directories to public in time, was a public service which was being affected by the liberal attitude of the MTNL and due to the condensation of delay on the part of he MTNL to become benevolent by entering into the supplemental agreement with no apparent benefit to the MTNL, without inviting fresh tenders from intending persons to perform the same job for the next five yars. Public authorities are essentially different from those of private persons. Even while taking decision in respect of commercial transactions a public authority mut be guided by relevant considerations and not by irrelevant ones. If such decision is influenced by extraneous considerations which it ought not to have taken into account the ultimate decision is bound to be vitiated, even if it is established that such decision had been taken without bias. The contract awarded for the publication of the directories had not only a commercial object but had a public element at the same time, i.e. to supply the directories to lacs of subscribers of telephones in Delhi and Bombay, every year within the stipulated time free of cost. In such a situation MTNL could not exdrcise an unfettered discretion after the repeated breaches committed by UIP/UDI, by entering into a supplemental agreement with the Sterling for a fresh period of more than five years on terms which were only beneficial to UIP/UDI/Sterling with corresponding no benefit to MTNL, which they have realised only after the High Court went into the matter in detail in its judgment under appeal.

252. Therefore, from a close reading of the foregoing judgments it is well settled that open competitive bidding has been mandated in compliance of the requirement to ensure non-arbitrariness, fairness, reasonableness and transparency in procedure of award of contracts.

However, this ordinary rule is not an invariable rule. It is permissible to depart there from only for compelling reasons, considerations of public interest and in furtherance of the directive principles as enshrined in the Constitution.

253. In the instant case, there is no dispute that the CTCs are property of the MCD. In their allotment, therefore, the MCD is concerned with a decision to allot public property. It therefore, is necessary to examine the manner in which public property can be disposed of or dealt with.

254. So far as the disposal of public property is concerned, there are several enactments which confer the power on authorities to dispose of property which is taken over from its debtors. The principles laid down by the Apex Court upon the manner in which the financial corporation will exercise jurisdiction to dispose of the property, would throw some light on the issues raised before this Court. The Apex Court had occasion to consider the manner in which the Corporation ought to act under Section 29 of the State Financial Corporation

Act.

255. The Apex Court in its pronouncement reported at Karnataka State Industrial Investment and Development Corporation Limited v. Cavetel India Limited inter alia held thus:

19. From the aforesaid, the legal principles that emerge are:

i)The High Court while exercising its jurisdiction under Article 226 of the Constitution dos not sit as an appellate authority over the acts and deeds of the Financial Corporation and seek to correct them. The doctrine of fairness does not convert the writ courts into appellate authorities over administrative authorities.

ii)In a matter between the Corporation and its debtor, a writ court has no say except in two situations:

(a) there is a statutory violation on the part of the Corporation, or

(b) Where the Corporation acts unfairly i.e. unreasonably.

iii)In commercial matters, the courts should not risk their judgments for the judgments of the bodies to which that task is assigned.

iv)Unless the action of the Financial Corporation is mala fide, even a wrong decision taken by it is not open to challenge. It is not for the courts or a third party to substitute its decision, however, more prudent, commercial or businesslike it may be, for the decision of the Financial Corporation. Hence, whatever the wisdom (or the lack of it) of the conduct of the Corporation , the same cannot be assailed for making the Corporation liable.

v)In the matter of sale of public property, the dominant consideration is to secure the best price for the property to be sold and this could be achieved only when there is maximum public participation in the process of sale and everybody has an opportunity of making an offer.

vi)Public auction is not the only mode to secure the best price by inviting maximum public participation, tender and negotiation could also be adopted.

vii)The Financial Corporation is always expected to try and realise the maximum sale price by selling the assets by following a procedure which is transparent and acceptable, after due publicity, wherever possible and if any reason is indicated or cause shown for the default, the same has to be considered in its proper perspective and a conscious decision has to be taken as to whether action under Section 29 of the Act is called for. Thereafter, the modalities for disposal of the seized unit have to be worked out.

viii)Fairness cannot be a one-way street. The fairness required of the Financial Corporations cannot be carried to the extent of disabling them form recovering what is due to them. While not insisting upon the borrower to honour the commitments undertaken by him, the Financial Corporation alone cannot be shackled hand and foot in the name of fairness.

Reasonableness is to be tested against the dominant consideration to secure the best price.

256. The following observations of the Apex Court in Jasper I. Slong v. State of Meghalaya and Ors. are topical and also instructive:

19. It goes without saying that the Government while entertaining into contracts is expected not to act like a private individual but should act in conformity with certain healthy standards and norms. Such actions should not be arbitrary, irrational or irrelevant. The awarding of contracts by inviting tenders is considered to be one of the fair methods. If there are any reservations or restrictions then they should not be arbitrary and must be

justifiable on the basis of some policy or valid principles which by themselves should be reasonable and not discriminatory. (See para 7 of Hindustan Development case.). The said judgment also states that any act which excluded competition from any part of the trade or commerce by forming cartels should not be permitted.

257. Mr. Valmiki Mehta, learned senior counsel appearing for MCD has forcefully argued that this Court in exercise of its jurisdiction under Article 226 of the Constitution of India can examine the challenge to MCD's action only from the angle of scrutinising as whether the decision was based on relevant material or whether it irrelevant considerations had gone into the same. There can be no dispute that so long as there is some material in existence before the authority which took the decision in its support, then the same cannot be assailed.

This Court has been called upon to examine a decision to allot all CTCs to a single organisation without taking recourse to the open competitive bidding process. At the same time, the decision to rescind all contracts with the CTCs is under challenge.

The MCD has taken an absolute position to the effect that all the NGOs are defaulters and incapable and only Sulabh is capable of providing the service.

For these reasons, it has become necessary to examine the factual matrix and the material on record in some detail.

258. The Municipal Corporation of Delhi before this Court has failed to inform the petitioners of their deficiencies. No notice or show cause notice has been issued to them. No intimation of their default in respect of payment of the license fee has been intimated. Even at the time, the matter went to hearing, the Municipal Corporation of Delhi was not in a position to state as to which petitioner was defaulting in which CTC or the exact amount which was due and payable. The petitioners had no intimation of the action which was being contemplated agaisnt them. They were not given any opportunity or information with regard to the proposal of the MCD to hand over the CTCs to Sulabh. No petitioner was put to notice of the terms and basis on which the allotment was contemplated to Sulabh nor was any offer sought from them on this basis. The MCD has not paid any attention as to the functioning and conduct of those NGOs who were not defaulters. It has not been urged that the action of the MCD was motivated by any of the directive principle or any of the provisions of the Constitution in varying the normal rule of the allocation of the CTCs by public auction or tender which procedure was adopted on the earlier occasion after a detailed situation of the functioning of the CTCs. Apart from a bald assertion that the action of the MCD was reasonable and fair inasmuch as it was based on past experience and the reputation of Sulabh, no other justification for the deviation from the general rule and a tenable reason for procedure adopted has been placed before this Court.

259. MCD has sought to strongly defend its action and has urged that the writ petitions are mala fide. It has been submitted that the CTCs has been recently constructed and there could have been practical/teething difficulties in not more than which 'each of the complexes'. It is further urged that the 'defects, if any were of such a nature that they would have rendered functioning of the CTC impossible'. MCD admits that the 'petitioner took over the possession after writing 'taken over subject to rectification of deficiency' on the handing over taking over of possession notes.' It also accepts that there was, 'fair recording of minutes' in the various meetings.

260. However, writ large in the face of these submissions is the fact that even at the time when the matter was being argued, MCD could not pin point as to which were the CTCs which were non-functional on the date possession thereof was handed over to the NGOs or when it was decided to cancel the contracts. It cannot be disputed that the MCD had sent special staff to execute of the Yamuna Action Plan and also had a huge infrastructure of engineering staff. MCD had also appointed field monitors in respect of specific community toilet complexes. Yet even at the time when the writ petition was in the final stages of hearing, it has no

material in its power and possession in support of its case. Perusal of the report of the Sub-Committee appointed by the standing committee shows that it has really endorsed the proposal of the Commissioner as contained in the letter dated 19th July, 2004 without any further material placed before it.

261. The principal stand on behalf of the respondent-MCD is that the Standing Committee; the statutory sub-committee and the Full House of the Municipal Corporation of Delhi are statutory authorities and their decision is not open to judicial review by this Court. It is vehemently urged that the sub-committee approved handing over of only the non-functional CTCs and the executive wing enlarged the scope of the decision to 1963 CTCs.

However, as noticed hereinabove, this is not so.

262. On 3rd January, 2004, without any material on record and without the MCD taking any of the series of steps required to be taken as per meetings held in 2003, the Commissioner of the MCD decided to hand over the non-functional CTCs to Sulabh. Sulabh demanded all the CTCs under the YAP. On 30th April, 2004, the MCD decided to hand additional CTCs to it on as is where is basis. On 21st June, 2004, a decision was taken to conduct a joint inspection from 1st July, 2004 to 31st July, 2004 and that MCD would bear the cost of repairs to be conducted by Sulabh.

263. From the above discussion, it is evident that therefore, the reason for cancellation of the contracts of the petitioners and handing over of the 1963 CTCs to Sulabh is not based on any consideration of defaults on the part of the petitioners or of efficacy or reputation of Sulabh or on the basis of default of the operating agencies or past experience of the MCD, but on the pure dictate of Sulabh that taking over only 349 non-functional CTCs on as is where is basis was not viable.

264. While considering the decisions being taken, it is necessary to bear in mind that the construction of the CTCs under the Yamuna Action plan was undertaken as late as in 2002 only under the explicit, close supervision and monitoring by the MCD. Yet even in 2004, the MCD is considering major defects and structural defects as well as rectification.

265. As per the figures brought on record, MCD incurred a total cost of construction of 959 CTCs of approximately Rs. 145 crores. Against these, after a period of not even of two years, upon the joint inspection conducted by the MCD and Sulabh, an estimate has been arrived at for effecting repair and maintenance of the 325 complexes is to the tune of between Rs. 45 to 60 crores. It must be noted that this amount is not to be spent by Sulabh but to be paid by MCD to Sulabh as per the decision noticed hereinabove.

This huge amount of money is to be expended out of public funds on effecting repairs and rectifications including "structural defects" in CTCs which are not even two years old and some of which have not been even admittedly operated.

266. It is also necessary to note that the provision of sanitation and the toilet facilities has been urged to be an obligatory duty of the Municipal Corporation of Delhi. Therefore, on the showing of the respondents themselves, by this decision, the MCD has completely abdicated its obligatory duty to Sulabh.

267. The Standing Committee had suggested that the CTCs be made operated on free of charge basis. Three hundred and fifty seven CTCs were being operated and maintained by the MCD on free of charge basis which were purely in public interest. There is no complaint in respect of these CTCs from either the public or from the MCD. None of the authorities involved in the decision making either the Commissioner or the Standing committee or the Full house of the Corporation even considered this aspect of the matter let alone dwelt on it at any length.

268. Before this Court, the principal plea urged in support of the decision taken is the fact that the earlier mode of allotment envisaged a dual responsibility. The second principle ground which has been urged more forcibly is that all the other NGOs were fly by night operators who were all defaulters. The default in their functioning and lack of financial discipline is stated to be one of the principle reason that MCD took the decision to hand over all the CTCs to Sulabh. It has been vehemently and repeatedly urged that because of their default, public interest was suffering and the purpose for having constructed these CTCs was not being achieved.

Such an argument can only be supported by material which was placed before the decision making authority. Even though, the MCD was aware of the challenge having been made and the action taken by it, still no material was placed before the authorities to support this reason which has been urged before this Court.

269. The Sub-Committee also did not even bother to take the assistance of the services of any expert agency or appoint any monitoring agency to ascertain the ground realities and the factual position. Even the report of the field monitors which ought to have been in the power and possession of the MCD does not appear to have been taken into consideration. The Sub-Committee, unlike the previous Sub-Committee, did not inspect any of the CTCs prior to submission of its report.

270. Along with the letter dated 19th July, 2004, of the Commissioner of the MCD, even a draft memorandum of understanding was forwarded. Therefore, the entire exercise of appointment of the sub-committee and to obtain some type of a report appears to have been undertaken only with the intention of creating a semblance of application of mind and due regard to the relevant facts on the part of the MCD. This was clearly a crude exercise consciously undertaken with knowledge that this Court was in seisin of the matter and show cause notice had been issued.

271. The MCD maintained a huge staff under what was known as the sanitation wing. For the purposes of discharge of its duty in operating and maintaining the CTCs which were under its control. Undoubtedly, the MCD would be maintaining a huge paraphernalia of engineering staff as well as workers including sweepers, cleaners etc. Such employees of the MCD deployed at the CTCs would be rendered without a posting and assignment once Sulabh had taken over the running the CTCs. This work force would be rendered redundant and the MCD would be compelled to bear the expense of salary of such work force without any work being performed by them.

272. Thus the decision changed at the stage of the consideration of the Commissioner as on 3rd January, 2004 and 30th April, 2004. No Sub-Committee examined the proposed change in the model agreement suggested by the previous sub-committee. No financial parameters or quantification of expenses or examination thereof by any financial and technical experts was undertaken. The Memorandum of Understanding was also drafted without any examination of the earlier agreement and put forth with the letter dated 19th July, 2004. This was approved without consideration of any of the financial and revenue implications. Without assessing the liability in undertaking repairs, the MCD has taken on such tremendous responsibility.

273. It has been further vehemently contended that the decision to hand over all the CTCs to a single agency is a new policy decision of the MCD which involves no dual responsibility and no expenditure of the MCD. According to Mr. Valmiki Mehta, learned senior counsel for the MCD, it has only total administration control with a no fault termination clause.

274. Unfortunately, this submission is based on a pure mis-conception as to what would amount to a 'policy decision'. As discussed above, the policy decision involved engagement of private agencies for the operation and maintenance of CTCs as against their operation and maintenance by the Municipal Corporation of Delhi. The considered decision which was taken was that the allocation of the CTCs must be by a competitive biding process resulting in invitation of tenders after vide publicity in the newspapers.

However, decision was taken at the instance of the Commissioner of the MCD initially to hand over non-functional CTCs to Sulabh which was expanded at the instance of Sulabh to handing over of the CTCs under the Yamuna Action Plan. It is noteworthy that even Sulabh merely demanded handing over of only the 959 CTCs under the Yamuna Action Plan which was extended by the MCD to 1963 CTCs. These included CTCs in respect of which there was no complaint and which were running smoothly without any default. These also included such CTCs which were being run by the MCD itself without any default. Such decision cannot be termed as a `policy decision' which cannot be examined by the court in exercise of its powers of judicial review.

275. It also emerges from the aforenoticed facts and circumstances that MCD has all along accepted that large number of the CTCs were non-functional; that they were non-functional because of basic structural defects; that the civil contractors who constructed the CTCs were responsible in a big way for the faults in the CTCs; that this position was admitted by the MCD even in the background note sent by it to the central government giving an explanation as to why CTCs were not functioning; this fact was also accepted in the various joint meetings as well as the various communications thereto and therefore in the reply sent by MCD to the queries raised by Mr. Vijender Kumar Gupta in his letter of 28th July, 2004. This position was also accepted by the Commissioner of the MCD when he recorded the note on 3rd January, 2004. It is in court for the first time that all the NGOs to whom the CTCs were allotted have been labled as defaulters and fly by night operators.

276. It would be useful to also examine the license fee payment position of some of the petitioners. The petitioners have placed a tabulation before this Court in the course of hearing on 2nd February, 2005 with regard to the license fee which has been paid by them. M/s Himalayan Institute of Pollution Control & Social and Economic Development, petitioner in W.P.(C). 11865/2004, has submitted that it was allotted a total of 19 CTCs. Out of these, 103 were under the Slum & JJ Department while nine were under the Yamuna Action Plan. The petitioners contends that nine of the CTCs were non-functional when the allocation was made. The petitioner has contended that it has rendered eight of the CTCs functional by spending Rs. 3 lakhs approximately and as on 22nd January, 2005, 18 of the CTCs are functional, only 1 CTC was non-functional due to non user and it being situated in a field in a village. This petitioner contends that approximately 16 lakhs would be the total license fee payable in respect of the CTCs allocated to it. The petitioner has admittedly paid Rs. 11 lakhs and is entitled to adjustment of the expenditure incurred in making the CTCs functional. It has invoked arbitration proceedings in respect of 2 of the CTCs. It has therefore been urged that there are no dues against the CTCs which have been allocated to it.

M/s Dalit Manav Uthan Sansthan, petitioner in W.P.(C) No. 11857/2004 has submitted that it was allocated 18 CTCs all under the Yamuna Action Plan. All the 18 CTCs were non-functional when the allocation was made. The petitioner contends that it has expended approximately Rs. 9,71,161/- and had thereby made 12 of the CTCs functional. However on 27th January, 2005, only 11 CTCs were non-functional while 7 were not. Some of the reasons which have been set out include the admitted position that the site of the Rajiv Gandhi Smiriti Van became non-functional from 17th August, 2000 due to non-availability of electricity, choking of sewer lines and failure of the tubewell bore. The CTC at the Zoo site was not available. Five CTCs were non-functional due to non-functioning of the sewer line, electric short-circuiting and failure of the tubewell bore. According to this petitioner, the total license fee payable in respect of the functional CTCs would be Rs. 19,99,192/- The petitioner has actually paid a sum of Rs. 13,27,452/- It is entitled to the expenditure which it has incurred on the non-functional CTCs which are to the tune of Rs. 9,71,161/- According to the petitioner, as on 27th January, 2005, it has a credit balanace of Rs. 2,99,461/- with the MCD.

Akhil Bhartiya Manav Seva Sansthan, has filed W.P.(C) No. 12142/2004. It was allocated twenty CTCs. All twenty were non-functional at the time of allocation. The petitioner has spent approximately Rs. 6,42,800/- in making 14 of the CTCs functional. As on 27th January, 2005, only 13 of the CTCs were functional. It has given the reason for the 7 CTCs being non-functional. Three of the CTCs were non-functional due to failure of the boring in the tubewell; one CTC stood encroached by the villagers; in one CTC the sever line was completely choked apart from other reasons and in two CTCs no electricity has been provided out of which

one was not even handed over. This petitioner has claimed that it has made payment of license fee to the MCD to the tune of approximately Rs. 7 lakhs and after adjustments of the expenditure incurred by it in making the CTCs functional, the MCD has a credit balance of Rs. 42,800/- in favor of this petitioner.

277. This information was furnished in court after service of a copy thereof to the other side. The MCD has not placed before this Court any information or record as to what has been received by it from the various allottees.

278. The other petitioners have also placed such facts before the court. The several joint meetings held in 2003 and heretofore noticed several issues relating to postponement of the dates from which payments were to commence. Certain issues relating to reduction in the amounts which were to be payable towards electricity etc were also pending decision by the competent authority. More importantly, not a single notice under Clause 15.5 to any NGO had been issued.

279. If the facts stated by the petitioners on record are correct, then it certainly cannot be contended that the petitioners were 'fly by night' operators as they have been labled by the respondents or that the experience of the MCD with the petitioners was such as to render them unfit to operate or maintain the CTCs. The MCD has not placed a single complaint from any user on record. There is not even a single complaint by its field monitors or the executive engineers or the other engineers of the MCD against any of these petitioners on court record. There is not a single letter communicated to these petitioners that they are defaulters in making payment of the license fee disentitling them to operate or maintain the CTC. There was no material to such effect before the Commissioner of the MCD when the decision was taken on 3rd June, 2004 or when the communication dated 19th July, 2004 was addressed by him or before the standing committee. Even the sub committee appointed by the MCD on 22nd July, 2004, did not have any such material before it. There was even no material to any such effect even before the Full House of the MCD when it considered the matter on 25th October, 2004.

On the contrary the admitted position is that as late in 2004, the accounts of the MCD for the years 2002, 2003 were not ready.

280. So far as complaints made by some of the petitioners to the MCD regarding the non-functional CTCs are concerned, the petitioners M/s Himalayan Institute of Pollution Control & Social and Economic Development has placed before this Court its letters dated 31st July, 2002, dated 6th August, 2002, dated 9th October, 2002, 18th December, 2002, 10th December, 2002, 20th December, 2002, December 2000 and even as late as on 3rd April, 2003. This letter records that the petitioners have knocked at every door in the MCD for completion of the project which included both civil and electrical components and handing over the complex for operation for the use of public. No steps have been taken even though the petitioner had deposited the security amount and the license fee in advance as required. The communications of MCD placed on record show general letters making vague assertions without dealing with the specific deficiencies pointed out by the petitioner.

281. M/s Dalit Manav Seva Sansthan, petitioner in W.P.(C) No. 11875/2004 also similarly addressed letters to the MCD dated 17th July, 2002, 30th July, 2002, 6th January, 2004 which have been placed before this Court.

Similarly, M/s Akhil Bhartiya Manav Seva Sansthan, petitioner in W.P.(C) No. 12142/2004 had made repeated complaints to the MCD inter alia dated 7th July, 2002, 26th July, 2002, 13th May, 2003 and 20th May, 2004 which have been annexed by the writ petition. The communications of the MCD, again, are general circulars, which do not address the specific complaints of the petitioners.

282. In the written submissions filed by MCD, it has been pointed out that it has filed three affidavits, two written submissions, one status report, three charts showing what according to it are the license fee dues. It is noteworthy that none of these affidavits show any details or quantification of either amounts paid by the petitioner in terms of the dates on which they were due or the dates on which they were paid. There is no

assessment or quantification with regard to the expenditure incurred on construction of CTCs other than the 959 CTCs or the cost being incurred by the MCD thereon. No material has been placed before this Court with regard to the revenue which was being generated from many of the CTCs. There is no figure placed before this Court by the MCD of the total amount received as security from the various NGOs to whom the 959 CTCs of the Yamuna Action Plan were allocated. The MCD admits receipt of some amounts running into lakhs of rupees from the other CTCs. However, no decision in terms of the proposals made in the meetings placed on record herein have been placed before this Court. No official from the MCD has bothered to verify or rectify the defects which were being pointed out by the NGOs which were admittedly in existence for a long period of almost two years since the same were allocated to the NGOs. Even the note dated 3rd January, 2004 of the Commissioner of the MCD, whereby it was decided to hand over non-functioning CTCs to Sulabh records that they suffer from several defects.

283. It is noteworthy that the MCD in the writ petitions has placed reliance on the survey which it has conducted with Sulabh International in July, 2004 to contend that the CTCs were functional and that the petitioners were earning revenue from the CTCs. Such a submission completely ignores the principle contention of the petitioners that they have spent moneys on the non-functional CTCs and have rendered them functional. The reliance of the MCD on the survey conducted in July, 2004 with Sulabh supports the contentions of the petitioners that the large number of the CTCs were non-functional and suffering from structural defects. It is an admitted position in the various meetings which have been placed on record by the petitioners wherein the senior officers of the MCD accepted the fact that there were several structural defects and other reasons for the CTCs were not functional. Infact this was even accepted by the Commissioner of the MCD when he recorded the minutes dated 3rd January, 2004 and took the decision to hand over 389 non-functional CTCs to Sulabh International. Perusal of the handing over notes relied upon by the MCD to submit that the CTCs were in working condition in fact shows that in most of these notes, the NGOs have recorded the defects including the fact that power connections and gensets were not provided as yet.

284. So far as the payment of security amount and license fee is concerned, MCD does not dispute that it has received the security deposit from the NGOs/agencies to whom the CTCs were allocated. So far as the payment of license fee is concerned, the MCD does appear to have received some amounts. Some of the petitioners have placed, what according to them stands paid.

Writ petitioner Himalayan Institute of Pollution Control and Social and Economic Development (W.P.(C) No. 11865/2004) has contended that out of the total 19 CTCs allotted to it, nine of which were under the Yamuna Action Plan, all these CTCs were non-functional at the time of allocation. Eight have been made functional by it by spending its own moneys. The total license fee payable according to it in respect of the functional CTCs was 16 lakhs. It claims to have spent an amount of Rs. 3 lakhs in making the CTC functional and claims to have paid an amount of Rs. 11 lakhs approximately towards license fee to the MCD.

285. Dalit Manav Uthan Sansthan, petitioner in W.P.(C) 11857/2004 similarly has contended that all the 18 CTCs allocated to it under the Yamuna Action Plan, were non-functional when allocation was made. This petitioner contends that it had made 12 of the CTCs functional out of its own funds. It contends that total license fee payable by it in respect of the functional CTCs was to the tune of Rs. 19,99,152/- This petitioner has submitted that it has made an expenditure of Rs. 9,71,161/- in making the CTCs functional. According to it, it has paid an amount of Rs. 13,27,452/- to the MCD. It repudiates all liability to bear the expense of rendering the CTCs functional and has claimed that in fact it had a credit balance with the MCD of Rs. 2,99,461/- If the expenditure incurred by it on making the CTCs functional is excluded.

286. Akhil Bhartiya Manav Sewa Sansthan, writ petitioner in W.P.(C) 12142/2004 has contended that out of the 20 CTCs allotted to it, all 20 were non-functional at the time of allocation. By spending an amount of Rs. 6,42,800/-, it has been able to make 14 of the CTCs functional. Total license fee payable in respect of the functional CTCs came to Rs. 13 lakh and it has paid an amount of Rs. 7 lakh to the MCD. Claiming entitlement to adjustment of the expenditure incurred by it in making the CTCs functional, it has claimed that

it is entitled to arrears of Rs. 42,800/- from the MCD.

287. This information was furnished in court after service of a copy thereof to the other side. The MCD has not placed before this Court record as to what has been received by it from the various allottees.

288. During the course of hearing, bald total figures of what is stated to be allegedly due to the MCD in respect of the petitioners have been placed in a tabulation without a reflection as to the date on which the amount became due, the CTCs in respect of which they were due and the dates on which the payments were made.

The petitioners have challenged these figures and have placed their own calculation enclosing receipts issued by MCD in respect of the payments actually made by them.

289. Against this, even in the submissions placed before this Court on 22nd August, 2005, the MCD points out that it has clarified that "there are clerical errors as to the computation (as bills/receipts may not have been received from the concerned department from the engineers at the time of the computation) the same would be corrected on an individual basis as and when pointed out". The MCD has further stated that "Even assuming that there is a margin of error at the time of preparation of the status report, the total arrears due are to the tune of 8.5 crores"' ; "financial computation of arrears for all may have been done from the initial date of handing over of the 18 complexes"' ; "computational errors would be corrected as and when brought to the notice of the corporation"'. The MCD has thus levelled non-specific allegations of generalities and contradictions to the cases of the petitioners completely losing sight of the fact that it is a statutory organization with a huge infrastructure of engineering staff, accounting staff and legal assistance. In todays era of computing, accounting systems reduce complicated figures and accounting to child's play and accessible by the mere pressing of a key on a keyboard. This is more so when payments of a determinate sum of money are to be made periodically, so that dues and payments are merely not to be reflected in three columns, one containing a debit; the other the credit entries and the third column, the balance, without any further application of mind. There is no question of 'computational errors' on the part of a statutory authority. The submissions on behalf of the MCD are preposterous more so when it has taken such pleas to support a contention that relevant material was placed before the Commissioner, the Standing Committee, the Sub-committee and the Full House of the MCD so as to enable them to term and lable all the NGOs as defaulters. These figures thus would relate to the period from around the end of December, 2003 till October, 2004 while it has been filing these tabulations and charts till August, 2005 in court. To say the least, conveyance of information today does not require manual handing over of the same but can be transmitted on computers from the various zones where the engineering staff is located to the accounting section where the same had to be compiled. Therefore, the computation errors of nominal, trivial or of insignificant magnitude would be left based in the realm of conjectures. The position however assumes significance when the tabulations placed by the MCD before this Court were, on its own showing, wholly incorrect and certainly insufficient to enable MCD to label each and every NGO, which had participated in the tendering process and was operating and maintaining the CTCs, as a defaulter. Certainly, it would be most improper to tarnish or paint all the NGOs black merely because some of the NGOs were defaulting in the payment.

290. Undoubtedly, financial discipline was to be maintained. However, bearing in mind the purpose for which the CTCs had been constructed and the agreements entered into, their operation and maintenance assumes even greater importance bearing in mind the larger public interest. It is MCD's case itself that the CTCs were not revenue generating. Then the question as to why the CTCs were not being operated and maintained required to be examined more closely. It was MCD's case in all the meetings held after the possession of the CTCs were handed over to the NGOs, that large number of CTCs were suffering from structural defects. So much so, there were recommendations that the security deposit of the contractors who constructed the CTCs and were not coming forward to rectify the same, be not paid. Further there were admissions that there were several CTCs where the septic tanks were not connected to the toilet; water connections were not available and there was no provision for electricity as noticed above. These facts were confined by the MCD when it

effected the inspection with Sulabh and agreed to play crores to it for effecting the repairs. For this reason, the Commissioner without going into anything more had suggested that non-functioning CTCs be handed over to Sulabh.

291. Perhaps a justification can be found for the fact that the engineers of the MCD did not notify any of the NGOs nor considered non-payment as breach in these very reasons and also as several issues including subsidization towards the charges of electricity; rebate towards the payment of the license fee with effect from the date on which the CTCs were rendered operational were still pending final decision with the competent authority.

292. It is also a fact that so far as the CTCs under the MCD's operation and maintenances are concerned, there was no defect or problem at all. The public had a larger advantage of these CTCs being available for usage, free of any charge. Therefore, all the arguments laid in favor of the handing over of all the CTCs to Sulabh are negated as they are not supported by the factual matrix. There was neither dual control nor default in the payments by the MCD in respect of CTCs run by it. Certainly, MCD's contention that all the NGOs were defaulters and an inexperienced 'fly by night operator' cannot be accepted.

The CTCs have been constructed on government land and property. They have been constructed by expending public money. There can be no manner of dispute that the CTCs are public property constructed in public interest for the use of public at large.

293. At this stage, it becomes necessary to deal with the contention raised by the Municipal Corporation of Delhi which has supported its decision to enter into a 30 year contract with Sulabh contending that this was not the first time that the MCD was so doing. Reliance has been placed on the earlier policy in this behalf. According to the MCD, the earlier CTCs were constructed by the NGOs at the cost of the MCD. In these contracts, the maintenance was with the NGOs on pay per use basis while MCD paid for electricity, water and cleaning of the septic tank. In the written submissions which have been handed over to the court which are dated 22nd August, 2005, the MCD has submitted that it proposed to hand over to Sulabh not only those CTCs constructed under the Yamuna Action Plan which had been constructed by Class I Contractors and handed over to the NGOs but MCD also proposed to hand over CTCs which were 'constructed as early as in 1984'. It has been stated that the only reason why MCD accepted the condition of one time repair before handing over all CTCs to Sulabh was that after taking possession, the NGO tried to escape its obligations by complaining that the CTCs which were handed over to it was non-functional in the first place and thereby defeat the purpose of the entire exercise. The MCD has contended that the survey carried away by it with Sulabh revealed that most of the CTCs were in a functional stage contrary to the allegation of the NGOs maintaining them.

294. In so urging, MCD failed to consider that it has agreed to pay over Rs. 45 crores for effecting repairs of the CTCs. In the various minutes of the meetings which were held between the MCD and NGOs, the Field Monitors and all the stake holders even in the beginning of 2003 and on 9th, 10th, 11th, 15th, 17th and 18th of July, 2003, the MCD has noted defects and the fact that 359 CTCs were non-functional has been admitted even in the decision taken by the Commissioner on 3rd January, 2004 and in the note submitted by the MCD to the Central Government. Yet again, MCD is drawing vague generalizations without reference to any specifics. No such specific facts or figures were placed before any of the decision making authorities at the relevant points of time when the decisions were taken. The submission now made is belied by the exorbitant amount which was agreed to be paid towards the repairs as also the submissions made through out the year 2003 and the admissions that structural defects had to be removed in the CTCs on the part of the MCD officials. The same is also amply borne out from the fact that not a single notice to this effect was addressed by any of the engineers who were in the field and would have been aware of the actual position. On the contrary the minutes noticed that security deposit of the contractors should not be paid for the reason that they were not completing the jobs.

295. Again there is no consideration or explanation whatsoever in the records of the MCD as to why those CTCs under the 30 year contract, in respect of which there was neither any complaint nor could there have been any default of payment for the reason that no license fee was payable, were to be taken over from the persons or organization maning the same and handed over to Sulabh.

More importantly, there is no explanation as to where was the occasion or need for cancelling such agreements in respect of which there was no difficulty, no default and no complaint whatsoever. The MCD has opted not to take into consideration the loss of revenue which would result to it by cancellation of such agreements and in view of the expenditure which was envisaged under the new terms which had been proposed by Sulabh and which were being agreed by it. The only party benefiting out of the new agreements would have been Sulabh.

296. For operating and maintaining these CTCs, Sulabh gets the full expenditure for effecting such repairs as it deems fit and usage charges from the public as well as revenue from the advertisement without having to pay any amount to the MCD for either as security or as license fee or as any part of revenue sharing from the advertisements.

The MCD has taken a decision to allot all the CTCs to Sulabh. It has taken a further decision to cancel the allotment of all the NGOs to whom the CTCs were allotted. Thereby the MCD has excluded all other from consideration.

It has also thereby taken a decision not to take recourse to the method of allotment of the CTCs to Sulabh by open competitive method of bidding.

297. Sulabh has filed an affidavit dated 1st August, 2005 contending that it is the pioneer in the field of provision of community toilet complexes. It has been submitted that the Sulabh movement was founded in the year 1974 by Dr. Bindeshwar Pathak in the state of Bihar for the liberation of scavengers and for provision of better sanitation facilities for the general public. It has been vehemently contended that by adopting the Sulabh model, the state has been able to effectively discharge its fundamental duty of providing dignified and hygienic public conveniences to the public at low cost. Being a public welfare activity and not a commercial profit making venture, this work has been awarded to Sulabh International by all States and State agencies on the basis of its experience and parity to complete the work on the basis of direct negotiation. Sulabh has contended that it was invited by the MCD in the year 1986 to Delhi when it was awarded the work of construction and maintenance of two complexes on the basis of the Patna model. It was in view of the good engineering and operational services rendered by Sulabh that MCD allotted more work on 16th August, 1990 resulting in by the year 1992 a total of 126 CTCs which were constructed and maintained by Sulabh without any complaint.

So far as the complaints against Sulabh are concerned, it has been contended that the complaints relate to Jan Suvidha Complexes which were constructed by MCD or other municipal authorities wherein the work was not properly executed and the same were also not maintained by the MCD which was responsible for the same. Despite request of the Sulabh to MCD, no steps to rectify the matter were taken. Sulabh has disputed the accuracy of the report of the three member committee against it. It has been submitted that there is no complaint against Sulabh in respect of 206 CTCs which it is maintaining and operating for the MCD on a thirty year contract without any license fees.

So far as the credentials of Sulabh are concerned, it has been urged at great length that Sulabh has a reputation not only on a national level but is internationally recognised for the work which it is doing, it has been urged that the works which it is conducting have all been awarded to it without participating in any tender and it is performing various projects only by invitation.

298. On behalf of the Sulabh Organisation, it has been urged that it is even operating and maintaining CTC complexes in court complexes in Delhi and that frivolous, baseless and malicious public interest litigation which were filed against it in different high courts including Patna, Himachal Pradesh stand dismissed. Hence, the allegations of the petitioners against Sulabh as an organisation are without any basis and are wholly unjustified. Sulabh has placed before this Court copies of the decisions rendered by High courts. The allegations which have been levelled by the petitioners with regard to the functioning by Sulabh have been vehemently disputed. It has also been urged that the organisation has no sister concerns and that the entities being projected as sister concerns of Sulabh are not so. It has been urged that Sulabh International has given financial aid to sister concerns of even some of the petitioners including M/s Himalayan Institute of Pollution Control and Social and Economic Development. Merely because Sulabh could have facilitated the functioning of some of the organisations, financially or technically, it is not in any manner responsible to or under the control of Sulabh over the functioning of such an organisation.

299. Based on a letter dated 16th May, 2002 from the Municipal Administration and Water Supply Department, Govt. of Tamil Nadu, it is asserted that a ban was imposed on dealings with Sulabh as they indulged in sub-standard work.

As per the statement of Sulabh a ban imposed by the Government of Tamil Nadu in the year 1991 which ban had not been lifted in May, 2002. There could be no doubt that the allegations of the petitioner related to the Thiruputhur Town Panchayats and from the averments in the writ petition and the documents enclosed.

It is noteworthy that while there is a denial by Sulabh with regard to the allegation of blacklisting, by the Govt. of U.P., however Sulabh does not deny that recovery of Rs. 3.40 crores Along with interest was directed to be effected from Sulabh International. This fact does not support the petitioners so far as their contention with regard to inefficiency in Sulabh's functioning is concerned.

The petitioners have further contended that the Market Federation of Lucknow blacklisted Sulabh and that the revocation order dated 25th July, 1994 relied upon by Sulabh did not relate to the same case which was referred in the newspaper report and that in any case, the order dated 25th July, 1994 does not say that the blacklisting was by mistake.

The Patna City Corporation by its order dated 25th January, 1996 took back all toilet and bath complexes from Sulabh.

In this context, the petitioners have also pointed out that there is no denial by it to the allegation whereby Rs. 3.40 crores Along with interest which was paid to Sulabh was not utilized by it under the scavengers liberation programme and was required to be recovered with interest.

The petitioners has placed material before this Court that the Patna City Corporation by an order dated 25th January, 1996 has actually withdrawn toilets from Sulabh. The petitioners have also placed some other document of the State Government requiring CBI to probe into Sulabh's malfunctioning.

Sulabh has contended that it is still working at the Patna Railway Station and in other parts of the Bihar under orders of the State Government.

It is noteworthy that infact there is no material placed on record after the order dated 5th May, 1999 which reproduces the order dated 28th April, 1999. There is no material to support that there was any variation in the order dated 5th May, 1999.

The petitioners have placed an order passed by the Government of Bihar on 14th March, 1997 directing a CBI enquiry into allegations of irregularities into utilization of Rs. 200 crores by Sulabh. This amount was granted for welfare scheme which has not been explained by Sulabh in any manner. The documents relied upon by the

respondent pertained to the year 1990 whereas the order of the Government of Bihar is dated 14th March, 1997. Furthermore, the PIL which was filed against Sulabh was dismissed on the ground that the petitioners were attempting to settle personal grudges and enmities which is not permissible in public interest litigation. In any case, the PIL has no consequence inasmuch as the Government of Bihar had ordered a CBI inquiry as back as on 14th March, 1997. Sulabh has contended that no CBI enquiry was conducted.

The petitioners have also strongly contended that in Delhi, the MCD itself has held against Sulabh. It is an admitted position by all concerned that the report of the committee dated 16th January, 1999 was accepted by the MCD and a decision was taken on the basis of that report to withdraw the operation and maintenance of the CTCs from Sulabh. In fact, pursuant to this report, 66 CTCs were actually withdrawn from Sulabh and to give to other NGOs by auction or tender.

From the above, certain complaints made against Sulabh are admitted, others stand corroborated and established. This is not to detract from the submission that Sulabh was the pioneer in the field of public toilets and has made a commendable contribution to the area it is addressing. Several publications of the work undertaken by it have been placed before the court. It has made a mark nationally and achieved international recognition for its expertise at the same time.

300. But this matter cannot rest on Sulabh laurels alone. There is another side to this aspect. From the foregoing, it is evidenced that several persons have the experience and the necessary ability to operate and maintain the CTCs. Several persons who were awarded the CTCs are not defaulters. The construction of the CTCs does not involve construction of new CTCs or new buildings or any new technology. The contract involves only running and maintenance of the toilets which have been constructed by the MCD. At the most, certain repairs are necessary or defects which were never provided initially have to be supplied. There was no material before the MCD or placed before the court to the effect that any person, authority or committee made a complaint that the NGOs who were running the CTCs had created a problem. The petitioners and the other NGOs have objected that the MCD has by its decision created an unfair monopoly in maintenance and operation of the CTCs at the instance of Sulabh while exercising hostile discrimination against the petitioners. Therefore, the action of the MCD must fail even at the stage of primary review of its action in the light of the principles laid down by Apex Court in Om Kumar's case (supra).

301. The submissions regarding the ability and virtues of Sulabh's functioning and its reputation diminish in significance in the light of the considerations which must go into decision making of the kind involved in the instant case. In my view such consideration is only one out of the various other factors involved as noticed above. In any case, the MCD has been unable to make out a case that Sulabh was the only NGO who was capable of efficiently operating and maintaining the CTCs. MCD has also been unable to support its decision in making the exception it drew in allotting the CTCs enbloc to Sulabh without inviting competitive bidding and for carving out a one sided agreement, totally loaded in favor of the NGO. It has been unable to support its action in ignoring the revenue with was being generated as also opportunity cost and payment of Rs. 45 crores and more to Sulabh for "repairs".

302. Another contention which has been vehemently urged on behalf of the petitioners that the defaults attributed to the petitioner were in fact contrived defaults for which Sulabh was responsible. According to the petitioners, Sulabh participated in the bidding for the CTCs indirectly through its sister concerns who did not pay license fees to the MCD. The submission is that it is the default of these 27 sister concerns of Sulabh which has been attributed to the petitioners by MCD.

303. The petitioners have pointed out that Sulabh was registered in Patna as Sulabh Sauchalaya Sansthan and its name was changed later as Sulabh International and again to Sulabh International Social Service Organisation by which name it is known even today. Ninety seven NGOs were awarded 339 CTCs under the Yamuna Action Plan. 160 CTCs out of the 339 CTCs allocated to these 27 NGOs, have remained non-functional and up to September, 2004, a sum of more than Rs. 1crore was due from them towards the

license fee. The petitioner has pointed out, out of these 27 NGOs, those at serial numbers 3,4,6 to 8, 10, 11, 13 to 16, 18 to 22 and 24 (annexure P 23 at page 392 and 393 of W.P.(C) 11865/2005) also carry the suffix "Sulabh Sauchalaya Sansthan". The only change in the name is to the extent that the name of a district in Bihar has been also prefixed. For instance, they are known as the Aurangabad District Sulabh Sauchalaya Sansthan; Bhagalpur District Sulabh Sauchalaya Sansthan, Chapra District Sulabh Sauchalaya Sansthan; Darbhanga district Sulabh Sauchalaya Sansthan ; Dhanbad District Sulabh Sauchalaya Sansthan and are to be found at serial Nos. 3,4, 6, 7 and 8 of the list. At serial No. 9 the organistion which is now known as Gautam Budh Paryavaran Umnavan Sansthan was earlier known as Gaya District Sulabh Sauchalaya Sansthan (at page 463 of W.P.(C) 11865/2005).

So far the names of the NGOs at serial Nos. 9, 23, 25 and 26 is concerned, the same also carries the suffix Sulabh Sauchalaya Sansthan and again only the name of a district was prefixed. Later the names of these organisations have been changed.

304. Yet another organisation namely International Institute of Sulabh Systems is mentioned at serial No. 12 of this list which was registered under the Societies Registration Act as a society on 29th August, 1985. At the time of its registration, Dr. Bindeshwar Pathak founder chairman of Sulabh was the chairman of the society and his wife was the vice-chairman of that institute. The copy of the original registration certificate and the memorandum of association of the International Insitute of Sulabh System has been placed before this Court by the petitioner, M/s Himalayan Institute of Pollution Control & Social and Economic Development.

305. The petitioners have submitted that these 27 NGOs are engaged in similar work as Sulabh and there is commonality of interest and finances between them. According to the petitioners, Sulabh in its affidavit dated 21st February, 2005 has admitted that the NGOs are nurtured and aided by it and that financial, infrastructural assistance and necessary training are also given to them by it.

306. The petitioners have placed on record several documents in order to indicate a close relationship the 27 NGOs with Sulabh. Inter alia, these include :

(i) letter dated 7th January, 1993 (page 491 of W.P.(C) 11865/2005) signed by Shri Subodh Kumar Jha, as honorary chairman of Sulabh International, referring to "most of our complexes in the trans-Yamuna area". The letterhead mentions state branches in different states;

(ii) letter dated 4th May, 1993 sent by Ajay Kumar as honorary chairman of Sulabh to the International Institute of Sulabh Systems (one of the 27 NGOs above referred) to deduct some amount payable to a party and to remit the amount to Sulabh International;

(iii) letter dated 19th September, 1994 from the Commissioner, MCD to the Municipal Secretary of the MCD which deals with the construction and subsequent maintenance of the Jan Suvidha Complexes on "pay and use basis" in the JJ Clusters/slum areas in Delhi pursuant to the advertisement in July, 1993. This letter notices that by a resolution dated 10th March, 1994 the works were allocated to 9 agencies including Sulabh International and refers to the meetings with Dr. Pathak, founder of Sulabh International. During these discussions, it transpired that these agencies which had earlier applied to organisations in July, 1993 had at one or the other point of time some association with Sulabh International and Dr. Pathak assured that these agencies will also be able to take the works on smaller scale and on the same rates, terms and conditions as approved by the standing committee. This was reiterated by Dr. Pathak in a meeting with Hon'ble Chief Minister, Delhi on 14th September, 1994.

(iv) It is noteworthy that finally it was decided that work be awarded at 25 locations to Sulabh and simultaneously the case be submitted for award of work on the above lines to the other agencies which included Vaishali District Sulabh Sauchalaya Sansthan; G Sauchalaya Sansthan; Begusarai District Sulabh Sauchalaya Sansthan and all other agencies which had a similar name;

(v) Circular dated 31st March, 1995 signed by Shri Ajay Kumar as honorary chairman of Sulabh International Social Service Organisation from the Founder's office. This circular was addressed inter alia to "All Vice Chairman of NGOs";

(vi) a letter dated 11th October, 1995 was addressed by Shri Subodh Kumar as advisor of the Ranchi District Sulabh Sauchalaya Sansthan. In this letter, Shir Subodh Kumar refers to the fact that this organisation is already engaged in construction and maintenance work from the Slum Wing of the MCD;

(vii) a letter dated 13th February, 1996 was written by Shri Akhilesh Kumar Jha as vice chairman of the Akhil Bhartiya Paryavaran and Gramin Vikas Sansthan to Sulabh enclosing a draft of Rs. 1 lakh to it;

(viii) a letter dated 10th April, 1996 was signed by Shri Subodh Kumar Jha on behalf of the Ranchi District Sulabh Sauchalaya Sansthan to the Addl. Commissioner, MCD of Delhi with regard to construction and subsequent maintenance of the Jan Suvidha complexes on "pay and use basis" in the JJ Cluster and Slum area in the NCT of Delhi.

(ix). Strong reliance has been placed on the minutes of a meeting dated 4th May, 1996 which was held under the chairmanship of Shri Subodh Kumar Jha and Shri Ajay Kumar to review the works relating to the construction of the Jan Suvidha Complexes. The chairman directed that review meetings would be held on 2nd of every month at 11 a.m. Representatives of Madhubani, Chapra, Katihar, Bhojpur, Vaishali and Darbhanga were asked to attend the meeting on every Saturday Along with the meeting of projects at 2.30 p.m. All NGOs were requested to submit their monthly trial balance and progress report before the meeting of the 2nd of Saturday every month to Shri Manoj Kumar Jha for discussion. Action was directed to be taken by all the NGOs in this meeting. Mr. Manoj Kumar Jha was entrusted with the task of inspection of the physical progress of the works in the different districts. The trial balances and schedules were required to be checked up by Mr. M.C. Jha, while representatives of Begu Sarai; ABP Gramin Vikas Sansthan and IISS, Madhopura, Samastipur, Gaya and Sarasa were required to attend the meetings regularly and copies of the minutes were required to be circulated to all NGOs within one week. Amongst those who participated in the meeting and have signed the minutes include Shri Subodh Kumar Jha of the Ranchi District Sulabh Sauchalaya Sansthan, Shri Ajay Kumar from the Siwn District Sulabh Sauchalaya Sansthan. The representatives of 24 of the district Sauchalayas have attended this meeting. It refers to the Bhojpur, Bojpur District, Aurangabad District Sulabh Sauchalaya Sansthan, Palanou, Dhanbad, Khangwan District Sulabh Sauchalaya Sansthan;

(x) By a letter dated 1st August, 1996, issued by the Administrative Executive to the honorary chairman of Sulabh, a meeting of the representatives of 10 districts was called on 7th August, 1996 to review the project implementation. Ten of the NGOs who were invited were those which are included in the 27 NGOs to whom the CTCs were allocated in Delhi.

(xi) A meeting was held on 2nd August, 1996 to review the progress of the works relating to the construction of the Jan Suvidha Complex with the Slum & JJ Department of the MCD. This was held under the chairmanship of the Chairman, DSIB. Amongst the various persons who attended the meeting, Shri Subodh Kumar Jha and Shri Ajay Kumar represented Sulabh International while the other NGOs who were participating in the meetings which were conducted by Sulabh International as noticed above were also present.

307. Apart from the above M/s Himalayan Institute of Pollution Control & Social and Economic Development has placed voluminous documentation before this Court in order to establish that 27 of the NGOs who participated in the auctions conducted by the MCD and successfully bid for allocation of the CTCs have a close relationship and actually are part of Sulabh. The petitioners have vehemently urged that not only do these organisations maintain close financial interaction with Sulabh but they all maintain a bank account in State Bank of Indore at Janakpuri branch, New Delhi. It has been stated that SISSO also maintains a bank account with the same bank as these organisations. In support of the submission of close financial

interaction between Sulabh International and the other NGOs and commonality of intent and functioning, the following correspondence has been placed before the court:

(i) copy of a letter dated 29th May, 1990 on behalf of Executive Chairman, Sulabh to the Akhil Bhartiya Paryavaran Evam Gramin Vikas Sansthan, Ahmedabad(ABPEGVS for brevity);

(ii) copy of a letter dated 22nd September, 1995 from Akhilesh Kumar Jha, Vice Chairman, ABPEGVS to the chairman, Sulabh International enclosing demand draft of Rs. 1 lakh;

(iii) copy of a letter dated 13th February, 1996 from Akhilesh Kumar Jha, Vice Chairman, ABPEGVS to the founder Sulabh International enclosing demand draft of Rs. 1 lakh;

(iv) copy of a letter dated 10th August, 1996 from Akhilesh Kumar Jha, Vice chairman, ABPEGVS to founder Sulabh International with a draft of Rs. 1 lakh;

(v) copy of a letter dated 24th January, 1997 again from Akhilesh Kumar Jha, VC, ABPEGVS to founder Sulabh International with a demand draft of Rs. 1 lkah;

(vi) copy of a letter dated 10th June, 1997 from Akhilesh Kumar Jha, VC, ABPEGVS to founder Sulabh International with a demand draft of Rs. 1 lkah;

(vii) copy of a letter dated 15th April, 1995 from Mr. J.K. Jha, Chairman(M), Sulabh International to the advisor Ranchi District Sulabh Sauchalaya Sansthan wherein it has been noted that the Ranchi District Sulabh Sauchalaya Sansthan has not paid the contribution for the months of January to March, 1995 and a reminder has been issued to make payment of Rs. 12,782/- immediately (at page 609 of the paper book).

308. In order to show the close working and the control exercise by Sulabh over the functioning of the other NGOs, the petitioners have placed before this Court a letter from Shri S.P. Singh on behalf of the Bhagalpur District Sulabh Sauchalaya Sansthan to Shri J.K. Jha, Chairman(Maintenance) of Sulabh with copies inter alia to Shri Mulkhraj, Ajay Kumar, Damodar Bhartiya and Subodh Kumar Jha giving a detailed account and status of the rejuvenation of four toilet complexes of the Kalkaji Zone. It has been pointed out that this has been effected from the amount of Rs. 1,55,000/- given to it and he sought reimbursement of the amount of Rs. 13,258/- further put into the project account amongst other amounts. By this letter Shir S.P. Singh has informed that formal handing over of the charge of maintenance of 21 toilet complexes is handed over to Sulabh.

Shri Subodh Kumar Jha as Treasurer of the Bhagalpur District Sulabh Sauchalaya Sansthan at the time of its registration in 1983-84, has addressed a letter dated 10th April, 1990 on behalf of the Ranchi District Sulabh Sauchalaya Sansthan to the Addl. Commissioner, MCD Slum Wing with regard to the construction and maintenance of the Jan Suvidha Complexes on pay and use basis and has filed an affidavit dated 23rd October, 2004 before this Court as Chairman of Sulabh in W.P.(C) 11865/2004.

A letter which is similar in content with regard to other accounts dated 4th April, 1995 has been also filed and a letter dated 3rd May, 1995 giving final accounts in respect of the repair work of toilet complexes of the Kalkaji Zone has been placed before this Court.

309. The closeness of the relationship between the Ranchi District Sulabh Sauchalaya Sansthan and Sulabh is evidenced also by the fact that Shri Subodh Kumar Jha was the decision maker in both the organisations. In this behalf, Shri Subodh Kumar Jha addressed a letter dated 22nd December, 1995 on behalf of Ranchi District Sulabh Sauchalaya Sansthan to the NDMC regarding taking over of urinal cum toilets of the NDMC. Similarly, Shri Akhilesh Kumar Jha, a senior functionary of Sulabh has addressed a letter dated 10th April, 1997 on behalf of ABPEVS to the founder of Sulabh forwarding a demand draft of Rs. 1 lakh.

Further, copies of letters dated 29th November, 1997 and 1st December, 1997 from the ABPEGVS to Chairman, Sulabh International Social Service Organisation regarding the statement of account has been placed before this Court. Information with regard to the status of the auditing of the account books have been also placed before the court.

It is further pointed out that on 10th January, 1994, 9 NGOs were selected by the MCD for allotment of CTCs to Sulabh. Sulabh International Social Service Organisation was one of these nine and did not accept the terms of allotment. Consequently, the CTCs were allotted to the remaining eight. Work at 44 locations was so allotted. Material has been placed before the court to show that work was allotted to other agencies in respect of whom Sulabh gave assurance. There were 29 such agencies. Again in 1995, CTCs were so allotted to 5 NGOs.

310. According to the petitioners, Sulabh International was shortlisted and called to participate in the auction of the CTCs. It did not do so and had taken the high stand that it only accepts work on nomination basis and does not participate in tenders and auctions. This was merely a ruse while Sulabh actually participated in the auction through its sister organisations as a shield, 27 of whom were actually awarded the 321 CTCs. The petitioners have pointed out that 160 CTCs which were allocated to these sister organisations remain non-functional even on date. It is further pointed out that according to the MCD, these 27 NGOs owe a sum of Rs. 1,10,13,494/- to the corporation. According to the petitioners, these are contrived defaulters created by Sulabh in order to create a situation so that the Municipal Corporation of Delhi awards all the CTCs to it in the manner in which it has done.

311. Neither the Municipal Corporation of Delhi nor Sulabh have opted to deny the specific allegations with have been raised in this behalf against the 27 NGOs.

312. The respondent Sulabh International Social Service Organisation has filed a reply dated 21st February, 2005 in W.P.(C) 11865/2004 Himalayan Institute of Pollution Control and Social Economic Development v. Commissioner, MCD to contend that it is an accepted mother NGO and is so recognised also by the National Institute of Urban Affairs which is intended to nurture other NGOs engaged in similar work. According to Sulabh, these nurtured NGOs retained their own individual identities except to the extent that they had to refund to Sulabh, the financial assistance received by them from it during their teething period. According to Sulabh, its pioneering role in a guiding and aiding the activities of other NGOs has received national and international recognition. The National Institute of Urban Affairs which is the implementing agency for the Government of India United Nations Development Programme on "National Strategy for the Urban Poors"has designated Sulabh as one of the 'Mother NGOs'.

It is stated that it has 50000 volunteers and that amongst the NGOs who are beneficiaries of the training and help extended by Sulabh, the Himalayan Institute of Pollution and Economic Development (the petitioner in W.P.(C) No. 11865/2004); Akhil Bhartiya Manav Sewa Sansthan (the petitioner in W.P.(C) No. 12142/2004) have received substantial aid and assistance from it. Shri Krishan Kumar Jha, Secretary General of the Indian Bhoomi Paryavaran Vikas Sansthan, (petitioner in W.P.(C) 12948/2004) is stated to have been a volunteer of Sulabh who received an honorarium for his voluntary service till July, 2001 and he last drew honorarium in January, 2003.

The explanation given for not approaching the MCD for allotment of the work of operation, maintenance and management of the CTCs is because Sulabh International is not in this service for commercial or profit motive. It has agreed to take over the CTCs only as this work would benefit a large section of slum dwellers and underprivileged classes of Delhi. All the other allegations made by the petitioners are denied by a bald assertion that the allegations made by the petitioners were unfortunate, unnecessary and false and intended only to damage Sulabh's reputation. Counter allegations have been made against the petitioners.

313. In order to establish that Sulabh International Social Service Organisation has a bank account with the State Bank of Indore, Janakpuri, New Delhi, the petitioners have placed on record photocopies of three cheques which are dated 30th November, 2009 for Rs. 32,93,750/-, 30th November, 2010 and 30th November, 2011 each for the same amount as well as 30th November, 2005 for Rs. 32,93,750/- in favor of the Addl. Commissioner (Slum & JJ) of the MCD. These cheques are signed by the Chairman, Administration, Honorary Financial Advisor, Honorary Secretary, Honorary Assistant Accountant for Sulabh International Social Service Organisation.

Also placed on record is the photocopy of a cheque dated 13th March, 1995 drawn on the State Bank of Indore, Janakpuri, New Delhi in the sum of Rs. 24,230/- by Ranchi District Sulabh Sauchalaya Sansthan in favor of a third party M/s Venus Engineering (at page 612).

M/s Bhagalpur Sarai District Sulabh Sauchalaya Sansthan passed a resolution in a meeting held by it on 27th October, 1994 whereby it unanimously resolved that the current account with the State Bank of Indore, Janakpuri, New Delhi under its name would be operated under the joint signatures of two of the three persons who were named in this resolution.

To the same effect is a resolution passed by the Begusarai District Sulabh Sauchalaya Sansthan on 16th March, 2001 with regard to operation of the bank account in its name with the State Bank of Indore, Janakpuri Branch, New Delhi.

In any case, in the light of the specific allegation that these 27 NGOs are having an account in the State Bank of Indore, Janakpuri Branch, New Delhi and are having interse and financial dealings with Sulabh through the same, it was easy for the MCD to rebut the same in as much as it was possessed of the documents and records relating to the payments of security and the license fees which was paid to it by these NGOs and hence was aware of their bankers. Yet no information regarding this aspect was made available even though the MCD had ample opportunity to provide the same.

314. So far as the assertion that 27 of the NGOs who successfully bid and were allocated 321 CTCs is concerned, the petitioners have placed substantial material before this Court to show that these organisations have some kind of a connection with Sulabh. The documents which have been placed on record show bank transactions and a close control over the functioning of several of these NGOs by Sulabh so much so that these NGOs have to submit reports to Sulabh. Several lakhs of rupees have been transacted by a single NGO and paid to Sulabh. Other NGOs have been reporting regularly to Sulabh with regard to the work being done on the CTCs. Regular review meetings have been held and it would appear that Sulabh substantially controls and calls for explanation also from the NGOs. Senior officials of these NGOs are also occupying senior positions with Sulabh. It would therefore appear that Sulabh has some kind of control and involvement in the functioning of these NGOs or in any case some commonality of interest.

315. According to the petitioners, as on 30th June, 2005, each of these 27 organisations who were allotted 347 CTCs out of the total of 959 CTCs under the Yamuna Action Plan were owing to a huge amount of Rs. 1,27,05,252.00 to the MCD.

In the face of these allegations, the MCD was required to examine the same more closely to arrive at a firm finding in respect thereof. If the allegations of the petitioners are to be believed, then these 27 NGOs would have contributed in a large way to the situation which was created. Dr. Bindeshwar Pathak of Sulabh had given personal assurance to the Chief Minister, Delhi as noticed above which was noted in the letter dated 19th September, 1994 of the MCD. Therefore, the MCD cannot possibly simply brush aside the averments of the petitioner on the bald pleas that they were malafide, frivolous or without any basis.

316. Despite the respondents being called upon to produce the record relating to the allegations of the petitioners with regard to the respondent Sulabh maintaining an account in the same bank as the other

concerns or statement of the payments which have been received from these persons, no such information was placed. Sulabh has also not denied specifically the allegations made and there is no explanation with regard to the close financial and functional control exercise by it.

317. So far as the instant case is concerned, it is necessary to examine these allegations only in view of the assertion on behalf of the petitioner of the impact that Sulabh has had on the allegations of breach of the terms of auction by the NGOs necessitating decisions to cancel the contracts with the NGOs and handing over all the CTCs to itself. The main justification in court in supp decisions is that all the NGOs were gross defaulters. The aspect of matter certainly then assumes significance and has been completely ignored.

Decision in Public Interest

318. There is one more facet to the issue of the decision being based on relevant facts. In the light of the foregoing discussion, amongst the exceptions which have been held by the Apex Court as justifying a decision to not to take a recourse to the method of open auction or tendering for grants of a contract, primary are considerations of public interest. Before this Court forceful arguments have been also advanced that MCD has acted in public interest as the issue involved is the interests of public hygiene and health; environmental pollution etc. Even the ultimate decision of the Corporation to allot to Sulabh notices that it was in `public interest' to do so.

319. Public interest is not statutorily defined, however the same used in several statutes. This expression has received expansion in judicial pronouncements and applies to almost all activity of the state and statutory authorities. In fact the courts have gone to the extent of holding that public interest would override all considerations of individual or private interest.

In Words & Phrases, Permanent Addition, Vol. 35, public interest is defined thus:

"Public interest" means more than a mere curiosity; it means something in which the public, the community at large, has some peculiary interest, or some interest by which their legal rights or liabilities are affected. It does not mean anything so narrow as the interests of the particular localities, which may be affected by the matters in question. (Ref. State v. Crockettt, 206 P. 816, 817, 86 Olk. 124).

Further, it would be useful to consider the rights of the public which have been defined thus:

"Public interest" means 'of public right', and the word 'public' in this sense means 'pertaining to the people', or affecting the community at large; that which concerns a multitude of people.' and the word 'right' as so used, means 'a well-founded claim; an interest; concern; advantage; benefit,' and the term 'public interest' means more than a mere curiosity, and means something in which the public has some pecuniary interest, or some interest by which their legal rights or liabilities are affected (Ref. State v. Lyon, 165 P.419, 420, 63 Okl. 285).

320. It is stated that property becomes clothed with a public interest when used in a manner to make it or public consequence, and affect the community at large.

The circumstances which clothe a particular kind of business with a 'public interest' as to be subject to regulation, must be such as to create a peculiarly close relation between the public and those engaged in it and raise implications of an affirmative obligation on their part to be reasonable in dealing with the public. One does not devote this property or business to a public use, or clothe it with a public interest, merely because he makes commodities for an sells to the public in common callings, such as those of the butcher, baker, tailor, etc. (Ref.: Chas Wolff Packing Co. v. Court of Industrieal Realtions of State of Kansas, Kan., 43 S.Ct. 630, 633, 262 U.S. 522, 67 L.Ed. 1103, 27 A.L.R. 1280.)

321. However, it has further been stated that the expression 'public interest' and 'public use' are not synonymous in determining whether a use is public, we must look not only to the character of the business to be done but also as to the proposed mode of doing it. If the use is merely optional with the owners, or the public benefit merely incidental, it is not a public use authorising the power of eminent domain. There must be in general a right to the definite use of the property, a right which the law compels the owner to give to the general public. It is not enough that the general prosperity of the public is promoted (Ref Niagara Falls & W. .Ry.Co., 15 N.E. 429, 108 N.Y. 376). The true criterion by which to judge the character of the use is whether the public may enjoyed by right or only by permission. (Ref. Great Western Natural Gas & Oil Co., v. Hawkins, 66 N.E., 765, 768, 30 Ind.App. 557). The test whether the use is public or not is whether a public trust is imposed upon the property; whether the public has a legal right to the use, which cannot be gainsaid or denied or withdrawn at the pleasure of the owner. The expressions 'public interest' and 'public use' are not synonymous.

Thus, where a railroad condemned land for public use and rented it to a wholesale grocery company, the use of the land by the grocery company was not a public use, for, while it might be a public benefit or public interest, no obligation rested upon the grocery company to conduct its business for the benefit of the public; the true criterion of a public use being whether the public may enjoy it by right or by permission only, and the terms 'public interest' and 'public use' not being synonymous. (Ref. Neitzel v. Spokane International Ry.Co., 117 P. 864, 869, 65 Wash, 100, 36 L.R.A., N.S., 522).

Similarly, expending money in caring for streets which are so narrow that the village cannot accept them as streets is not a 'public use' of money. (Ref: Smith v. Smythe 90 N.E. 1121, 1123, 197 N.Y. 457, 35 L.R.A., N.S., 524, citing In Re Niagara Falls & W.R. Co., 15 N.E. 429, 432, 108 N.Y. 375, 385.)

Therefore the expression 'public interest' and 'public use' are not synonymous. The establishment of furnaces, mills, and manufactures, the building of churches and hotels, and other similar enterprises, are more or less matters of public concern, and promote in a general sense the public welfare, but they lie without the domain of public uses for which private ownership may be displaced by compulsory proceedings.

322. The expression public interest finds place in the Constitution. It has also been noted by the Apex Court in various decisions. The expression is therefore a word of definite concept and not nebulous. Public interest in relation to public administration means that only honest and efficient persons are to be retained in service while services of dishonest or corrupt or those whoa re almost dead wood are to be dispensed with (Re : State of Gujarat and Anr. v. Suryakant Chunilal Shah (1999) 1 SCC 529). Any action in the interest of the security of the state is clearly in public interest (Re : Abdul Ghani v. State of J&K (1973) SCC 525).

323. Under the Motor Vehicles Act, 1939, the State Government may issue directions of general nature in public interest under Section 43A. Such interest is not restricted to the interest of the operators or of the passengers. It takes in two fold general factors such as the route or the area issuance of permits which may be issued on a route area or having regards to the needs and convenience of the traveling public; non-availability of sufficient number of other services; problems of law and order, availability of fuel, impact of atmospheric pollution caused by vehicles; condition of roads; considerations of economics of running the services etc. (Re : Rameshwar Prasad v. State of U.P.)

Administrative decisions in public interest may require consideration of maintenance of standards of efficient competence utility and the requirement of the citizens.

324. The Apex Court had occasion to consider a challenge to an award of tender by the Maharashtra State Electricity Board for design, manufacture, supply, erection and commissioning of pipes and steel tanks for two units of a thermal power station. The challenge to the action was laid on a contention of relaxation of the qualifying criterion in favor of the person to whom the contract was awarded. In its judgment reported at Raunaq International Ltd. v. I.V.R. Construction Ltd., the Supreme Court laid down that the consideration in

the award of the contract would be commercial considerations. In this behalf, it was held thus:

9. The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision, considerations which are of paramount importance are commercial considerations. These would be:

(1) the price at which the other side is willing to do the work;

(2) whether the goods or services offered are of the requisite specifications;

(3) whether the person tendering has the ability to deliver the goods or services as per specifications. When large works contracts involving engagement of substantial manpower or requiring specific skills are to be offered, the financial ability of the tenderer to fulfill the requirements of the job is also important;

(4) the ability of the tenderer to deliver goods or services or to do the work of the requisite standard and quality;

(5) past experience of the tenderer and whether he has successfully completed similar work earlier;

(6) time which will be taken to deliver the goods or services; and often

(7) the ability of the tenderer to take follow-up action, rectify defects or to give post-contract services.

Even when the State or a public body enters into a commercial transaction, considerations which would prevail in its decision to award the contract to a given party would be the same. However, because the State or a public body or an agency of the State enters into such a contract, there could be, in a given case, an element of public law or public interest involved even in such a commercial transaction.

10. What are these elements of public interest? (1) Public money would be expended for the purposes of the contract. (2) The goods or services which are being commissioned could be for a public purpose, such as, construction of roads, public buildings, power plants or other public utilities. (3) The public would be directly interested in the timely fulfillment of the contract so that the services become available to the public expeditiously. (4) The public would also be interested in the quality of the work undertaken or goods supplied by the tenderer. Poor quality of work or goods can lead to tremendous public hardship and substantial financial outlay either in correcting mistakes or in rectifying defects or even at times in redoing the entire work - thus involving larger outlays of public money and delaying the availability of services, facilities or goods, e.g., a delay in commissioning a power project, as in the present case, could lead to power shortages, retardation of industrial development, hardship to the general public and substantial cost escalation.

325. According to the MCD, its decision has been taken in public interest.

326. It has been urged at great length by Mr. P.N. Lekhi, learned senior counsel appearing for Sulabh. It has been urged that the issue in this case relates only to a matter of hygiene and public health which does not entail any element of commerce or profit making. It has been urged that Sulabh is the pioneer in the field and does not participate in public auctions and tenders. The MCD has recognised the ability of this organisation and it is in order to provide the best service to the public at large that the MCD has decided to allot all the CTCs to Sulabh. Such a decision cannot be faulted as it has been taken purely for reasons of public interest.

327. This submission has been vehemently disputed on the other side which has pointed out that when the MCD took the considered decision to allot the CTCs by a process of public auction, it had taken into consideration other aspects of the matter as well. The terms and conditions on which the allotment was to be made was effected after a deliberation and consideration of the experience of several decades. In public

interest, while a notional cost to be recovered from the user was envisaged, however, the MCD had taken into consideration the expenditure which it incurred in construction of the CTCs and it had also imposed a requirement of deposit of security as well as a periodic license fee on the NGOs. It has been pointed out that MCD was conscious of the fact that certain income could be derived from the CTCs which was beyond the amounts received from the users of the toilets. Such revenue could be generated by permitting advertisement on the CTCs which were the property of the statutory authority. While allotting the CTCs to the petitioners, the MCD had prohibited advertisement by the NGOs and had consequently reserved the right absolutely to itself, however while making the allocation of the CTCs to Sulabh, it has completely abdicated its right and conferred the same on Sulabh without any reservation. A notional amount towards advertisement tax has been reserved while there is no element of revenue sharing. The action of the MCD is to be faulted for this reason as well inasmuch as without any assessment of the revenue which is to be generated, MCD has taken the decision to permit advertising on the CTCs which it decided to hand over the CTCs to Sulabh.

328. Having regard to the transaction in the instant case, there are two facet to the award of CTCs. One is the business of operation and maintenance of the CTCs to render public toilets available to the public at a cost. The other aspect relates to derivation of any revenue there from. There is no dispute that in the instant case, there were two sources of revenue which were generated on the CTCs. One is from the charges which are to be paid by the users of the toilet while the second aspect of the revenue which is generated from the commercial exploitation of advertising thereon.

So far as the provision of the facilities of the toilets to the citizens is concerned, it is to be borne in mind that the CTCs are state property intended for public use. Public interest gets interfaced because of the public hygiene and public health which use of the toilet is intended to promote. There is also an unavoidable aspect relating to the prevention of untreated sewage flowing into the river Yamuna which has tremendous environmental consequences and impact on the health of the city. Thus, the use of the CTCs renders the same essential for the community and the city in public interest.

329. The explanation which has been elaborately placed before this Court for taking the decision to hand over all the CTCs to Sulabh is cross subsidisation. The MCD has placed reliance on the request of the Sulabh to hand over all the CTCs to compensate it for CTCs wherefrom adequate revenue was not being generated. It is in order to effectuate such an intention that, according to MCD, the decision has been taken to award all the CTCs to Sulabh apart from considerations of efficient running by this organisation. To this extent, the MCD could possibly urge that it has taken a decision for reasons of public interest.

However, so far as the decision to promote advertising rights to Sulabh is concerned, it is nobody's case before this Court that the decision was taken because of any element of public interest. There is no explanation at all for the same not a whisper of a consideration of the revenue which would be generated there from. Such a decision in the light of the principles laid down by the Apex Court in the various judgments which have been cited by the respondents themselves, had to be guided by sound principles of maximising revenue and nothing else. The advertisement rights are clearly outside the domain of public interest and public use inasmuch as Sulabh would exploit the same for its private commercial benefits.

330. MCD has received the amount of Rs. 51,50,000/- as security deposit in the auction process conducted and Rs. 94,81,181/- as license fees for the first quarter alone under the licenses to the NGOs. The MCD would have thus had a recurring income of at least Rs. 94,81,185/- per quarter from the license fees which was payable by the NGOs if it implemented all the decisions taken by it. From the records produced by the MCD before this Court, it is apparent that no official of the MCD performed their statutory duty. None bothered to even inspect the CTCs let alone effect the rectifications which they were bound to do so. This money was public money and could have been done away with only for good and justifiable reasons in public interest. Such public interest would have been the consideration justifying the decision by the MCD to depart from all ordinary rules of allotting public property by open competitive bidding and also ignoring the profit element in entering into contracts. Unfortunately, it is not so in the instant case. This was not done and the impugned

decision cannot be permitted to stand for this reason alone.

331. As noticed hereinabove CTCs which were also constructed and given to Sulabh and other NGOs in the years 1994 for maintenance for the thirty year period on 'pay and use basis', the permissible rate which could be charged from the user was 30 paise per entry and the user could avail both facility of toilet and bath by this facility. There was no complaint with regard to the operation and maintenance of these CTCs. Yet the MCD has stated that the lease of these CTCs be cancelled and all these CTCs be handed over to Sulabh on the new proposed terms and conditions.

332. About 373 CTCs stood allotted to NGOs outside of the CTCs constructed under the Yamuna Action Plan. There is no allegation that these NGOs had committed any default with regard to operation, maintenance or any payment in respect of these CTCs. There was also no complaint in respect of these CTCs till the MCD took the decision to withdraw these CTCs from the NGOs and hand over to Sulabh for operation and maintenance.

333. No objective assessment nor any cost benefit analysis was made prior to 3rd January, 2004 or even till 25th October, 2004, to assess the benefit or expense which would ensure to the MCD in effectuating and implementing the proposed terms on which the CTSs were proposed to be handed over to Sulabh. There is no objective evaluation of even public interest which is stated to have motivated the decision making. Therefore, there is no objective justification for the decision which has been taken by the MCD in respect of public property and with regard to an obligatory statutory function. The facility is essential and imperative, not only in terms of the hygiene of persons for whom it is intended but also towards the health of the city as a whole inasmuch as open defecation effects public health which has serious environmental impact in terms of the effect on pollution in the river Yamuna are a matter of such concern. Apart from a bald assertion that the decision is in public interest, none of these facets have been taken into account while taking the impugned decision.

334. Sulabh has been given unconditional advertisement rights with regard to the CTCs. There is no dispute that advertisements would generate substantial revenue. There is not even a semblance of an assessment or consideration to the quantum of revenue which would be generated by giving advertisement rights on 1963 CTCs to Sulabh. There can be no quarrel or dispute that the CTCs are public property. Therefore, there must to be good reason as to why the entire revenue generated from the public property is permitted to go into the coffers of a private party. While the fact that the private party was going to bear the running cost of operation and maintenance of the CTC, however all expenditure thereon including repairs, electricity, water, septic tank etc is to be borne by the MCD.

335. The entire thrust of the argument on behalf of Sulabh has been that it is engaged in developing the hygienic toilet habit in the poor people, not for any reason of self-promotion or profit, but on account of reasons of upholding the dignity of the individual, sheer altruism and philanthropy. On this high moral ground, it has taken a stand that it does not participate in commercial or competitive methods of allocation of toilet complexes in the nature of auctions and tenders. The MCD has stated that it has taken this action of cancelling the licenses and leases of all NGOs and handing over the CTCs to Sulabh on grounds of public interest. This being the position, there is no reason as to why the entire advertisement rights and the revenue there from should be permitted to go to Sulabh unless there is good reason for the MCD. It is more so, when the same is to be generated from property of the MCD. It is not as if Sulabh would not be recovering the usage cost from the toilet users. Sulabh has been permitted a variable rate in respect of slums and non-slums areas as well as the right to enhance the usage charges annually.

336. In this behalf, it would be useful to consider the principles for the functioning of public sector undertakings as laid down by the Apex Court in 1990 (Supp.) SCC 397 Oil and Natural Gas Commission and Anr. v. Assn. Of Natural Gas Consuming Industries of Gujarat and Ors. which in my view, hold good for statutory authorities as the Municipal Corporation of Delhi. In this case, the Supreme Court was concerned

with a challenge to price fixation by the Oil and Natural Gas Commission. The High Court held that the ONGC (ONGC for short) "is a public utility undertaking" which was bound to supply gas at the request of any member of the public at large and had directed that it should continue to supply gas to the respondents at an uncertain price till the price is fixed in accordance with the procedure derived by it notwithstanding that the contracts under which the respondents had agreed to effect such supplies had expired long ago. Before the Apex Courts, the correctness of the High Court conclusion that the price of gas must be determined on the basis of cost of production supplies a reasonable return for the investments made (which was referred to by the Apex Court as the 'cost plus basis'). The Apex Court considered several aspects of the principles which are required to be kept in mind for price fixation of essential commodities basic to public need.

The ONGC did not dispute that it is an instrumentality of the state. However, it refuted the suggestion that it had become a public utility undertaking with an obligation to supply goods to any consumer on reasonable conditions. So far as the contention that the cost plus basis would be the only basis for fixation of prices of essential commodities or services rendered by a public utility undertaking is concerned, the court held thus:

28. While the cost plus basis in a recognised basis for fixation of prices of essential commodities or for the services rendered by a public utility undertaking, it would not, in our view, be correct to treat it as the only permissible basis in all situations. On behalf of the ONGC it has been pointed out that even in the fixation of prices of essential commodities like levy sugar, the concept of cost plus is not necessarily the only method of fixing the price for the commodity. In considering the question whether the price fixation in that case was based on proper principles and by following correct methods in accordance with Section 3(3-C) of the Essential Commodities Act, this Court observed in the Anakapalle case p.899 : (SCC p.450, para 28)

'While examining question No. 3 learned Solicitor General has reminded us that 'cost plus' cannot always be the proper basis for price fixation. Even if there is no price control each unit will have to compete in the market and those units which are uneconomic and whose cost is unduly high will have to compete with others which are more efficient and the cost of which is much lower. It may be that uneconomic units may suffer losses but what they cannot achieve in the open market they cannot insist on where price has to be fixed by the government. The Sugar Enquiry Commission in its 1965 report expressed the vies that 'cost plus' basis for price fixation perpetuates inefficiency in the industry and is, therefore, against the long term interest of the country.

29. The court quoted from a study prepared in collaboration with the Institute of Chartered Accountants of India : (quoted at SCC pp. 450-51, para 30)

[C]osts alone do not determine the prices. Cost is only one of the many complex factors which together determine prices. The only general principle that can be stated is that in the end there must be some margin in prices over total costs, if capital is to be unimpaired and production maximised by the utilisation of internal surpluses...while the 'cost plus' pricing method is the most common, it may be argued that it is not the best available method because it ignores demand or fails to adequately reflect competition or is based upon a concept of cost which is not solely relevant for pricing decision in all cases. What is essential is not so much of current or past costs but forecast of future cost with accuracy....Generally pricing should be such as to increase production and sales and secure an adequate return on capital employed.

Again, in a somewhat different context in relation to a State transport undertaking, this Court observed, in D.R. Venkatachalam v. Deputy Transport Commissioner: (SCC p. 279, para 9)

the special status of a governemnt owned transport undertaking in a welfare State is obvious.... Its functional motto is not more profits at any cost but service to citizens first and in a far larger measure than private companies and individuals, although profitability is also a factor even in public utilities..

After so noticing, the court finally laid down the following principles:

30. These passages indicate that cost plus is not a satisfactory basis in all situations. The basis may need to be made more stringent in some situations and more broad-based in others. May be the cost plus is an ideal basis where the commodity supplied is the product of a monopoly vital to human needs. In that context the price fixed should be minimum possible as the customer or consumer must have the commodity for his survival and cannot afford more than the minimum. The producer should not, therefore, be allowed to get back more than a minimum profit. Indeed, in certain situations, it may even be inequitable to fix varying prices on the basis of the cost of each individual manufacturer and thus encourage inefficiency; it may be necessary to base it uniformly for a whole industry on the cost of the most efficient manufacturer as has been done in the case of drugs (vide Cynamide case). It was so vital that the goods should be available to the common man that the prices were statutorily fixed so low as to drive away inefficient producers and so as to make it possible only for the most efficient manufacturers to survive. Per contra, there can be situations where the need of the consumer is not so vital and the requirements of the economic scene are such that the needs of the producer should be given greater consideration. In such situations, the "plus" element in the cost plus basis (namely, the allowable profit margin) should not be confined to "a reasonable return on the capital" but should be allowed to have a much larger content depending on the circumstances.

31. The notion that the cost plus basis can be the only criterion for fixation of prices in the case of public enterprises stems basically from a concept that such enterprises should function either on a no profit - no loss basis or on a minimum profit basis. This is not a correct approach. In the case of vital commodities or services, while private concerns must be allowed a minimal return on capital invested, public undertakings or utilities may even have to run at losses, if need be and even a minimal return may not be assured. In the case of less vital, but still basic, commodities, they may be required to cater to needs with a minimal profit margin for themselves. But given a favorable area of operation, "commercial profits" need not be either anathema or forbidden fruit even to public sector enterprises.

336. In this judgment, the court noticed the publication on Public Enterprise by the Indian Institute of Public Administration, which pointed out that profits earned by state undertakings, whether operated by the Central or state undertakings directly or through corporation or companies which formed part of the surplus of public enterprise play an increasing part in financing economic development under the various national plans. Public enterprises in the under-developed areas are to break grounds in projects which are the core of development. If such projects are to be financed on an increasing scale, the price policies have to be so designed that significant surpluses are left with the projects to be employed either for their own expansion or for financing the expansion of other projects. In other words, there should be an element of profit in the process of their products or in the cost of their services to the public.

The court also quoted from the Krishna Menon Committee on State Undertakings (November, 1959) wherein Dr. V.K.R.V. Rao was quoted as saying thus:

As regards profits, it should be pointed out that contrary to same popular notions on the subject, profits have an important place in a socialist society, the difference between the economic price and the social price would be what may be called the planned profit and this would largely correspond to the excise duties and sales tax and other indirect taxes that are imposed in a capitalist society. These planned profits being no more than a way of mobilising resources and making them available to the community for purposes both of investment and maintenance expenditure.

A quotation from an article on "The Public Sector in India" in 'Issues in Public Enterprises' by Shri K.R. Gupta citing Dr. V.K.R.V. Rao, (at page 84)" was also relied upon by the Apex Court wherein he had stated thus:

the pricing policy should be such as to promote the growth of national income and the rate of this growth...public enterprises must make profits and the larger the share of public enterprises in all enterprises, the greater is their need for making profits. Profits constitute the surplus available for saving and investment

on the one hand and contribution to national social welfare programme on the other; and if public enterprises do not make profits the national surplus available for stepping up the rate of investment and the increase of social welfare will suffer a corresponding reduction;.... Hence the need for giving up the irrational belief that public enterprise should, by definition, be run on a no-profit basis.

337. The Supreme Court has also had occasion to consider such areas where instrumentalities of state are occupying a monopoly position in areas of essentialities for the citizens. This is so amongst others in the case of electricity boards. The court also drew a distinction between `reasonable profits' and `undue profits' in an earlier judgment of the Apex Court (which was also cited in ONGC v. Assn. of Natural Gas Consuming Industries (supra) reported at Kerela State Electricity Board v. S.N. Govinda Prabhu & Bros., the court observed thus:

8. Shri Potti, learned Counsel for the consumers placed great reliance on the observations of this Court in Kerala State Electricity Board v. Indian Aluminium Co., Bihar State Electricity Board v. Workmen and P. Nalla Thampy Thera v. Union of India to contend that the Electricity Board was barred from conducting its operations on commercial lines so as to earn a profit. In the first case, the observations relied upon were: (SCC p. 483, para 19)

Furthermore, Electricity Boards are not trading corporations. They are public service corporations. They have to function without any profit motive. Their duty is to promote coordinated development of the generation, supply and distribution of electricity in the most efficient and economical manner with particular reference to such development in areas not for the time being served or adequately served by any licensee (Section 18). The only injunction is that as far as practicable they shall not carry on their operations at a loss (Section 59). They get subventions from the State Governments (Section 63). In the discharge of their functions they are guided by directions on questions of policy given by the State Governments (Section 78-A). There are no shareholders and there is no distribution of profits.

In the second case the Court observed: (SCC p. 234, para 4)

The Electricity Board it not an ordinary commercial concern. It is a public service institution. It is not expected to make any profit. It is expected to extend the supply of electricity to unserved areas without reference to considerations of loss that might be incurred as a result of such extension.

In the third case where the Court was considering the position of the Indian Railways it was observed: (SCC pp. 604-05, para 14 and p. 609, para 25)

The Indian Railways are a socialised public utility undertaking. There is at present a general agreement among writers of repute, that the price policy of such a public corporation should neither make a loss nor a profit after meeting all capital charges and this is expressed by covering all costs or breaking even; and secondly, the price it charges for the services should correspond to relative costs. Keeping the history of the growth of the Railways and their functioning in view, the commendable view to accept may be that the rates and fares should cover the total cost of service which would be equal to operational expenses, interest on investment, depreciation and payment of public obligation, if any. We need not, however, express any opinion about it.

We have said earlier that the Railways are public utility service run on monopoly basis. Since it is a public utility, there is no justification to run it merely as a commercial venture with a view to making profits. We do not know - at any rate it does not fall for consideration here - if a monopoly based public utility should ever be a commercial venture geared to support the general revenue of the State but there is not an iota of hesitation in us to say that the common man's mode of transport closely connected with the free play of this fundamental right should not be. We agree that the Union Government should be free to collect the entire operational cost which would include the interest on the capital outlay out of the national exchequer. Small marginal profits cannot be ruled out. The massive operation will require a margin of adjustment and, therefore, marginal

profits should be admissible.

We do not think that any of these observations is in conflict with what we have said. Pure profit motive, unjustifiable according to us even in the case of a private trading concern, can never be the sole guiding factor in the case of a public enterprise. If profit is made not for profit's sake but for the purpose of fulfillling, better and more extensively, the obligation of the services expected of it, it cannot be said that the public enterprise acted beyond its authority. The observations in the first case which were referred to us merely emphasised the fact that the Electricity Board is not an ordinary trading corporation and that as a public utility undertaking its emphasis should be on service and not profit. In the second case, for example, the Court said that it is not expected to make any profit and proceeded to explain why it is not expected to make a profit by saying that it is expected to extend the supply of electricity to unserved areas without reference to considerations of loss. It is of interest that in the second case4, dealing with the question whether interest cannot be taken into account in working out profits, the Court observed. (SCC p. 235, para 5)

The facile assumption by the Tribunal that the interest should not be taken into account in working out the profits is not borne out by the provisions of the statute.

In the third case, the Court appeared to take the view that the railway rates and fares should cover operational expenses, interest on investment, depreciation and payment of public obligations. It was stated more than once that the total operational cost would include the interest on the capital outlay out of the national exchequer. While the Court expressed the view that there was no justification to run a public utility monopoly service undertaking merely as a commercial venture with a view to make profits, the Court did not rule out but refrained from expressing any opinion on the question whether a public utility monopoly service undertaking should ever be geared to earn profits to support the general revenue of the State.

338. The clear principle which has been laid down by the Apex Court thus is that making of profits is not an anathema to public enterprise. Even in areas of essentialities and obligatory duties and facilities, the State and its instrumentalities may make reasonable profits which support the general revenue of the state. It is not necessary for the authority to function on a 'no profit and no loss' basis or on a mere 'cost plus' basis.

339. So far as the provision of toilet complexes is concerned, the same is in the nature of provision of an essential facility to the general public. In ONGC v. Association of Natural Gas Consuming Industries of Kerala, 1990 Supp. SCC 317, the Apex Court upheld disparity in principles between supplies effected to public sector undertakings and public utilities. The court defined a public utility in para 20 at page 416 of the report thus:

Public Utility - A privately owned and operated business whose services are so essential to the general public as to justify the grant of special franchises for the use of public property or of the right of eminent domain, in consideration of which the owners must serve all persons who apply, without discrimination. It is always a virtual monopoly.

340. In K.K. Bhalla v. State of M.P. and Ors., a challenge was laid to the allotment of land by the State of M.P. in favor of the proprietor of a newspaper and a charitable organisation inter alia on the ground that the grant of rebate in the premium and the ground are violated on the statutory norms, hence was violative of Article 14 of the Constitution. The private respondents urged that the allotment was as per the policy of the respondents and hence amenable to judicial review.

The court held that the State and the development agencies being creatures of the statute were bound to act within the four corners thereof. Procedures for disposal of land having been laid down in the rules, power in that behalf was required to be exercised strictly in conformity thereof and not de hors the same. The court further held that the policy decision relied upon by the respondents was ultra vires being contrary to the statutory rules and consequently no direction for allotment could be made pursuant to such a policy. Any

action by way of a policy decision or otherwise at the hands of the statutory authority must be in consonance with the statutory rules and not de hors the same.

341. For this reason as well, the objection on the part of the MCD that in the instant case, the contract required the petitioners to perform certain functions and consequently was in the nature of a contract of service and hence not enforceable would not apply inasmuch as it failed in handing over CTCs fit to be operated.

342. In .I. Builders Pvt. Ltd. v. Radhey Shyam Sahu, the court has occasion to consider the obligatory duties of the U.P. Municipal Corporation to maintain parks. The court observed that the decision to construct an underground shopping complex by M.I. Builders Pvt. Ltd. was in contravention of the provisions of the U.P. Municipal Corporation Act and the agreement which was entered with the builder was against two settled norms and wholly illegal. It was held by the Apex Court that the boggie of congestion being the reason for justifying the construction in public interest was introduced only to justify the action of the mahapalika. The entire exercise was gone into to confer undue benefit on M.I. Builders, smacked of arbitrariness unreasonableness and irrationality justifying interference in exercise of powers of judicial review. The court upon consideration of the manner in which the decision making evolved and the nature of the agreement which was entered into with the builder held thus:

57. We may now examine some of the terms of the agreement dated 4-11-1993. There are six recitals to the agreements which cannot be correlated to any discussion in any of the meetings of the Mahapalika, the Executive Committee or the High Power Committee. Under Clause (2) of the agreement it is for the builder to make a construction at its own cost and then to realise the cost with profit not exceeding more than 10% of the investment in respect of each shop. Nobody knows how much cost the builder is likely to incur and how long it will continue to be in possession of the shopping complex. Full freedom has been given to the builder to lease out the shops as per its own terms and conditions to persons of its choice on behalf of the Mahapalika and the Mahapalika shall be bound by these terms and conditions. The builder has also been given the right to sign the agreement on behalf of the Mahapalika on the terms and conditions which the builder may deem fit and proper. The builder is only required to give a copy of the agreement to the Mahapalika after its execution and both the Mahapalika and the builder shall remain bound by the terms of that agreement. Since there is no project report nobody knows how many shops the builder would construct and of what sizes. The Mahapalika is allowed to charge Rs 5000 per shop for every second and subsequent transfer of shops by the builder but what amount is to be charged for the first transfer or subsequent transfers is left to the sole discretion of the builder. A bare glance at the terms of the agreement shows that not only the clauses of the agreement are unreasonable for the Mahapalika but they are atrocious. No person of ordinary prudence shall ever enter into such an agreement. A trustee, which the Mahapalika is, has to be more cautious in dealing with its properties. Valuable land in the heart of a commercial area has been handed on a platter to the builder for it to exploit and to make runaway profits. As a matter of fact on examining the terms of the agreement we find that the Mahapalika has been completely ousted from the underground shopping complex for an indefinite period. It has completely abdicated its functions.

58. To repeat, the agreement is completely one-sided favoring the builder. A land of immense value has been handed over to it to construct an underground shopping complex in violation of the public trust doctrine and the Master Plan for the city of Lucknow. The Mahapalika has no right to step in even if there is any violation by the builder of the terms of the agreement or otherwise. The Mahapalika, though considered to be the owner of the land, is completely ousted and divested of the land for a period which is not definite and which depends wholly on the discretion of the builder. On the question of reasonableness reference may be made to Wade on Administrative Law, 7th Edn., p. 399. The learned author observed that:

The court must strive to apply an objective standard which leaves to the deciding authority the full range of choices which the legislature is presumed to have intended. Decisions which are extravagant or capricious cannot be legitimate.

Quoting Lord Hailsham, L.C. in W. (an infant), Re where he said:

Two reasonable persons can perfectly reasonably come to opposite conclusions on the same set of facts without forfeiting their title to be regarded as reasonable.

The following passage from the treatise would be relevant:

This is not therefore the standard of 'the man on the Clapham omnibus'. It is the standard indicated by a true construction of the Act which distinguishes between what the statutory authority may or may not be authorised to do. It distinguishes between proper use and improper abuse of power. It is often expressed by saying that the decision is unlawful if it is one to which no reasonable authority could have come. This is the essence of what is now commonly called 'Wednesbury unreasonableness', after the now famous case in which Lord Greene, M.R. expounded it as follows:

It is true that discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology used in relation to exercise of statutory discretions often use the word 'unreasonable' in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably'. Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington, L.J. in Short v. Poole Corporation gave the example of the red-haired teacher, dismissed because she had red hair. This is unreasonable in one sense. In another it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another.

This has become the most frequently cited passage (though most commonly cited only by its nickname) in administrative law. It explains how 'unreasonableness', in its classic formulation, covers a multitude of sins. These various errors commonly result from paying too much attention to the mere words of the Act and too little to its general scheme and purpose, and from the fallacy that unrestricted language naturally confers unfettered discretion.

Unreasonableness has thus become a generalised rubric covering not only sheer absurdity or caprice, but merging into illegitimate motives and purposes, a wide category or errors commonly described as 'irrelevant considerations', and mistakes and misunderstandings which can be classed as self-misdirection, or addressing oneself to the wrong question. But the language used in the cases shows that, while the abuse of discretion has this variety of differing legal facets, in practice the courts often treat them as distinct. When several of them will fit the case, the court is often inclined to invoke them all. The one principle that unites them is that powers must be confined within the true scope and policy of the Act.

Taken by itself, the standard of unreasonableness is nominally pitched very high: 'so absurd that no sensible person could ever dream that it lay within the powers of the authority' (Lord Greene, M.R.); 'so wrong that no reasonable person could sensibly take that view' (Lord Denning, M.R.); 'so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it' (Lord Diplock). It might seem from such language that the deliberate decisions of ministers and other responsible public authorities could almost never be found wanting. But, as may be seen in the following pages, there are abundant instances of legally unreasonable decisions and actions at all levels. This is not because ministers and public authorities take leave of their senses, but because the courts in deciding cases tend to lower the threshold of unreasonableness to fit their more exacting ideas of administrative good behavior.

59. When we keep in view the principles laid by this Court in its various judgments and which we have noticed above, it has to be held that the agreement dated 4-11-1993 is not a valid one. The agreement defies logic. It is outrageous. It crosses all limits of rationality. The Mahapalika has certainly acted in a fatuous manner in entering into such an agreement. It is a case where the High Court rightly interfered in exercise of its powers of judicial review keeping in view the principles laid down by this Court in Tata Cellular v. Union of India. Every decision of the authority except the judicial decision is amenable to judicial review and reviewability of such a decision cannot now be questioned. However, a judicial review is permissible if the impugned action is against law or in violation of the prescribed procedure or is unreasonable, irrational or mala fide. On the principle of good governance reference was made to a decision of the Division Bench of the Bombay High Court in State of Bombay v. Laxmidas Ranchhoddas AIR Bom at p. 475 (para 12). It was submitted that bad governance sets a bad example. That is what exactly happened in the present case.

60. In State of Bombay v. Laxmidas Ranchhoddas a Division Bench of the High Court was considering the argument that the writ of mandamus being discretionary, the Court should consider whether it should not put a limitation upon its own powers and jurisdiction. It was submitted that it was impossible for any State to function if there was a constant interference by the High Court in the executive acts performed by the officers of the State. Chagla, C.J., speaking for the Court, said:

It may be that interference by the High Court may result in inconvenience or difficulty in administration. But what we have to guard against is a much greater evil. When we find in the modern State wide powers entrusted to Government, powers which affect the property and person of the citizen, it is the duty of the courts to see that those wide powers are exercised in conformity with what the legislature has prescribed. We are not oblivious of the fact that in order that the modern State should function the Government must be armed with very large powers. But the High Court does not interfere with the exercise of those powers. The High Court only interferes when it finds that those powers are not exercised in accordance with the mandate of the legislature. Therefore, far from interfering with the good governance of the State, the Court helps the good governance by constantly reminding the Government and its officers that they should act within the four corners of the statute and not contravene any of the conditions laid down as a limitation upon their undoubtedly wide powers. Therefore, even from a practical point of view, even from the point of view of the good governance of the State, we think that the High Court should not be reluctant to issue its prerogative writ whenever it finds that the sovereign legislature has not been obeyed and powers have been assumed which the legislature never conferred upon the executive.

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72. The High Court in its impugned judgment has not doubted the capacity of M.I. Builders to undertake the project but then that is not the issue. The question is why was it not necessary to invite tenders for the project of such a high cost? Why was it thought that it was only M.I. Builders in the country who could undertake the job? Why was the project report not obtained to know the cost of the project? Why could it not be thought that there could be any other person who could undertake the job at a lesser cost and in an equally competent manner? Public interest has certainly been given a go-by. There was some undercurrent flowing to award the contract to M.I. Builders. The High Court said "lest we are taken amiss we wish to make it clear that we do not doubt either the bona fides of the authorities or the competence of the respondents M/s M.I. Builders to enter into the impugned agreement but we are of the view...." The competence of M/s M.I. Builders to undertake the project is not doubted when now it is seen that proper construction has been made but before taking the decision to award the contract to it nobody knew its credentials. No attempt was made whatsoever to consider if there was any other person more competent for the job or if of equal competence could offer better terms. In these circumstances, the dictum contained in the case of Kasturi Lal Lakshmi Reddy v. State of J&K becomes inapplicable. No advantage can be drawn by the builder from the decision of this Court in G.B. Mahajan case as here the whole process of awarding contract to M.I. Builders has been gone through in an unabashed manner and in flagrant violation of law with the sole purpose of conferring benefit on it. All said and done, we fail to understand the certificate given by the High Court about the bona fides of the

authorities in awarding the contract to M/s M.I. Builders. The officers of the Mahapalika, who were imp leaded as the respondents by name, did not file any replies to contradict the allegations made against them. Rather it appears that it was a fit case where the High Court should have directed an enquiry to be made as to how the project came to be awarded to M.I. Builders including the conduct of the lawyers.

343. The entire proposal to hand over the CTCs to Sulabh commenced from the certification of its standing and credibility by the Commissioner in the decision taken on 3rd January, 2004. This certification received endorsement in all subsequent decisions. The petitioners have pointed out that on account of the performance of Sulabh, by an order dated 22nd March, 2000 of the then commissioner of the MCD, out of 164 Jan Suvidha Complexes given to Sulabh, 66 have been taken back from it. The report dated 16th November, 1999 was given by a committee appointed by the MCD on the operation and maintenance of the CTCs which were earlier allocated to Sulabh on lease basis without charging any license fee. There was no material whatsoever contrary to the report of the committee dated 16th November, 1999 before the Commissioner of the MCD on 3rd January, 2004 or any of the authority. This report on the performance of Sulabh and the decision of the then Commissioner of the MCD on 22nd March, 2000 do not even find mention in the entire decision making when it commenced from the note dated 3rd January, 2004 and crystalised into the letter dated 19th July, 2004 which forms the basis of the decision taken by the MCD on 25th October, 2004. Even in respect of claim of Sulabh regarding exceptional work in other states, several doubts had been created.

344. Neither the Commissioner nor any authority involved in the decision making undertook any assessment of the reputation, credibility and performance of any of the NGOs. Admittedly large number of these organizations were successfully operating and maintaining the CTCs allocated to them. Several of the NGOs were not defaulters in payment of license fee even according to the MCD. Some of these NGOs may even be better than Sulabh in terms of performance. But since no material on this aspect is available on the records, the same is left in the realm of speculation.

345. The MCD is precluded from dealing with the property or allocating the same to third parties without following due and such process which is free from the taints of unfairness, arbitrariness and mala fide. A conscious and considered decision after taking into consideration all relevant factors including revenue which could possibly be earned is necessarily to be taken before the CTCs can be allocated or handed over to any party by entering into a lease or a license.

346. As per the principles laid down by the Apex Court, it is open to the State to carve out an exception or a reasonable classification. Even preference of a particular institution is permissible on grounds of public interest. Furtherance of directive principles also permit the authority to make such preference. However, it is well settled that if assailed, such a decision would required to withstand judicial scrutiny. In the light of the above, existence of material in support of the administrative decision of the authority is also mandatory.

347. From the above discussion certain imperative facts can be called out which can be enumerated thus:

(i). A considered and conscious decision was taken by the Corporation to allot CTCs by inviting tenders or by auction in 1999-2000 "A model form of agreement" was prepared and approved in this behalf. The decision included a limit that no NGO would be allotted more than two groups out of the 103 groups formed for allotting 959 CTCs under the Yamuna Action Plan.

(ii). Sulabh was one of the short listed NGOs for participating in the auction programme but opted not to participate in the auction for allotment of the 959 CTCs under the Yamuna Action Plan.

(iii). The petitioners have asserted that Sulabh has some kind of relationship or in any case, commonality of interest and a large measure of control with the 27 other NGOs who were allotted as many as 309 CTCs out of the 959 CTCs under the Yamuna ActionPlan. The admitted position is that 160 CTCs out of these have remained non-functional. These 27 NGOs owing approximately Rs. 1,10,13,494/- towards the license fee.

(iv). No objective assessment was undertaken with regard to the work of operation and maintenance of the CTCs that were auctioned to different NGOs. The auctions were held in the year 2002 while possession appear to have been handed over to these CTCs up to June, 2002. In 2004, the proposal was being mooted to rescind the agreement with these NGOs without any objective assessment as to the reason for why the CTCs had remained non-functional and whether the same was solely for the fault of the NGOs.

(v). Not a single notice of default was issued by the Municipal Corporation to any of the NGOs who defaulted in payment of license fee or did not operate and maintain the CTCs till hearing in the present matter had commenced.

(vi) Clasue 15.5 provided for a seven day notice to the NGOs where no notice of any kind has been given to the petitioners. Under Clause 17, a monitoring, operating and maintenance agency was to be appointed which has not been done.

(vii) Most of the NGOs claimed that they had made large number of CTCs functional by spending out of their own resources. The license with the NGOs did not contain any such covenent whereby the NGOs were so required to do so.

(viii). In the meetings dated 9th, 10th, 11th, 15th, 17th, 18th July, 2003 and even the Review Meeting under the Yamuna Action Plan dated 22nd January, 2004, the defects in the CTCs rendering them non-functional were noticed and several decisions were taken which were not implemented. These defects were not attributable to the NGOs.

(ix) As late as in December, 2002, the MCD submitted a report to the Ministry of Environment and Forest of the Union of India to the effect that all the CTCs under the Yamuna Action Plan had not been handed over to NGOs for operation and maintenance. It has been stated that out of 959 CTCs under the Yamuna Action Plan, only 872 had been handed over to NGOs and out of these only 633 were functional. This status report submitted by the MCD also recorded that 289 CTCs were non-functional due to non-availability of power connection, boring defects etc.

(x) In the minutes recorded in the several meetings noticed herein, the engineers have complained that the contractors who built the CTCs have not been paid. It is noteworthy that the MCD has admitted that the CTCs suffered from structural and other defects which required rectification before the Sulabh can operate them in terms of the decision taken on 25th October, 2004. These structural defects are obviously for the fault of the contractors who built the CTCs. No action whatsoever has been taken against the contractors who constructed the CTCs or handed over non-functional CTCs to the engineers. It cannot be emphasized enough that the MCD had in its power and possession the complete record in respect of each CTC and each NGO. It had with it every detail of the dates from which the NGOs were liable to pay the license fees and other charges; the amounts, which were actually paid, and the dates of the payment as also the defaults. These complete particulars been withheld from this Court.

Not a single letter of cancellation of contract for any breach of the license has been placed on record. By a unilateral decision taken on 25th October, 2004, it was decided to cancel all the licenses without quantifying the dues of the NGOs or the extent of the default and without any kind of notice to the NGO.

(xi) The NGOs to whom the CTCs were allocated under the Yamuna Action Plan had from the very first opportunity indicated major defects and shortcomings that existed in the CTCs. The MCD had accepted and admitted the existence of these shortcomings and several proposals were mooted with regard to postponement of the date from which the license fee was to commenced, subsidy in the rates at which electricity charges would be payable and other similar proposals. No final decision was taken on these matters.

(xii) There are several NGOs other than Sulabh which have been maintaining CTCs on pay and use basis either for a period of thirty years or on tender basis in respect of which there is no complaint whatsoever. MCD is also operating a large number of CTCs without complaint. Yet a blanket decision was taken to cancel all leases and to hand over the CTCs to Sulabh on a thirty year lease on totally one sided terms and conditions.

(xiii) Under the model agreement and the license which was executed with the petitioners and the other NGOs, huge amounts were recovered by the MCD towards security as well as the license fee. The MCD has received an amount of Rs. 51,50,000/- as security deposit under the auction process and Rs. 94,81,185/- as license fee for the first quarter alone. This has been stated in a background note on the Yamuna Action Plan which has been placed before this Court by M/s Bhagwati Foundation. The background note has been prepared by the MCD and not disputed before this Court. This was the kind of revenue which was generated.

(xiv) The amount of revenue which was being generated or could have been recovered if the agreements were implemented in right, earnest and in the correct spirit, is not a relevant factor or a material factor while taking a decision in respect of public property worth crores of rupees wherefrom revenue of several crores could be generated which may be put to use for the benefit of the public at large.

(xv) The MCD had prohibited advertising rights to those NGOs who were also responsible for payment of the electricity and water charges and also had the responsibility of cleaning of septic tank and effecting all repairs.

(xvi) So far as dual responsibility which has been cited as a major reason for cancellation of the contracts with the NGOs is concerned, such dual responsibility existed in respect of toilets which were given for the period of thirty years on the thirty year leases which are admittedly working successfully without any complaint. In the thirty year leases, while the entire maintenance was done by the NGOs, it remained the responsibility of the MCD to provide water and electricity and to clean the septic tank. Therefore, there appears to be no basis for the contention that "dual responsibility" under the agreement with the NGOs was not successful and necessitated the change of method of allocation in handing over CTCs to Sulabh.

(xvii) As late as on 10th July, 2003, in the minutes of the joint meeting held on 30th January, 2004 in the note of the Commissioner MCD and the background note submitted tot he Government of India, there was acceptance by the MCD that the deficiencies in the CTCs were not removed. The Assistant Engineer had stated that the contractors was not turning up and the decision was taken that security to the contractor would not be released. Several minutes noted that the NGOs were facing difficulty and that CTCs were not .

It is therefore an admitted position on the part of MCD that all the NGOs were not defaulters in payment.

(xviii). The terms and conditions of the auction in which the CTCs were allocated to the NGOs envisaged deposit of security amount as well as license fee. Admittedly, MCD had earned huge amounts running into several lakhs of rupees towards the security amount and as license fee.

(xix) Without any analysis as to what would be the total sum which would be earned towards the license fee in respect of all the CTCs in terms of the agreement entered into between the MCD and the NGOs and also giving a complete go bye to the model agreement which had been proposed after a detailed analysis of the experience of the MCD over several decades, all the prohibitions, terms and conditions stipulated therein were given a go bye. The MCD proposed and decided not to charge any amount on account of security or as license fee from Sulabh. The decision was taken to lease all the CTCs to Sulabh for a thirty year lease period. Apart from the fact that Sulabh was not to pay any amount to the MCD, it was still permitted to charge the users for the toilet use. This was contrary to the very basis from which the decision of the Standing Committee dated 17th of December, 2003 stemmed whereby the Standing Committee by Resolution No. 673 had resolved to provide "free of charge" service to Delhites. Against the rupee one which the NGOs could charge, Sulabh was permitted to charge rupees one for toilet use only. In small areas and in areas other than slums, it was increased four times by prescribing the rate of Rs. 2 per toilet, Sulabh was permitted to increase the user

charge at the rate of 10% per year. The petitioner has placed a calculation before this Court that by the time, the thirty year lease is over, the users would be paying Rs. 16 for using the toilet in slum areas and Rs. 32 for users in non-slum areas.

348. From the records produced before this Court, it is evident that there has been neither appropriate consideration of these facts nor the grounds which have been laid before this Court justifying the decision made out. A semblance of application of mind and a patch work explanation has been put together to justify a decision.

349. While the respondents did hold out that certain formal decisions with regard to payment of license fee subsidisation of electricity dues etc and steps to render all the CTCs functional would be taken as noticed hereinabove, however, the same did not culminate any formal decisions on the basis of the recommendations by the authorities in the MCD who were dealing with the matter.

350. It is also to be noted that the MCD had entered into individual agreements with the NGOs. Each person was facing different difficulties and reasons for non-payment of the license fee. There were individuals who had paid full payment of the dues as well. As noticed hereinabove, there were also NGOs who were requesting the MCD to take back possession of certain CTCs. Certainly, the requirement in law and public interest was not justified by taking a blanket decision. The MCD was required to take a considered and comprehensive decision in respect of the individual NGOs before they could be labeled as defaulters.

351. No material had been placed before the MCD with regard to the expenditure which was to be entailed in effecting the repairs of the CTCs before the decision to bear the same was taken by it. Equally so, even till the hearing in the case, there is no material with regard to revenue which it would earn from the advertisement which it could retain. The respondents had admittedly not assessed, evaluated or considered the economic factors which could have permitted it to depart from the normal rule of public auction and pubic tender.

352. It is important to notice here that this withdrawal of the 66 CTCs from Sulabh was certainly an important fact which would deserve to be considered by the MCD before arriving at a decision to award CTCs to Sulabh. There is nothing on record which could be considered as a circumstance in favor of Sulabh for its failure to properly operate or manage the CTCs which were earlier allotted to it for which it was receiving payment from the MCD in fact and the entire costing and responsibility was also that of the MCD. Certainly, the decisions of the MCD cannot be said to be guided by public interest or based on relevant considerations.

353. From the above, it is amply borne out that certainly the justification urged before this Court was not made out from the facts before the authorities. It is also apparent from the record that material and relevant facts which required consideration were ignored.

354. So far as the present case is concerned, a blanket decision has been taken by the Municipal Corporation of Delhi to the effect that all the CTCs would be handed over to Sulabh and that all the contracts with the NGOs would be cancelled. In Shrilekha Vidyarthi (Kumari) v. State of U.P. , the challenge laid to a circular dated 6th February, 1990 State of Uttar Pradesh terminating the engagement of all the Government counsel engaged throughout the State of U.P. for civil-revenue/Criminal and urban sealing work on and from 28th February, 1990 and to make new appointment in their place. This decision was challenged on grounds of arbitrariness.

The challenge before this Court is to a similar decision of the Municipal Corporation of Delhi which took the decision to allot the CTCs without regards to the accepted method of allotment by way of a competitive process and to one person and decided to enbloc terminate the contracts of the petitioners and other NGOs to whom it has been allotted after competitive bidding. As noticed above, such omnibus decision could not be supported by the MCD to any relevant material which was before the authorities at the time of their decision making.

355. There is no dispute that the Municipal Corporation of Delhi is exercising jurisdiction from the Municipal Corporation of Delhi Act, 1957. All discretion has to be exercised in accordance with the discretion conferred by the statute. It has been urged on behalf of both the Municipal Corporation of Delhi as well as Sulabh that the exercise of discretion by the MCD is not amenable to judicial review. It would be useful to refer to the principles laid down by the Apex Court with regard to exercise of discretion under statutory provisions. In this behalf, the judicial pronouncement Bangalore Medical Trust v. B.S. Muddappa and Ors. is both topical and constructive. The court held thus:

48. Much was attempted to be made out of exercise of discretion in converting a site reserved for amenity as a civic amenity. Discretion is an effective tool in administration. But wrong notions about it results in ill-conceived consequences. In law it provides an option to the authority concerned to adopt one or the other alternative. But a better, proper and legal exercise of discretion is one where the authority examines the fact, is aware of law and then decides objectively and rationally what serves the interest better. When a statute either provides guidance or rules or regulations are framed for exercise of discretion then the action should be in accordance with it. Even where statutes are silent and only power is conferred to act in one or the other manner, the Authority cannot act whimsically or arbitrarily. It should be guided by reasonableness and fairness. The legislature never intends its authorities to abuse the law or use it unfairly.

356. The submissions made in the affidavits of the Municipal Corporation of Delhi could not be substantiated by it nor has it been able to establish that either the Commissioner or the Sub-committee, or the Full House of the Corporation took into consideration all relevant factors noticed hereinabove.

In fact, having taken a decision to allot the CTCs to Sulabh, a crude effort was made to support the executive action. Such action was undoubtedly destructive of forthrightness and fairness. On all relevant dates MCD was conscious that its decision had been challenged by way o fthe present writ petition and has to be tested on the anvil of law establishing the interest of members of the society was involved.

357. I may also deal with the submission made by Mr. P.N. Lekhi, learned senior counsel for the petitioner to the effect that the petitioners have not laid any pleadings which they were bound to do so in support of their writ petition and that the writ petitions deserve to be rejected on this sole ground alone. In this behalf, reliance has been placed on the pronouncement of the Supreme Court in Bharat Singh v. State of Haryana.

It is pointed out that in para 13 of its pronouncement reported at entitled Bharat Singh v. State of Haryana the Apex Court held that merely pleadings as to profiteering by the State in a writ petition was a pleading in abstract without any reference to any material in support thereof. No particulars or facts were laid even before the Apex Court but the point was sought to be substantiated at the time of hearing while referring to certain facts stated in the application of the respondent-HSIDC. The Apex Court in these circumstances held thus:

13. As has been already noticed, although the point as to profiteering by the State was pleaded in the writ petitions before the High Court as an abstract point of law, there was no reference to any material in support thereof nor was the point argued at the hearing of the writ petitions. Before us also, no particulars and no facts have been given in the special leave petitions or in the writ petitions or in any affidavit, but the point has been sought to be substantiated at the time of hearing by referring to certain facts stated in the said application by HSIDC. In our opinion, when a point which is ostensibly a point of law is required to be substantiated by facts, the party raising the point, if he is the writ petitioner, must plead and prove such facts by evidence which must appear from the writ petition and if he is the respondent, from the counter-affidavit. If the facts are not pleaded or the evidence in support of such facts is not annexed to the writ petition or to the counter-affidavit, as the case may be, the court will not entertain the point. In this context, it will not be out of place to point out that in this regard there is a distinction between a pleading under the Code of Civil Procedure and a writ petition or a counter-affidavit. While in a pleading, that is, a plaint or a written statement, the facts and not evidence are required to be pleaded, in a writ petition or in the counter-affidavit not only the facts but also the evidence in proof of such facts have to be pleaded and annexed to it. So, the

point that has been raised before us by the appellants is not entertainable. But, in spite of that, we have entertained it to show that it is devoid of any merit.

358. It was urged that the petitioners have laid no factual basis for their arguments and reliance was placed on

Board of Trustees, Ayurvedic and Unani College, Delhi v. State of Delhi(para 21) wherein the court held thus:

In our view the petitioners have not made out any basis for the contention that (1) there were other institutions similarly situated, and (2) petitioner No. 1 was picked out for unequal treatment. The names of no other institutions similarly situated have been disclosed. In the first Sholapur case Chiranjit Lal Chowdhuri v. Union of India , it was held by a

majority of Judges of this Court that even one corporation, (in our case one society) or a group of persons can be taken as a class by itself for the purpose of legislation, provided it exhibits some exceptional features which are not possessed by others.

The Courts should prima facie lean in favor of constitutionality and should support the legislation if it is possible to do so on any reasonable ground, and it is for the party who attacks the validity of the legislation to place all materials before the court which would go to show that the selection is arbitrary and unsupportable. Throwing out of vague hints that there may be other instances of similar nature is not enough for this purpose.

359. I have dwelt at length with the case set up by the petitioners. In this regard, the assertions of some of the petitioners are noticed in several paras hereinabove. Several representations of the writ petitioners and minutes of joint meetings as annexed to the petitions, have been dwelt at length above. and elsewhere are necessary. Similar assertions have been made in all other writ petitions. Before this Court, the petitioners have enclosed as annexures, their various representations and complaints to the MCD. Reports of field monitors have been annexed with the writ petition and placed before the court as also the minutes of the joint meetings held by the officials of the MCD. The petitioners have assailed the action of the MCD to allot all the CTCs to Sulabh the allegations of arbitrariness, discrimination on the ground that the same is opposed to public interest. At the same time, a challenge has been laid to the consequent decision taken by the MCD to cancel the allocations of the CTCs to the petitioners. In the light of what is noticed above and the principles on which such a challenge has to be examined, it cannot be contended that the necessary averments and the material has not been laid before this Court.

Challenge on the ground that the decision results in creation of a monopoly

360. The decision taken by MCD has been challenged on another grounds by the petitioners. It has been asserted that by the impugned action, the respondents have created a monopoly in favor of Sulabh which is in violation of Article 14 and 19(1) of the Constitution of India.

It is further asserted that the MCD has appointed Sulabh by an executive order which, being not a law, is opposed to the provisions of Article 19(6) of the Constitution.

361. Such an issue has arisen for consideration before the Apex Court on several occasions. I find that again this is legally permissible only as an exception. The Apex Court has held that the monopoly as contemplated under Article 19(6) of the Constitution is something which leads to the total exclusion of others. Creation of a small captive market in favor of a state owned undertaking out of a larger market has been held to not create a monopoly as contemplated under Article 19(6) of the Constitution, when the captive market has been found to consist of only state owned institutions.

Thus, in Rai Sahib Ram Java v. State of Punjab, the court was considering a restriction imposed by the state on purchase of text books and held that a publisher did not have the right to insist on any of his books being

accept as text books.

In Narain Das Indurkhya v. State of M.P., the court also followed the principles laid down in Rai Sahib Ram Jawaya Kapur's case.

Again in Sarkari Sasta Anaj Vikreta Sangh v. State of M.P., the court was concerned with the right of the state to give preference to cooperative societies in the matter of allotment of fair price shops. In this case, the court observed that cooperative societies play a positive and progressive role in the economy of our country and most surely in the fair and effective distribution of essential articles of food. Consequently, it was held that "there certainly was a reasonable classification and a nexus with the object intended to be achieved, which was a fair and assured supply of rations to the consumers. The fundamental right of traders like the petitioners to carry on business and foodstuffs was in no way effected. They could carry on trade in foodstuffs without hinderance as dealers, only, they could not run fair price shops as agents of the Government. No one could claim a right to run a fair price shop as an agent of the Government. All that he could claim was a right to be considered to be appointed as an agent of the Government to run a fair price shop. If the Government took a policy decision to prefer consumers' cooperative societies for appointment as their agents to run fair price shops, in the light of the frustrating and unfortunate experience gathered in the last two decades, there can be no discrimination."

362. In (1986) 3 SC 398 Hindustan Paper Corporation Ltd. v. Government of Kerala, the Supreme Court held that in appropriate cases in order to place an industry owned by the Government on an enduring basis in the national interest, some concessions could be shown to it. It was further held that the preference shown to government companies cannot be considered to be discriminatory as they stand in a different class altogether and the classification made between government companies and the others for the purpose of the statute in question was a valid one.

363. Again while dealing with the preference given by the Government of Kerala to the institutions run by the cooperative societies in supply of pump sets, the Supreme Court in Krishnan Kakkanth v. Government of Kerala cited with approval the principles laid down by the Supreme Court in an earlier judgment rendered in Saghir Ahmad v. State of U.P. reported at . In Krishnan Kakkanth's case (supra), the court cited with approval the following principles from the earlier case:

28. Under Clause (1)(g) of Article 19, every citizen has a freedom and right to choose his own employment or take up any trade or calling subject only to the limits as may be imposed by the State in the interests of public welfare and the other grounds mentioned in Clause (6) of Article 19. But it may be emphasised that the Constitution does not recognise franchise or rights to business which are dependent on grants by the State or business affected by public interest.

364. Disparities in price which were permitted between supplies to public sector undertakings and private industries was upheld in the 1990 Supp SCC 397 Oil & Natural Gas Commission v. Assn. of Natural Gas Consuming Industries of Gujarat. The Apex Court held that a favorable treatment of public sector organisations, particularly the ones dealing with essential commodities or services, would not be discriminatory.

365. From the principles laid down by the Apex Court in the aforenoticed decisions, it is clear that such decision which would partially affect the sale prospects of a company, cannot be equated with creation of a monopoly. In each of the cases above, the decision was based on considerations of public interest and furtherance of interest of the State. Thus, it has been held that preference shown to cooperative institutions or public sector undertakings being in public interest, would not be construed as arbitrary so as to give rise to a contention of violation of Article 14 of the Constitution as the same is in public interest.

366. The aforenoticed principles of the Apex Court were reiterated in entitled Indian Drugs & Pharmaceuticals Ltd. and Ors. v. Punjab Drugs Manufacturers Association and Ors. wherein the court rejected a challenge to the decision of the State Government to purchase certain medicines for government hospitals and dispensaries only from public sector companies or companies in which the State had substantial interest. The Supreme Court had held that such a policy neither created a monopoly in favor of public sector undertakings nor was discriminatory. Such a policy merely created a small captive market in favor of State owned undertakings out of a larger market and consequently could hardly be termed as creation of a monopoly.

367. These principles however shall not arise in a case as the present where the court is concerned with the action of the state with reference to picking and choosing of private individuals to award contracts as the court was not dealing with a case in which the State chose to make a classification between a private manufacturer and a public sector undertaking. In such a case, the principles laid down by the Apex Court in Ramana Dayaram Shetty v. International Airport Authority of India would apply.

368. In the case in hand, the MCD has made a choice not between a cooperative society, public sector undertaking or an undertaking in which the state or a statutory authority had substantial interest on the one hand and private organisations on the other. The MCD has made a choice between different non-governmental organisations concerned with the work of running, operating and maintaining toilet complexes. Therefore, the considerations which weighed with the Apex Court in holding that it was permissible for the authority to choose or create a "captive market" in respect of the services may not apply.

The question which remains to be answered is whether such a choice can be effected even if a monopoly is created, having regard to the nature of service or facility which was to be provided to the public at large?

369. It has been pointed out that without undertaking any survey or inspection or even examining as to on whom fault was attributable, on the submission of Sulabh that taking only 364 CTCs was not a viable proposition and that all 959 CTCs be given to it on the thirty year lease without any license fee, the decision was taken by the MCD to allocate all 1963 CTCs to Sulabh.

In respect of most of these CTCs, MCD was not complaining of any difficulty whatsoever.

370. Mr. Jayant Bhushan, learned senior counsel for some of the petitioners has also pointed out that the MCD by its decision has completely abdicated what are stated to be the obligatory function of the MCD. Allotment based on cross subsidization was introduced at the instance of Sulabh. No assessment of the expenditure involved in undertaking the repairs and provision of the electricity, water, septic tank was undertaken nor the revenue which could be earned from advertising calculated or estimated. A blanket decision was taken to grant of these rights to Sulabh at the demand of the same raised by the organization. Sulabh was required to conduct the survey and inspection. After the decision was taken to cancel the contract, then steps taken to undertake a survey and to issue notices to the petitioners as noticed hereinabove.

371. A stand has been taken on behalf of the Municipal Corporation of Delhi that under Clause 10 of the agreement with the NGOs; the NGO was required to ask for advertising rights in respect of the CTCs and that since no NGO asked for such right, none was permitted to advertisement.

In this behalf, the Jan Sudhar Committee, petitioner in W.P.(C) 13389/2004 has submitted that it asked for advertisement rights but its request were completely ignored by the MCD.

372. Exercise of power is tested before the courts on whether relevant considerations have gone in and irrelevant considerations kept out of determination. It is equally well settled that reasonableness for purposes of judging whether there was an 'excess of power' or an 'arbitrary' exercise of it, is really the demonstration of a reasonable nexus between the matters which are taken into account in exercising a power and the purposes

of exercise of that power (Ref: (1974) 2 SCC 630 at para 13, Saraswati Industries Syndicate Ltd. v. Union of India).

373. In (1989) 4 SCC 187 Supreme Court Employees' Welfare Association v. Union of India and Anr., it was held that an act is ultra vires either because the authority has acted in excess of its power in the narrow sense, or because it has abused its power by acting in bad faith or for an inadmissible purpose or on irrelevant grounds or without regard to relevant considerations or with gross unreasonableness. These principles were laid down by Lord Greene M.R. in Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation in (1947) 2 All ER 680.

Power is exercised in bad faith where its repository is motivated by personal animosity towards those who are directly affected by its exercise. Power is no less abused even when it is exercised in good faith but for an unauthorized purpose or on irrelevant grounds etc. It was so stated by Lord Macnaghten in Westminster Corporation v. London and North Western Railway Co. in 1905 AC 426.

374. The principles were restated by the Apex Court in , Barium Chemicals Ltd. v. Company Law Board thus:

Even if (the statutory order) is passed in good faith and with the best of intention to further the purpose of the legislation which confers the powers, since the Authority has to act in accordance with and within the limits of that legislation, its order can also be challenged if it is beyond those limits or is passed on grounds extraneous to the legislation or if there are no grounds at all for passing it or if the grounds are such that no one can reasonably arrive at the opinion or satisfaction it can well be said that the authority did not honestly form its opinion or that in forming it, it did not apply its mind to the relevant facts.

375. The power of judicial review can be exercised suo moto if an illegality is brought to the notice of the court. It was so held in K.K. Bhalla v. State of M.P.(para 74); Sham Lal v. Atme Nand Jain Sabha (Retd.); Chairman & M.D., BPL Ltd. v. S.P. Gururaja; Devaswom Managing Committee v. C.K. Rajan.

376. The position of the MCD therefore has to be tested in the light of these well settled and binding principles of law. In (2003) 8 SCC 5 M & T Consultants, Secunderabad v. S.Y. Nawab, the court held thus:

17. A careful and dispassionate assessment and consideration of the materials placed on record does not leave any reasonable impression, on the peculiar facts and circumstances of this case, that anything obnoxious which requires either public criticism or condemnation by courts of law had taken place. It is by now well settled that non-floating of tenders or absence of public auction or invitation alone is no sufficient reasons to castigate the move or an action of a public authority as either arbitrary or unreasonable or amounting to mala fide or improper exercise or improper abuse of power by the authority concerned. Courts have always leaned in favor of sufficient latitude being left with the authorities to adopt their own techniques of management of projects with concomitant economic expediencies depending upon the exigencies of a situation guided by appropriate financial policy in the best interests of the authority motivated by public interest as well in undertaking such ventures.

377. So far as the provision of toilet complexes is concerned, the same is in the nature of provision of an essential facility to the general public. In ONGC v. Association of Natural Gas Consuming Industries of Kerala 1990 Supp. SCC 317, the Apex Court upheld disparity in principles between supplies effected to public sector undertakings and public utilities. The court defined a public utility in para 20 at page 416 of the report thus:

Public Utility - A privately owned and operated business whose services are so essential to the general public as to justify the grant of special franchises for the use of public property or of the right of eminent domain, in consideration of which the owners must serve all persons who apply, without discrimination. It is always a virtual monopoly.

378. In K.K. Bhalla v. State of M.P. and Ors., a challenge was laid to the allotment of land by the State of M.P. in favor of the proprietor of a newspaper and a charitable organisation inter alia on the ground that the grant of rebate in the premium and the ground are violated on the statutory norms, hence was violative of Article 14 of the Constitution. The private respondents urged that the allotment was as per the policy of the respondents and hence amenable to judicial review.

The court held that the State and the development agencies being creators of the statute were bound to act within the four corners thereof. Procedures for disposal of land having been laid down in the rules, power in that behalf was required to be exercised strictly in conformity thereof and not de hors the same. The court further held that the policy decision relied upon by the respondents was ultra vires being contrary to the statutory rules and consequently no direction for allotment could be made pursuant to such a policy. Any action by way of a policy decision or otherwise at the hands of the statutory authority must be in consonance with the statutory rules and not de hors the same.

379. It is well settled that public orders, publically made in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officers making the order of what he meant, or what was in his mind; or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the actions and conduct of those to whom they are addressed and must be construed objectively with reference to the language in the order itself. It was so held in Commissioner of Police v. Gordhandas Bhanji.

In Mohinder Singh Gill v. Chief Election

Commissioner, the court further observed that "orders are not like old wine becoming better as they grow older" and held thus:

8. The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose, J. in Gordhandas Bhanji.

These principles were followed by the Apex Court in Bahadursinh Lakhubhai Gohil v. Jagdishbhai M. Kamalia and (at p. 639) Hindustan Petroleum Corpn. Ltd. v. Darius Shapur Chenai.

380. From the foregoing discussion, there was nothing before the Commissioner, MCD on 3rd January, 2004 or 30th April, 2004 to the effect that all the NGOs were incapable of providing the necessary service or were defaulters, there was no material to this effect even before the Sub-Committee which submitted its report in July, 2004 or before the Full House of the Corporation when it took the decision in October, 2004. Two questions required to be answered which were : firstly, whether all the NGOs were incapable of operating and maintaining the CTCs and were defaulters? Secondly, whether Sulabh was the best suited and the only organisation capable of providing the requisite services? In the light of the material which has been placed before this Court and the reasoning given in the decisions placed before this Committee, the answer to both these questions is clearly in the negative and has to be an emphatic No. In view of the principles laid down by the Apex Court, so far as material supporting decision is concerned, therefore, it is apparent that the MCD cannot support its decisions with its assessments, reasons and tabulations given in the counter affidavits or the written submissions filed before this Court.

381. Mr. Jayant Bhushan, learned senior counsel appearing for the petitioner has urged that in view of the respondents stand that the decision was a collective decision, it is not the petitioner's case that personal malafides are attributable to any person. It is urged that in the instant case, the decision to take away the CTCs from all the NGOs and hand them over to Sulabh suffers from gross legal malafides.

382. In K.K. Bhalla v. State of M.P., the court further held that malice may either be on fact or in law. Passing of an order for unauthorised purpose constitutes malice in law (see Punjab SEB Ltd. v. Zora Singh ; Union of India v. V. Ramakrishnan).

383. It would be useful to consider the principles laid down by the Apex Court in . S.R. Venkataraman v. Union of India and Anr. wherein the court stated thus:

5. We have made a mention of the plea of malice which the appellant had taken in her writ petition. Although she made an allegation of malice against V.D. Vyas under whom she served for a very short period and got an adverse report, there is nothing on the record to show that Vyas was able to influence the Central Government in making the order of premature retirement dated March 26, 1976. It is not therefore the case of the appellant that there was actual malicious intention on the part of the Government in making the alleged wrongful order of her premature retirement so as to amount to malice in fact. Malice in law is, however, quite different. Viscount Haldane described it as follows in Shearer V. Shields, (1914) AC 808 at p. 813:

A person who inflicts an injury upon another person in contravention of the law is not allowed to say that he did so with an innocent mind; he is taken to know the law, and he must at within the law. He may, therefore, be guilty of malice in law, although, so far the state of his mind is concerned, he acts ignorantly, and in that sense innocently.

Thus, malice in its legal sense means malice such as may be assumed from the doing of a wrongful act intentionally but without just cause or excuse, or for want of reasonable or probable cause.

6. It is however not necessary to examine the question of malice in law in this case, for it is trite law that if a discretionary power has been exercised for an unauthorised purpose, it is generally immaterial whether its repository was acting in good faith or in bad faith. As was stated by Lord Goddard C.J., in Pilling v. Abergele Urban District Council, (1950) 1 KB 636 where a duty to determine a question is conferred on an authority which state their reasons for the decision, "and the reasons which they state show that they have taken into account matters which they ought not to have taken into account, or that they have failed to take matters into account which they ought to have taken into account, the court to which an appeal lies can and ought to adjudicate on the matter."

7. The principle which is applicable in such cases has thus been stated by Lord Esher M.R. in The Queen on the Prosecution of Richard Westbrook v. The Vestry of St. Pancras (1890) 24 QBD 371 at p. 375:

If people who have to exercise a public duty by exercising their discretion take into account matters which the Courts consider not to be proper for the guidance of their discretion then in the eye of the law they have not exercised their discretion.

This view has been followed in Sedler v. Sheffield Corporation (1924) 1 Ch 483.

8. We are in agreement with this view. It is equally true that there will be an error of fact when a public body is prompted by a mistaken belief in the existence of a non-existing fact or circumstance. This is so clearly unreasonable that what is done under such a mistaken belief might almost be said to have been done in bad faith; and in actual experience, and as things go, these may well be said to run into one another.

384. In The Collector (District Magistrate) Allahabad and Anr. v. Raja Ram Jaiswal, court held that:

26. Where power is conferred to achieve a purpose has been repeatedly reiterated that the power must be exercised reasonably and in good faith to effectuate a purpose. And in this context 'in good faith' means 'for legitimate reasons'! Where power is exercised for extraneous or irrelevant considerations or reasons, it is unquestionably a colourable exercise of power or fraud on power and the exercise of power is vitiated. If the

power to acquire land is to be exercised, it must be exercised bona fide for the statutory purpose and for none other. If it is exercised for an extraneous, irrelevant or non-germane consideration, the acquiring authority can be charged with legal mala fides. In such a situation there is no question of any personal ill-will or motive. In Municipal Council of Sydney v. Campbell 1925 AC 338 at p. 375 it was observed that irrelevant considerations on which power to acquire land is exercised, would vitiate compulsory purchase orders or scheme depending on them. In State of Punjab v. Gurdial Singh acquisition of land for constructing a grain

market was challenged on the ground of legal mala fides. Upholding the challenge of this Court speaking through Krishna Iyer, J. explained the concept of legal mala fides in his hitherto inimitable language, diction and style and observed as under (at page 321 of AIR):

Pithily put, bad faith which invalidates the exercise of power - sometimes called colourable exercise or fraud on power and oftentimes overlaps motive, passions and satisfactions - is the attainment of ends beyond the sanctioned purposes of power by simulation or pretension of gaining a legitimate goal. If the use of the power is for the fulfillment of a legitimate object the actuation or catalysation by malice is not legicidal. The action is bad where the true object is to reach an end different from the one for which the power is entrusted, goaded by extraneous considerations, good or bad, but irrelevant to the entrustment. When the custodian of power is influenced in its exercise by considerations outside those for promotion of which the power is vested the court calls it a colourable exercise and is undeceived by illusion. In a broad, blurred sense Benjamin Disraeli was not of the mark even in Law when he stated: "I repeat...that all power is a trust - that, from the people, and for the people, all springs, and all must exist.

After analysing the factual matrix, it was concluded that the land was not needed for a Mandi which was the ostensible purpose for which the land was sought to be acquired but in truth and reality, the Mandi need was hijacked to reach the private destination of depriving an enemy of his land through backseat driving of the statutory engine. The notification was declared invalid on the ground that it suffers from legal mala fides. The case before us is much stronger, for more disturbing and unparalleled in influencing official decision by sheer weight of personal clout. The District Magistrate was chagrined to swallow the bitter pill that he was forced to acquire land even though he was personally convinced there was no need but a pretence. therefore, disagreeing with the High Court, we are of the opinion, that the power to acquire land was exercised for an extraneous and irrelevant purpose and it was colourable exercise of power, namely, to satisfy the chagrin and anguish of the Sammelan at the coming up of cinema theater in the vicinity of its campus, which it vowed to destroy. Therefore, the impugned notification has to be declared illegal and invalid for this additional ground.

385. It has been urged at great length by Mr. P.N. Lekhi, learned senior counsel that in view of the provisions of Article 243R of the Constitution of India, the MCD acquires the status of a local self government and its policy decision is not amenable to judicial review. It has been alleged that the policy decision has been taken by a duly elected representative opted which is not amenable to judicial review. In this behalf, reliance has been placed on the pronouncement of the Apex Court in (2005) 5 SCC 409 (paras 18 to 25) Ramesh Mehta v. Sanwal Chand Singhvi.

It has been urged that in view of the constitutional provision after the 74th Amendment Act of 1994, the panchayats and corporation became authorities under the Constitution and a policy decision taken by them could not be impugned.

In this case, the Apex Court had occasion to examine a challenge to the elections to the municipal board. This judgment has no application in the facts and circumstances of the present case. Furthermore, the decision is no where akin to legislation or quasi-legislation or even a policy decision as has been noticed hereinabove.

386. As per the constitutional scheme, and the binding principles of law laid down by the Apex Court, even an Act of Parliament in effectuating legislation is open to judicial review on grounds of violation of Article 14. This being the position in law, it certainly cannot be urged that the decision of the MCD to award to the

contract of running and maintenance of CTCs to a particular person is not amenable to judicial review in the light of the position of the MCD by virtue of Article 243R of the Constitution.

For the same reason, the principles laid down in .

Narain Singh v. State of U.P. and 2003 2 All.E.R. 497 Sheldrake v. Directorate of Public Prosecution would have no application.

387. This contention must fail for yet another reason. Learned senior counsel appearing for the MCD had submitted that it does not support the submission on behalf of Sulabh in this behalf. It was urged that the decision urged on behalf of the MCD was an administrative decision and amenable to limited scrutiny by the courts as has been noticed in the judgments relied upon on behalf of the MCD. The members of the Municipal Corporation of Delhi even though they are elected, while taking decision as in the instant case, certainly are not rendered as legislators and have not made any laws which have been impugned before this Court.

In this behalf, even in the pronouncement relied upon by Mr. P.N. Lekhi, learned senior counsel appearing for Sulabh in Municipal Corporation of Delhi v. Birla Cotton & Spinning Mills, the Apex Court noticed that it is only in Chapter VIII of the Delhi Municipal Corporation Act that the corporation has powers to frame rights etc which amount to subordinate legislation.

388. Mr. P.N. Lekhi, learned senior counsel has urged that the decision of the Commissioner of the MCD was dispassionate and made in the facts and circumstances on record in public interest. It has been urged that the same cannot be impugned even on grounds of bias. In this behalf reliance was placed on M.P. Special Police

Establishments v. State of M.P. No such argument has been laid before this Court by the petitioners.

389. It now becomes necessary to examine the position of law in respect of the last contention urged on behalf of the Sulabh Sauchalya. It has been urged that even if this Court was to hold against the respondents on all the other contentions, even then the present case is not a fit case for exercise of the extraordinary writ jurisdiction of this Court under Article 226 of the Constitution of India. Undoubtedly, there is a distinction between writs which are issued as a matter of right, such as a writ of habeas corpus and those issued in its exercise of discretion such as certiorari and mandamus. The jurisdiction to do so has been conferred upon the High Court under Article 226 of the Constitution of India whereby the High Court exercises control over, inter alia, Government functioning and enforces obedience of laws and rules by enforcing proper, fair and just good of it. Where the Government or any authority passes an order which is contrary to rules or law, it becomes amenable to correction by the courts in exercise of writ jurisdiction. But one of the principles inherent in it is that the exercise of power should be for the sake of justice.

390. In State of Maharashtra and Ors. v. Prabhu, the Apex Court held that one of the principles inherent in the exercise of the High Court powers under Article 226 should be for the sake of justice. One of the yard sticks for it is, if the quashing of the orders results in greater harm of the society then the Court may restrain from exercising the power.

On this test the Apex Court in Prabhu's case(supra) held that the social injury by appointing the respondent to an office of responsibility as a member of the Board, when he had been found responsible for mass copying at the examination centre of which he was a supervisor, would be more harmful to the society. The social injury by nominating or appointing the respondent to an office of such responsibility would not only have raised eyebrows in the educational circles but would have created an unhealthy atmosphere and shaken the confidence and faith of the society in the system and was prone to encouraging even the honest and sincere to deviate from their path. As a custodian of the Constitution, it is the responsibility of the High Court to maintain a social balance by interfering where necessary for the sake of justice and refusal to do so where it is against the social interest and the public good.

391. It would be appropriate to notice the observations of the Apex Court in Ramnik Lal Butta's and Anr. v. State of

Maharashtra wherein the Apex Court laid down the principle that it is not necessary for a court exercising jurisdiction in equity to grant a relief prayed for merely on the making out of a legal point, if the larger interests of the public so require. It was held that public interest would over ride any considerations of individual interest. In the judgment of the court reported at Ramniklal N. Bhutta and Anr. v. State of Maharashtra and Ors., the Supreme Court observed thus:

10. Before parting with the case, we think it necessary to make a few observations relevant to land acquisition proceedings. Our country is now launched upon an ambitious programme of all-round economic advancement to make our economy competitive in the world market. We are anxious to attract foreign direct investment to the maximum extent. We propose to compete with China economically. We wish to attain the pace of progress achieved by some of the Asian countries, referred to as "Asian Tigers", e.g., South Korea, Taiwan and Singapore. It is, however, recognised on all hands that the infrastructure necessary for sustaining such a pace of progress is woefully lacking in our country. The means of transportation, power and communications are in dire need of substantial improvement, expansion and modernisation. These things very often call for acquisition of land and that too without any delay. It is, however, natural that in most cases, the persons affected challenge the acquisition proceedings in courts. These challenges are generally in the shape of writ petitions filed in High Courts. Invariably, stay of acquisition is asked for and in some cases, orders by way of stay or injunction are also made. Whatever may have been the practices in the past, a time has come where the courts should keep the larger public interest in mind while exercising their power of granting stay/injunction. The power under Article 226 is discretionary. It will be exercised only in furtherance of interests of justice and not merely on the making out of a legal point. And in the matter of land acquisition for public purposes, the interests of justice and public interest coalesce. They are very often one and the same. Even in a civil suit, granting of injunction or other similar orders, more particularly of an interlocutory nature, is equally discretionary. The courts have to weigh the public interest vis a vis the private interest while exercising the power under Article 226 - indeed any of their discretionary powers. It may even be open to the High Court to direct, in case it finds finally that the acquisition was vitiated on account of non-compliance with some legal requirements that the persons interested shall also be entitled to a particular amount of damages to be awarded as a lump sum or calculated at a certain percentage of compensation payable. There are many ways of affording appropriate relief and redressing a wrong; quashing the acquisition proceedings is not the only mode to redress. To wit, it is ultimately a matter of balancing the competing interests. Beyond this, it is neither possible nor advisable to say. We hope and trust that these considerations will be duly borne in mind by the courts while dealing with challenges to acquisition proceedings.

In the instant case, public interest requires intervention by this Court.

392. It is well settled that a writ shall not be issued where writ jurisdiction has been invoked to secure a dishonest advantage or to perpetuate an unjust gain (Re: M.P. Mittal v. State of Haryana).

393. In Union of India v. SB Vohra (para 28 & 30), the Apex Court noticed that the broad principles of judicial review into administrative actions as were stated by Lord Diplock in Council of Civil Services Unions v. Minister for the Civil Services 1984(3) All ER 935 being legality, irrationality and procedural impropriety have greatly been over taken by other developments generally as, for example, not only in relation to proper and human rights but also in the direction of principles of legal certainty notably legitimate expectations.

Thus the parameters, scope and efficiency of judicial review, which has roots long back as a highly complex and constantly developing subject, has expanded from case to case. It is settled law that courts in exercise of its powers in judicial review would zealously guard human rights, fundamental rights and the citizens rights of life and liberty as also many non-statutory powers of governmental bodies as regard their control over property and assets of various kinds which can be extended to other hostile rights and the like or overseas aid

or compensating victims of crime.

The power of judicial review has been circumscribed by the restraint which courts would exercise in ensuring that they do not step outside the area of their institutional competence.

394. So far as the decision in AIR 1968 SCC 1232 MCD v. Birla Cotton, Spinning and Weaving Mills (supra) relied upon on behalf of Sulabh is concerned, the Apex Court was examining the constitutionality of Section 150 of the DMC Act 1957. It was held that by Section 150 of the DMC Act, the power was conferred on the MCD to levy any of the optional taxes by prescribing the maximum rights of tax to be levied and to fix class of persons and description of articles/properties to be taxed etc. It was held that such power was not unguided and could not be said to amount to excessive delegation. The legislative policy was found to be provided with sufficient safeguards and controls and that therefore the courts should not interfere.

395. In the instant case there is no such challenge and the issues which were raised before the Apex Court do not arise for consideration before this Court. It was only observed by the Court that in order to discharge its obligatory functions the MCD had the legal competence to raise funds to discharge the same.

396. I find that in MCD v. Birla Cotton Spinning & Weaving Mills (supra), the Apex Court held that in the matter of fixing of rates by the Corporation, the legislature had made the government the watch dog to control the actions of the Corporation in the matter of fixing rates and other instances of taxes as a check to see that reasonable rates are fixed by the Corporation when it proceeds to impose taxes under Section 150.

The Supreme Court held that finally there is another check on the power of the Corporation which is inherent in the matter of exercise of powers by subordinate public representative bodies such as municipal boards. In such cases if the act of such a body in the exercise of the power conferred on it by the law is unreasonable, the Courts can hold that such exercise is void for unreasonableness. It was held that an unreasonable tax can be considered by the courts but it must clearly be an exorbitant tax which goes so high as to be extortionate.

In my view, therefore, this judgment also does not further the proposition urged on behalf of the Sulabh to the effect that a decision such as the one impugned in these proceedings taken by the MCD would be totally beyond the pale of judicial review.

In view of this position in law, the judgments in

also do not support any of the contentions urged on behalf of M/s Sulabh International Social Services Organisation.

397. It has also been argued on behalf of the MCD that the petitioners cannot approbate and reprobate at the same time and MCD had a right under the Contract to terminate the same.

398. Placing reliance on the principles of Section 62 and 63 of the Contract Act, it has been urged that the petitioners had no right to approbate and reprobate at the same time. Having accepted the terms and conditions of allotment of the CTCs, it was not open for the petitioners to avoid their liabilities there under or assert that the agreements were void for the purposes of securing some other benefit or advantage. In support of this submission, reliance has been placed by Mr. Valmiki Mehta, learned senior counsel on the pronouncement of the Apex Court in Nagubai Ammal v. B. Shama Rao.

399. From a reading of this pronouncement, it is apparent that what is prohibited is having elected to take benefit of a transaction, it is not open to the same party to assert that the same was void in order to secure some other advantage. In the instant case, the petitioners have contended that they were the recipients of the allotments by the MCD, but on account of certain action and deficiencies, the MCD had itself proposed to vary the liabilities of the petitioners. In this behalf, reliance has been placed on minutes of certain meetings

between the parties and communications of the officers of the MCD. It is not the petitioner's contention that the contracts between them were void for any reason.

400. For the same reason, the pronouncement of the Apex Court in Ningava v. Virappa Shitappa relied upon by the MCD

would have no application. In the judgment before the Apex Court a challenge to a gift deed on the ground that the same was the result of perpetration of fraud was under consideration. It is well established that a contract or other transaction induced or tainted by fraud is not void but only voidable at the option of the party defrauded. It was held that until the transaction is avoided, it is valid, so that third parties without notice of the fraud may in the meantime acquire rights and interest in the matter, which they may enforce against the parties defrauded. There is no such contention in the instant case on behalf of the petitioners.

401. In New Bihar Bidi Leaves Company and Ors. v. State of Bihar and Ors., a challenge was laid to the constitutional validity of certain rules framed by the State of Bihar under the Bihar Kendu Leaves(Control of Trade) Act, 1973; Clause 13 and Clause 4(bb) of the tender notice and of the statutory agreement notified by the Bihar Government in the Bihar Government Gazzette and also the notices of demand issued under the impugned provisions demanding royalty from the petitioners in respect of the undelivered quantity of Kendu leaves.

At the time of inviting tenders in the prescribed form inviting purchasers to bid at the public auction, all tenderers or bidders are treated equally when they offered their rates or bids subject to statutory conditions including the impugned provision. It was not possible to classify purchases as was being contended by the petitioners between those whose offer/bids has been accepted into 'honest' purchasers or 'dishonest' purchasers. It was secondly held that if a person with his eyes open tenders and gives the highest bid at a public auction, of his own accord, it will be assumed that it is so because in his own estimation, the acceptance of the contract at those rates and subject to the notified terms and conditions, would afford him a reasonable scope for making profit.

It was lastly held that it is the fundamental principle of general application that if a person of his own accord, accepted a contract on certain terms and works out the contract, he cannot be allowed to adhere to and abide by some of the terms of the contract which prove advantageous to him and repudiate the other terms of the same contract which might be disadvantageous to him. The court applied the maxim qui approbat non reprobat i.e. to say that one who approbates, cannot reprobate.

Applying this principle, the court noticed that when the petitioners who had all offered highest bids by participation in the public auctions or by tenders, had accepted and worked out the contracts in the past but who were now resisting the demands or other actions arising out of impugned condition contained in Clause 13 on the ground that the same was violative of Article 19(1)g and Article 14.

402. The respondents have also placed reliance on the pronouncement of the Apex Court in Bhagat Ram Batra v. Union of India and Ors. In this case, the petitioner who was the auction purchaser repudiated the action on the ground that the area of the property was less than that represented at the time of the sale. At his instance, the respondents cancelled the auction sale in his favor. Subsequently, Realizing that the value of the property had appreciated and he should not have asked for cancellation of the sale in his favor, the appellant made an offer that he was prepared to accept the property in dispute if rehabilitation authorities allow proportionate reduction in the price offered by him on account of the fact that the area of the property had been found to be less than what had been represented at the time of the auction sale. By this time, the property had been resold and fetched a price of Rs. 10,1000/- against the price of Rs. 72,700/- offered by the appellant. It was in these facts, that the Apex Court held that it was open to the state to refuse to accept the conditional offer and cancel the sale and order resale.

The Apex Court has thus noticed that as per this maxim a party to an instrument or transaction cannot take advantage of one part of the document or transaction and reject the rest i.e. to say no party can accept and reject the same instrument or transaction. In this case, the Apex Court also noticed that a person cannot be debarred from enforcing his fundamental rights on the grounds of estoppel or waiver.

No principles of law has been laid down in this pronouncement and the same are clearly distinguishable from the facts of the instant case. It has been pointed out by Mr. Jayant Bhushan, learned senior for the petitioners that the petitioners could not and did not give up or abandon the contracts on account of the MCD's representation that the defects in the toilets would be repaired and removed.

403. It is to be noticed that in the present case, the petitioners are not contending that any term in the transaction is void. They are also not seeking to avoid the contract. On the contrary, their contention is that the MCD had agreed to relieve them of certain obligations which they had undertaken under the agreement on account of certain ground realities and existing facts. In my view, for this reason, the principle laid down by the Apex Court in these cases would have no application to the facts and circumstances of the present case which have been detailed at length above. The petitioners have also not contended that any of the condition of the agreement are violative of Article 19(1)g or Article 14 of the Constitution of India. There is no challenge to the terms and conditions of either the auction or the license agreement.

404. In Assistant Excise Commissioner and Ors. v. ISSAC Peter and Ors., the court was concerned with the attempt of the contractors to wriggle out of contractual obligations on pleas of promissory estoppel and based on the rule of legitimate expectation with regard to possible profits which they could make. In these circumstances, the court had observed thus:

21. There is yet another reason which militates against the licensees herein. Even according to them there was scarcity of arrack during the months of February and March 1981, i.e., towards the end of the previous excise year. It is also their case that auctions had to be postponed repeatedly half the shops in the State could not be sold during that excise year for the very same reason. It is equally clear that the intending bidders were not prepared to implicitly believe the statement of the Minister for Excise made on March 19, which is evident from the fact that no bidders were present on the adjourned date of auction, viz., March 26, 1981. We do not know what circumstances weighed with the respondent in offering his bids on the third date of auction March 27, 1981. The respondent attributes it to the assurance held out by the auctioning authorities. If he was not prepared to act upon the statement of the Minister for Excise, it is rather curious that he claims to have believed and acted upon the alleged assurance of the auctioning authorities. Having regard to the number of shops and the amounts of bids offered by the respondent, we would be justified in presuming that the respondent was an experienced businessman. It is unlikely that he - or for that matter, other licensees - believed implicitly the alleged assurance of the Excise Officers. As experienced businessmen they must have anticipated that there would be problems in supply since things cannot be rectified overnight. In any event, the only assurance was that the authorities would take steps to ensure additional supplies as in the previous year. It cannot be understood as a firm promise - assuming for the sake of argument that they were competent to hold out such promise (which we have found,t hey were not competent to). As a matter of fact, they did whatever they could. Whatever they could supply, they did supply. It is not a case where any essential term of contract was kept back or kept undisclosed. The Government had placed all their bids with their eyes open in the above circumstances they cannot blame anyone else for the loss, if any, sustained by them, nor are they entitled to say that license fee should be reduced proportionate to the actual supplies made. Question may arise, proportionate to what? Proportionate to their demand, proportionate to previous year's supply or proportionate to the average of previous three years' supplies?

22. xxx

23. Maybe these are cases where the licensees took a calculated risk. Maybe they were not wise in offering their bids. But in law there is no basis upon which they can be relieved of the obligations undertaken by them

under the contract. It is well known that in such contracts - which may be called executory contracts - there is always an element of risk. Many an unexpected development may occur which may either cause loss to the contractor or result in large profit. Take the very case of arrack contractors. In one year, there may be abundance of supplies accompanied by good crops induced by favorable weather conditions; the contractor will make substantial profits during the year. In another year, the conditions may be unfavorable and supplies scarce. He may incur loss. Such contracts do not imply a warranty - or a guarantee - of profit to the contractor. It is a business for him - profit and loss being normal incidents of a business. There is no room for invoking the doctrine of unjust enrichment in such a situation. The said doctrine has never been invoked in such business transactions. the remedy provided by Article 226, or for that matter, suits, cannot be resorted to wriggle out of the contractual obligations entered into by the licensees.

Again this pronouncement has no application to the present case. The petitioners before this Court have merely placed reliance on the acceptance on the part of the respondents to the effect that there were CTCs which were not functional for reasons which were not attributable to the NGOs. The officers of the MCD had also accepted this position and had stated that the same dues which were payable by the NGOs would be postponed. It is this issue which has to be considered by this Court. The present case is thus clearly distinguishable from Isac Peter's case.

405. Mr. Valmiki Mehta, learned senior counsel representing the MCD has urged vehemently that the petitioners had no rights to unilaterally alter their obligations under the contract. In this behalf, reliance has been placed on City Bank NA v. Standard Chartered Bank and Ors. to urge that novation, decision and alteration of contract can be done only with the agreement of both parties and not unilaternally under Section 62 of the Indian Contract Act. Both parties have to agree to substitute the original contract with a contract or resent or alter the same. It was urged that however, under Section 63, unlike Section 62, a promisecan unilaterally and may

(i) dispense with wholly or in part or

(ii) remit wholly or in part,

(iii) the performance of the promise made to him or

(iv) may extend the time for said performance or

(v) may accept instead of it in satisfaction which he thinks fit.

Again this submission has to be tested in the light of the contention of the petitioners who have contended that the admitted position was that the large number of CTCs were not functional and it was not the petitioners who were responsible for novation or recessation or alteration of the contract but it was the representation of the respondent themselves.

406. So far as the pronouncement of Asia Foundation and Contract Limited v. Trafalgar House Construction Limited and Ors. is concerned, the Apex Court was examining the

permissible limits of interference by a court of law in a matter relating to award of contract. In this context, recognising the well established parameters of judicial review, in matters relating to grant of contracts, the court held thus:

9. The Asian Development Bank came into existence under an Act called the Asian Development Act, 1966, in pursuance of an international agreement to which India was a signatory. This new financial institution was established for accelerating the economic development of Asia and the Far East. Under the Act the Bank and its officers have been granted certain immunities, exemption and privileges. It is well known that it is difficult

for the country to go ahead with such high cost projects unless the financial institutions like the World Bank or the Asian Development Bank grant loan or subsidy, as the case may be. When such financial institutions grant such huge loans they always insist that any project for which loan has been sanctioned must be carried out in accordance with the specification and within the scheduled time and the procedure for granting the award must be duly adhered to. In the aforesaid premises on getting the evaluation bids of the appellant and Respondent 1 together with the consultant's opinion after the so-called corrections made the conclusion of the Bank to the effect "the lowest evaluated substantially responsive bidder is consequently AFCONS" cannot be said to be either arbitrary or capricious or illegal requiring Court's interference in the matter of an award of contract. There was some dispute between the Bank on one hand and the consultant who was called upon to evaluate on the other on the question whether there is any power of making any correction tot he bid documents after a specified period. The High Court in construing certain clauses of the bid documents has come to the conclusion that such a correction was permissible and, therefore, the Bank could not have insisted upon granting the contract in favor of the appellant. We are of the considered opinion that it was not within the permissible limits of interference for a court of law, particularly when there has been no allegation of malice or ulterior motive and particularly when the court has not found any mala fides or favoritism in the grant of contract in favor of the appellant. In Tata Cellular v. Union of India this Court has held that:

The duty of the court is to confine itself to the question of legality. Its concern should be:

1. Whether a decision-making authority exceeded its powers,

2. committed an error of law,

3. committed a breach of the rules of natural justice,

4. reached a decision which no reasonable tribunal would have reached or,

5. abused its powers.

Therefore, it is not for the Court to determine whether a particular policy or particular decision taken in the fulfillment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. the extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under:

(i) Illegality: This means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it;

(ii) Irrationality, namely, Wednesbury unreasonableness.

(iii) Procedural impropriety.

The above are only the broad grounds but it does not rule out addition of further grounds in course of time.

407. It is these well established principles which were to be applied to be facts of the instant case which I am required to examine.

408. The respondents have also placed strong reliance on the pronouncement of the Apex Court in Ganga Retreat Limited v. State of Rajasthan and Ors. to submit that the petitioners were wrong in urging that there were misrepresentations on the part of the respondent with regard to the possession of the CTCc. It has been urged that assuming, without admitting, that there was any misrepresentation, the petitioners had the option to either rescind the contract or seek restitution or to form the contract without prejudice to their right to seek damages by way of restitution for loss caused by the alleged misrepresentation. The petitioners conduct in

proceeding to take over possession of the CTCs amounts to affirmation of the contract which clearly evidences the fact that the petitioners did not rescind the contract nor reserved their right to seek restitution by award of damages or seek restitution. Rather they affirmed the contract and went ahead with it. Even at the time of initiating the legal proceedings in this Court, it was still open to the petitioners to either affirm the contract without prejudice to their right to seek damages by way of restitution for the loss caused by the alleged misrepresentation or to rescind the contract by getting a declaration that the contract was not binding on the petitioners. In this behalf, the respondents have placed reliance on the following observations of the Apex Court in Ganga Retreat & Towers Limited (supra):

24. It was then contended on behalf of the appellants that in the conveyance deed the FAR was again mentioned as 2.0 at that stage there was a clear misrepresentation by the respondent. To establish misrepresentation on this count reliance was placed on the provisions of the Indian Contract Act. There is no force in this submission. Statement about the existing state of the law innocently made cannot constitute misrepresentation if it is later found that the statement was erroneous. This would be particularly so where the other party to whom the statement is made is aware of or has the ability to conveniently apprise itself of the correct state of the facts and the law applicable. Assuming (but without holding) that there was some misrepresentation, the appellants had a couple of remedies i.e. to either rescind the contract or seek restitution or to affirm the contract without prejudice to their right to seek damages by way of restitution for the loss caused by the misrepresentation. It is apparent that the appellants did not rescind the contract or seek restitution by way of damages. Instead, they affirmed the contract which is clear from the fact that they immediately commenced construction on the land even though the building plans were on FAR 1.75. Affirmation of the contract and proceeding with the construction clearly indicates that the appellants did not rescind the contract nor reserved their right to seek restitution by award of damages; or seek restitution, rather they affirmed the contract and went ahead with it.

25. It was then argued that the appellants had to start construction immediately as a very strict stipulation was contained in the auction notice (Condition 9). It was also represented in the sale deed that construction work on the plot should be commenced within one year from the date of handing over of the possession of the land and the construction of building should be completed within three years. The extension beyond three years was to be given subject to payment of a penalty of Rs. 20,000/- per month but in no case the period would be extended beyond two years. Clause 13 of the terms of the auction also provided that any violation of any terms and conditions would lead to forfeiture of purchase of right of the property and the property would stand reverted to the Government without paying any compensation for the property. Because of the condition contained in Clauses 9 and 13 of the terms of auction, the appellants in spite of having knocked the doors of the court had to start with the construction otherwise they ran the risk of their right to the property being forfeited. We do not find any merit in this submission. At the time of initiating the legal proceedings in the court, it was open to the appellants to either affirm the contract without prejudice to their right seeking damages by way of restitution for loss caused by alleged misrepresentation or to rescind the contract by getting the declaration that the contract was not binding on the appellants. The appellants elected the first option. Had the appellants rescinded the contract and prayed for declaration that the contract was not binding on them, then, on its being so declared, Terms 9 and 13 of the auction notice would not have bound the appellants in any way. The court while granting the relief could have moulded the relief according tot he facts and situation prevalent. It would not have in any way affected the appellants. The appellants cannot be permitted to sit on the fence in indecision and take a chance. By putting up the construction of basement and the other floors above the appellants have encumbered the property. The respondent cannot be fastened with the liability to pay for the construction put up by the appellants with full knowledge of true facts.

409. In the light of these submissions, on behalf of the MCD, Mr. Jayant Bhushan, learned senior counsel appearing for the petitioners has stated that the Municipal Corporation of Delhi is a statutory authority and that there is an obligation on it to act reasonably and fairly in all its actions. The Municipal Corporation of Delhi fairly and honestly, accepted the faults in the CTCs and the default on the part of the construction agencies. In fact senior officers of the MCD called upon the executive engineers who admitted the faults in

the CTCs and said the same would be got rectified from the private contractor and that the petitioners would be required to make payments from the date of the rectification. It has been also vehemently urged that none of the petitioners were considered defaulter till after the MCD decided to hand over all the CTCs to Sulabh International. The admitted position is that the petitioners took over the CTCs with deficiencies in the civil construction as well as default on the part of the electrical constructions and deficiencies in the electrical work.

410. In fact, it has been pointed out that the writ petitioner in W.P. (C) 8517/2005 namely Arya Gram Udyog Vikas Samiti v. MCD in fact wrote to the Municipal Corporation of Delhi to take the CTCs back. In this behalf, this petitioner had addressed a letter dated 6th August, 2003 and other communications. The petitioners have contended that let alone take any action on the repeated requests of the petitioner which was made in the light of the deficiencies in the CTCs, the Municipal Corporation of Delhi till date has not bothered to even sent a reply to these communications of the petitioners.

On the contrary, the Municipal Corporation of Delhi after having taken the decision to arbitrarily and illegally hand over the CTCs to Sulabh International, addressed demand letter dated 1st April, 2005 and 8th April, 2005 raising demands towards the license fees.

In this background, the petitioner has certainly urged a relevant question as to how it could possibly be termed as a 'defaulter' when the MCD had itself failed to take back the possession of the CTCs despite a communication made as back as on 6th August, 2003 to it.

411. The petitioners have placed reliance also on the pronouncement of a single Bench of this Court in Gupta and Anr. v. The Delhi Development Authority. In this case, the Delhi Development Authority had conducted the auction of shops and offices on 'as is where is basis'. The respondent took more than three months to confirm the exact area of the shop for which they had successfully bid despite repeated letters to the DDA informing it that on inspection at the site, the area of the stall in question was comparatively much less than the area scheduled for the auction. The respondents contended that it was the duty of the petitioner to have inspected the premises before participating in the auction or could have sought clarification at the stage of the auction and it is not open to the petitioner to thereafter resile from the auction. The petitioner was not willing to accept such shop and sought refund of the amount deposited. The respondent DDA however cancelled the allotment and forfeited the earnest money resulting in ultimately the petitioner filing a writ petition seeking a direction to the DDA to refund the earnest money deposited by him Along with interest. In this regard, this Court held thus:

12. There is no doubt that as per the general terms and conditions the shops and stalls were auctioned on as is where is basis and it was stipulated that the petitioner shall be presumed to have inspected the shop in question. There was thus an obligation on the part of the petitioner to verify the position of the shop before participating in the bid. However, there is simultaneously an obligation on the part of the respondent to have given the correct description in question. Thus if there is some minor defect in the shop the auction purchaser should not wriggle out of the auction on the said ground since he is presumed to have inspected the shop in question. However, the area of the shop in question is certainly an aspect which cannot fall within the said category. An auction purchaser must know correctly the space sought to be auctioned. The details given by the respondent will be presumed to be correct. Thus it is not permissible for the respondent to contend that even if there is such a large difference in area the respondent is not concerned with the sames. The respondent is a public body and must act in a fair and reasonable manner. Thus form the basis of the judgment in Anis-ur-Reluna and Anr. v. DDA(supra). In the case of Vardhman Properties Limited (supra), the auction purchaser had not only paid the bid amount but also deposited the balance amount and it is two ;months later that the issues dof the areas was raised. It was in these circumstances that the observations were made by the learned Single Judge of this Court that the auction purchaser should have verified the correct facts at site specially when the bid is on as is where is basis. The petitioner in the present case immediately after the successful bid inspected the shop and even addressed a letter to the respondent to confirm the exact area of the

shop. It took more than three months for the respondent to respond tot he same and justify the same on ground of inclusion of 50% of the basement. I am unable to accept the contention of learned Counsel for the respondent that there is no obligation on the part of the respondent in this behalf and that such details which are given in certain other auctions would have no material bearing. It is relevant to note that one of the auctions held on 9.8.1996 which is prior to the auction in question while the other auction dated 13.2.1999 which is subsequent to the said auction, details have been given wherever the basement has been included or terrace has been so included. Thus it is necessary to give correct description before an auction takes place.

13. The auction purchaser must know what is sought to be auctioned. The expression "as is where is" cannot be extended to include even large discrepancies area which is sought to be made good by inclusion of the basement area. It was obligatory on the part of the respondent to have specified that the area includes the basement area.

In the light of these findings, the court held that the forfeiture of the earnest money of the petitioner could not be sustained and the same was quashed. The Delhi Development Authority was required to refund the same with interest. Based on the principles laid down in this judgment, I find force in the contention of the petitioners that the respondent MCD was required to act fairly in the instant case especially in the light of the admitted position that several of the CTCs were faulty and incapable of being utilised.

412. It is noteworthy that the MCD had fairly accepted the several faults which were pointed out by the various NGOs. Even at the time of awarding the contract to Sulabh, it was noticed that there were several structural and other defects which required rectification. Electricity and water connections had not been obtained in several CTCs even at the time the petitioners contract were rescinded. Not a single instance has been pointed out where there was a default in payment of the security deposit or the license fee for the initial quarter. In the meetings conducted at the level of the Addl. Commissioner, Slum & JJ, it was agreed that subject to the approval from the competent authority, the NGOs would be required to pay the license fee with effect from the date when the CTCs were rendered functional. Not a word has been uttered as to what steps were taken for removal of the defects. Executive Engineers of the MCD admitted the fault as also the field monitors. It is an admitted position that the NGOs were handed over possession with several deficiencies in several CTCs.

413. There is no consideration as to what was the outcome of the minutes and the recommendations. The petitioners were all informed that they would be required to pay the license fees with effect from the date the CTCs were rendered functional. No decision to the contrary was communicated to the petitioner. Undoubtedly, the MCD did not seek to enforce the license fee till after it took the decision to rescind the contract with the petitioners without either a tracing the issue as to the CTCs having been rendered functional or the date from which the petitioners or the NGOs would be required to pay the license fee.

The petitioner was never given an opportunity to return the CTCs which were non-functional. Each time, the MCD had told the NGOs to pay from the date when the CTCs became functional and also that the work would be got done by the Executive Engineers and the contractors. The petitioner never had the situation where they could have handed back the CTCs. On the contrary, according to the petitioners, it was indicated to them that if they made the CTCs functional, they would be reimbursed. In these circumstances, it is not open to the MCD to contend that there was any unilateral decision on the part of the NGOs or any novation of the contract. The petitioners have pointed out the failure of the MCD to abide by their statutory and public law duty as well as the representation which was inherent in the very scheme of the award of CTCs that the functional CTCs would be handed over for operation and maintenance to the NGOs.

414. Addressing the arguments that all the NGOs were not defaulters, the petitioners have pointed out that the MCD in the third list which it handed over in court on 17th August, 2005 has pointed out that even as per its own records, several NGOs were not defaulters. In this list, the Delhi Jan Sudhar Samiti has been shown as not being a defaulter. On the contrary, there is a credit balance in its favor.

All the petitioners dispute the correctness of the list submitted by the MCD before this Court. However it is contended that even as per the list submitted by the MCD the decision to hand over the CTCs to Sulabh was unfair and was not based on any finding that the NGOs were defaulters.

415. There is an absolute obligation on the state to add reasonably and fairly. The petitioners were expected to take over CTCs for operation and maintenance. It is inherent in this function which the petitioner were to discharge that the CTCs which were handed over to them were in an operational condition. Even if the petitioners were required to take possession on an as is where is basis, the obligation on the state to act reasonably would not be mitigated by any other consideration.

416. Mr. Valmiki Mehta, learned senior counsel appearing for the MCD has urged that the writ sought by the petitioners in the instant case, amounts to a direction to the MCD to act in violation of the law and cannot be granted. In this behalf, reliance was placed on Vice Chancellor, University of Allahabad and Ors. v. Dr. Anant Prakash Mishra and Ors., wherein the court held that a mandamus cannot be issued to violate the law or to act in violation of the law. In this case, the court was concerned with the recruitment process and selection for the post of readers in the University of Allahabad. The process of selection to various posts including the post of readers in the University of Allahabad had been initiated prior to 12th December, 1993. On 22nd March, 1994, the U.P. Public Services (Reservation of Scheduled Castes, Scheduled Tribes and Backward Classes) Act, 1994, came into force with effect from 11th December, 1993. On the basis of the implementation of the provisions of this Act, a fresh advertisement was issued for the appointment of two readers in Chemistry, in February, 1995. The action of the Vice Chancellor in directing the selection process in compliance with the new statute was challenged. It was thus held that the statutory provisions having come into force, the University was bound to comply with the statutory mandate. In this background, the Apex Court had observed that a mandamus cannot be issued to violate the law or to act in violation of the law.

No such issue or question has been raised or arises in the instant case.

417. To the same effect are the observations of the Apex Court in Textile Labour Association and Anr. v. OL and Anr. also relied upon by the respondents. In this case, the Apex Court had observed that the Supreme Court in exercise of its powers under Article 142, cannot ignore any substantive statutory provision dealing with the subject and that it was only exercising a residuary power, which was supplementary and complementary to the powers specifically conferred on the Apex Court by statutes, exercisable to do complete justice between the parties wherever it is just and equitable to do so. The power under Article 142 was intended to prevent any obstruction in the stream of justice. The order of the court, in respect of which review was sought, was required to be read as though having been made pursuant to exercise of powers under Article 142 of the Constitution, till the same would have to be read in the light of the law laid down by the Apex Court in the Supreme Court Board Association v. Union of India and Anr.

There is nothing in the instant case which can support the submission that this Court is being required to issue a writ which is in violation of a statutory provision or any principle of law.

418. Again in 1995 (Supp. 1) SCC 304 Dental Council of India v. Harpreet Kaur and Ors., the Apex Court was considering a challenge to an order by the High Court directing the University to hold the first professional examination for students of an unvalidated and unrecognised dental college at the risk of such students. The Apex Court had held that such relief was not permissible in law and was not based on any legally recognised principles. Consequently, the Apex Court held that it would be preposterous to direct the University to hold examinations for the benefit of such students and that the order was unjustified.

Again, no such direction is being sought or being given in the instant case. While the dicta of the Apex Court is binding on this Court, however the pronouncement has to be read and applied in the facts of the instant case.

419. Again in Rajasthan Breweries Limited v. Stroh Breweries Company, the Division Bench of this Court was concerned with an appeal filed against an order passed by the learned Single Judge on an application under Section 9 of the Arbitration & Conciliation Act, 1996 seeking an ad-interim temporary injunction in the nature of stay of the two notices of termination issued by the respondent terminating a technical knowhow agreement as well as technical assistance agreement executed between the parties. The court placed reliance on the well settled legal principle that no injunction can be granted of which could not be specifically enforced. The court relied on the specific statutory provisions of Section 16(c) read with Section 41(e) of the Specific Relief Act, 1963 in this behalf. This judgment has no application to the issues raised before this Court.

420. Utilising the shield of the laudatory Yamuna Action Plan, imperative for the cause of not only the users of the community toilets, but for the restoration of glory of the river Yamuna, the lifeline of the community and the city, the MCD launched an ambitious proposal. Unfortunately, it has got embroiled in legal wrangles. The blame for the travails squarely lies on its officials who have really failed to perform their statutory duty and public law obligations. Defective construction has been permitted to come up on which crores of rupees including international funding was expended. This was not possible if those engineers in the field discharged their duties in right earnest. Perhaps they could have been motivated if their superiors were persuaded to leave the confines of their narrow offices to perform their public duty in its truest sense to conduct field visits; routine and surprise checks. Only then the city would have got 959 functional CTCs. Several decisions of the MCD discussed herein have dealt with publicity activity essential to inculcate the hygienic toilet habit in the populace. I do not find even the semblance of effort on the part of any official of the MCD to have touched on this aspect. It is agonising to note decision making steeped in file pushing, adhocism and sheer impressions despite the importance of the issues involved. Thus, it is not attitudes of the public alone which need to change. Certainly the approach to a public duty requires a greater commitment from those who are required to perform it.

421. Before parting with the case, from the foregoing, it would be permissible for the MCD to identify a single party for allocation of the CTCs. In this behalf, the words of the Apex Court in Raunaq International (supra) which are relevant read thus:

16. It is also necessary to remember that price may not always be the sole criterion for awarding a contract. Often when an evaluation committee of experts is appointed to evaluate offers, the expert committee's special knowledge plays a decisive role in deciding which is the best offer. Price offered is only one of the criteria. The past record of the tenderers, the quality of the goods or services which are offered, assessing such quality on the basis of the past performance of the tenderers, its market reputation and so on, all play an important role in deciding to whom the contract should be awarded. At times, a higher price for a much better quality of work can be legitimately paid in order to secure proper performance of the contract and good quality of work - which is as much in public interest as a low price. The court should not substitute its own decision for the decision of an expert evaluation committee.

However, the same must be for good reasons in public interest and upon consideration of the relevant material which must be borne out from its records. Irrelevant considerations required to be eschewed. Unfortunately the decisions were first taken and then steps taken to look for reasons to justify them.

The petitioners were admittedly clamouring and competing with the advocated interests of Sulabh. Even at the time of taking of the impugned decisions, the matter was already before this Court. Undoubtedly, the respondent MCD failed to abide by the legislative mandate. Its action was certainly not backed by rationality, public interest, general good or social betterment and cannot withstand judicial scrutiny even as per the legislative standards and the weight of judicial authority noticed hereinabove. The decisions have to be held to be unreasonable and arbitrarory and not based on relevant material, hence the decisions are violative of Article 14 of the Constitution. Certainly no nexus or connection can be drawn between the decision taken, the reasons put forth for the same and the purpose for which the MCD has exercised the power. The NGOs to say

the least were entitled to the notice, if not as per Clause 15.5, then in compliance with the principles of natural justice.

For all the foregoing reasons, the writ petitions are allowed.

422. Some of the writ petitioners have assailed the monetary demands made by the MCD against them. Certainly, the petitioners have a legal right to contest the imposition and demands. However, in the light of the foregoing discussion, it is not possible to adjudicate upon the same in the present proceedings for the scanty material which has been placed before this Court by the MCD and the stand taken that it is not possessed of the complete records relating to payments by the petitioners.

It is noteworthy that so far as the allotment of the petitioners were concerned, some allotments lapsed during the pendency of the writ petition and the MCD even took possession of several CTCs on the ground that the contract period was over.

423. From the present cases, it appears that as the MCD was proceeding to implement the impugned decisions and applications were filed by the petitioner seeking interim stay, CM 7737/2005 was filed by Bhagwati Foundation in WP(C) 10685/2004. When it came up for hearing before the Vacation Bench on 22nd day of June, 2005 the following order was recorded:

It is not in dispute that the contractual period under which the petitioner was operating has expired in June, 2005. Mr.P.N. Lekhi, learned Senior Advocate on instructions from Mr.Anurag Dubey states that Sulabh International is being handed over CTCs with an expressed stipulation that the arrangement between the MCD and Sulabh International would be subject to orders in the writ petition.

Mr.Valmiki Mehta, learned Senior Advocate appearing for MCD on instructions from Mr.Amit Paul, Advocate and Mr.O.P.Verma, Superintending Engineer, Slum & JJ Department, MCD states that before possession is resumed on the completion of the contract period, inventory of the fittings and fixtures installed at the CTCs would be prepared.

List the CM before the regular Bench on 8th July, 2005.

424. Thereafter Bhagwati Foundation filed CM No. 8533/2005 for similar reliefs. This application was listed on 19th July, 2005 when it was dismissed. This Court had observed thus :

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19. It is settled law that no interim relief can be granted which is beyond the main writ petition. In the instant case, admittedly by way of the present application, the petitioners are seeking relief with regard to action which has been taken by the Municipal Corporation of Delhi on 14th June, 2005 which is a cause which has arisen subsequent to the filing of the writ petition and does not form part of the writ petition.

20. There is yet another aspect of the matter. Perusal of CM 7493/2004 shows that in para 4 of the application,the petitioner itself had contended that most of the community toilet complexes are lying closed due to the fault of the respondents. There can be possibly no dispute to the fact that these community toilet complexes are intended for user by the lower income group who do not have the benefit of individual toilet facilities.

21. The contract with the petitioners has come to an end. The petitioner admittedly has no legal right to retain charge over the toilets. It is an admitted position that most of the community toilet complexes are lying closed. Prohibitory interim injunction orders are based in equity. In the instant case, there is no individual interest as the petitioner's have no legal right which is being sought to be enforced or violated. Judicial notice

can be taken of the implication of non-availability of such toilet complexes which would add not only to the woes of the users for whom they are intended but also aggravates the problems of the community and the city. Untreated sullage flowing into public drains and defaecation in open add to public health problems, especially in the current season.

22. In any case, I find that M/s SISSO is being permitted to operate and maintain the toilet complexes subject to orders which shall be passed in the writ petition. The same therefore is in the nature of an interim arrangement pending orders in the writ petition. Having regard to the nature of the utility which is imperatively required to be operated and made available for daily use by the public at large, public interest demands an interim arrangement for such purpose be made in order to ensure continuity of the service and hygiene of not only individuals but of the community and the city.

26. Learned Counsel for the petitioner has objected to the manner in which the respondents are taking over the community toilet complexes. It is being stated that no inventories are being prepared. He submits that his client would be willing to join in the preparation of the inventory so that the correct facts are brought on record and that the rights of the petitioner so far as its installations are concerned, are not prejudiced.

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In this view of the matter, it is directed that the respondent MCD shall give a spot notice to representative of the petitioner who shall accept the same and join in the inventory of the fittings and fixtures which shall be prepared before possession is resumed.

425. In view of the foregoing discussion, the writ petitions are allowed. I hold that the impugned orders dated 3rd January, 2004, 30th April, 2004, 21st June, 2004, proposal contained in letter dated 19th July, 2004 and the Resolution dated 25th October, 2004 of the Municipal Corporation of Delhi making allotment of all the Community Toilet Complexes to Sulabh International Social Service Organisation are arbitrary, unreasonable, illegal, void and without jurisdiction. The same are, consequently, hereby quashed.

426. In view of the foregoing and in order to prevent any inconvenience to the public at large, it is directed that further action for allotment of Community Toilet Complexes in accordance with law as per the principles noticed hereinabove, shall be taken and effectuated within two months. The MCD may continue with the current arrangement for operation and maintenance of such toilet complexes possession whereof stands handed over to Sulabh pursuant to the decision dated 25th October, 2004 of the MCD for a period of two months.

427. It is made clear that these directions shall not effect the agreements which were entered into by MCD with Sulabh International Social Organisation prior to the decisions impugned in these writ petitions.

428. It is directed that MCD shall remain bound by the statements made in court on 9th March, 2005 in WP (C) No. 16106/2004 & WP (C) No. 16108/2004.

429. In the foregoing circumstances, it is also directed that the impugned communications whereby the MCD has raised monetary demands upon the petitioners, shall be treated as a notice to the petitioners to show cause against the notice demand.

The petitioners shall be at liberty to place such material which is in its power and possession including the reasons as to why it is not liable to pay the amounts claimed in the impugned letters of demand within six weeks. In case hearing is sought by the petitioners, the same shall be granted after reasonable notice. The replies shall be considered by the MCD and a reasoned decision thereon be taken and communicated to the writ petitioners.

The petitioners shall be at liberty to take action in accordance with law in respect thereof.

The writ petitions are allowed in the above terms.

There shall be no order as to costs.