REPORTABLE

IN THE SUPREME COURT OF INDIA

ADVISORY JURISDICTION

RE: SPECIAL REFERENCE NO.1 OF 2012
[Under Article 143(1) of the Constitution of India]

O P I N I O N

D.K. JAIN, J. [FOR S.H. KAPADIA, CJ, HIMSELF, DIPAK MISRA & RANJAN GOGOI, JJ.]

In exercise of powers conferred under Article 143(1) of the Constitution of India, the President of India has on 12th April, 2012, made the present Reference. The full text of the Reference (sans the annexures) is as follows:

> **"WHEREAS** in 1994, the Department of Telecommunication, Government of India ("**GOI**"), issued 8 Cellular Mobile Telephone Services Licenses ("**CMTS Licenses**"), 2 in each of the four Metro cities of Delhi, Mumbai, Kolkata and Chennai for a period of 10 years (the "**1994 Licenses**"). The 1994 licensees were selected based on rankings achieved by them on the technical and financial evaluation based on parameters set out by the GoI in the tender and were required to pay a fixed licence fee for initial three years and subsequently based on number of subscribers subject to minimum commitment mentioned in the tender document and licence agreement. The 1994 Licenses issued by GoI mentioned that a

cumulative maximum of upto 4.5 MHz in the 900 MHz bands would be permitted based on appropriate justification. There was no separate upfront charge for the allocation of Spectrum to the licensees, who only paid annual Spectrum usage charges, which will be subject to revision from time to time and which under the terms of the license bore the nomenclature "licence fee and royalty". A copy of the 1994 Licenses, along with a table setting out the pre-determined Licence Fee as prescribed by DoT in the Tender, is annexed hereto as **Annexure I (Colly)**.

WHEREAS in December 1995, 34 CMTS Licenses were granted based on auction for 18 telecommunication circles for a period of 10 years (the "**1995 Licenses**"). The 1995 Licenses mentioned that a cumulative maximum of up to 4.4 MHz in the 900 MHz bands shall be permitted to the licensees, based on appropriate justification. There was no separate upfront charge for allocation of spectrum to the licensees who were also required to pay annual spectrum usage charges, which under the terms of the license bore the nomenclature "licence fee and royalty" which will be subject to revision from time to time. A copy of the 1995 Licenses, along with a table setting out the fees payable by the highest bidder, is annexed hereto as **Annexure II (Colly)**.

WHEREAS in 1995, bids were also invited for basic telephone service licenses ("**BTS Licenses**") with the license fee payable for a 15 year period. Under the terms of the BTS Licenses, a licensee could provide fixed line basic telephone services as well as wireless basic telephone services. Six licenses were granted in the year 1997-98 by way of auction through tender for providing basic telecom services (the "**1997 BTS Licenses**"). The license terms, inter-alia, provided that based on the availability of the equipment for Wireless in Local Loop (WLL), in the world market, the spectrum in bands specified therein would be

considered for allocation subject to the conditions mentioned therein. There was no separate upfront charge for allocation of spectrum and the licensees offering the basic wireless telephone service were required to pay annual Spectrum usage charges, which under the terms of the license bore the nomenclature "licence fee and royalty". A sample copy of the 1997 BTS Licenses containing the table setting out the license fees paid by the highest bidder is annexed hereto as **Annexure III (Colly)**.

WHEREAS in 1997, the Telecom Regulatory Authority of India Act, 1997 was enacted and the Telecom Regulatory Authority of India (the "**TRAI**") was established.

WHEREAS on 1st April, 1999, the New Telecom Policy 1999 ("**NTP 1999**") was brought into effect on the recommendation of a Group on Telecom ("**GoT**") which had been constituted by GoI. A copy of NTP 1999 is annexed hereto as **Annexure IV**. NTP 1999 provided that Cellular Mobile Service Providers ("**CMSP**") would be granted a license for a period of 20 years on the payment of a one-time entry fee and licence fee in the form of revenue share. NTP 1999 also provided that BTS (Fixed Service Provider or FSP) Licenses for providing both fixed and wireless (WLL) services would also be issued for a period of 20 years on payment of a one-time entry fee and licence fee in the form of revenue share and prescribed charges for spectrum usage, appropriate level of which was to be recommended by TRAI. The licensees both cellular and basic were also required to pay annual Spectrum usage charges.

WHEREAS based on NTP 1999, a migration package for migration from fixed license fee to one time entry fee and licence fee based on revenue share regime was offered to all the existing licenses on 22nd July, 1999. This came

into effect on 1st August 1999. Under the migration package, the licence period for all the CMTS and FSP licensees was extended to 20 years from the date of issuance of the Licenses.

WHEREAS in 1997 and 2000, CMTS Licenses were also granted in 2 and 21 Circles to Mahanagar Telephone Nigam Limited ("**MTNL**") and Bharat Sanchar Nigam Limited ("**BSNL**") respectively (the "**PSU Licenses**"). However, no entry fee was charged for the PSU Licenses. The CMTS Licenses issued to BSNL and MTNL mentioned that they would be granted GSM Spectrum of 4.4 + 4.4 MHz in the 900 MHz band. The PSU Licensees were also required to pay annual spectrum usage charges. A copy of the PSU Licenses is annexed hereto as **Annexure V (Colly)**.

WHEREAS in January 2001, based on TRAI's recommendation, DoT issued guidelines for issuing CMTS Licenses for the 4th Cellular Operator based on tendering process structured as "Multistage Informed Ascending Bidding Process". Based on a tender, 17 new CMTS Licenses were issued for a period of 20 years in the 4 Metro cities and 13 Telecom Circles (the "**2001 Cellular Licenses**"). The 2001 Licenses required that the licensees pay a one-time non refundable entry fee as determined through auction as above and also annual license fee and annual spectrum usage charges and there was no separate upfront charge for allocation of spectrum. In accordance with the terms of tender document, the license terms, inter-alia, provided that a cumulative maximum of upto 4.4 MHz + 4.4 MHz will be permitted and further based on usage, justification and availability, additional spectrum upto 1.8 MHz + 1.8 MHz making a total of 6.2 MHz + 6.2 MHz, may be considered for assignment, on case by case basis, on payment of additional Licence fee. The bandwidth upto maximum as indicated i.e. 4.4 MHz & 6.2 MHz as the case may be, will be

allocated based on the Technology requirements (e.g. CDMA @ 1.25 MHz, GSM @ 200 KHz etc.). The frequencies assigned may not be contiguous and may not be same in all cases, while efforts would be made to make available larger chunks to the extent feasible. A copy of the 2001 Cellular Licenses, along with a table setting out the fees payable by the highest bidder, is annexed hereto as **Annexure VI**.

WHEREAS in 2001, BTS Licenses were also issued for providing both fixed line and wireless basic telephone services on a continual basis (2001 Basic Telephone Licenses). Service area wise one time Entry Fee and annual license fee as a percentage of Adjusted Gross Revenue (AGR) was prescribed for grant of BTS Licenses. The licence terms, inter-alia, provided that for Wireless Access System in local area, not more than 5 + 5 MHz in 824-844 MHz paired with 869-889 MHz band shall be allocated to any basic service operator including existing ones on FCFS basis. A detailed procedure for allocation of spectrum on FCFS basis was given in Annexure-IX of the 2001 BTS license. There was no separate upfront charge for allocation of spectrum and the Licensees were required to pay revenue share of 2% of the AGR earned from wireless in local loop subscribers as spectrum charges in addition to the one time entry fee and annual license fee. A sample copy of the 2001 Basic Telephone License along with a table setting out the entry fees is annexed hereto as **Annexure VII**.

WHEREAS on 27th October, 2003, TRAI recommended a Unified Access Services Licence ("**UASL**") Regime. A copy of TRAI's recommendation is annexed hereto as **Annexure VIII**.

WHEREAS on 11.11.2003, Guidelines were issued, specifying procedure for migration of existing operators to the new UASL regime. As per

the Guidelines, all applications for new Access Services License shall be in the category of Unified Access Services Licence. Later, based on TRAI clarification dated 14.11.2003, the entry fee for new Unified Licensee was fixed same as the entry fee of the 4th cellular operator. Based on further recommendations of TRAI dated 19.11.2003, spectrum to the new licensees was to be given as per the existing terms and conditions relating to spectrum in the respective license agreements. A copy of the Guidelines dated 11.11.2003 is annexed hereto as **Annexure IX**.

WHEREAS consequent to enhancement of FDI limit in telecom sector from 49% to 74%, revised Guidelines for grant of UAS Licenses were issued on 14.12.2005. These Guidelines, inter-alia stipulate that Licenses shall be issued without any restriction on the number of entrants for provision of Unified Access Services in a Service Area and the applicant will be required to pay one time non-refundable Entry, annual License fee as a percentage of Adjusted Gross Revenue (AGR) and spectrum charges on revenue share basis. No separate upfront charge for allocation of spectrum was prescribed. Initial Spectrum was allotted as per UAS License conditions to the service providers in different frequency bands, subject to availability. Initially allocation of a cumulative maximum up to 4.4 MHz + 4.4 MHz for TDMA based systems or 2.5 MHz + 2.5 MHz for CDMA based systems subject to availability was to be made. Spectrum not more than 5 MHz + 5 MHz in respect of CDMA system or 6.2 MHz + 6.2 MHz in respect of TDMA based system was to be allocated to any new UAS licensee. A copy of the UASL Guidelines dated 14.12.2005 is annexed hereto as **Annexure X**.

WHEREAS after the introduction of the UASL in 2003 and until March 2007, 51 new UASL Licenses were issued based on policy of First Come-First Served, on payment of the same entry

fee as was paid for the 2001 Cellular Licenses (the "**2003-2007 Licenses**") and the spectrum was also allocated based on FCFS under a separate wireless operating license on case by case basis and subject to availability. Licensees had to pay annual spectrum usage charges as a percentage of AGR, there being a no upfront charge for allocation of spectrum. A copy of the 2003-2007 License, along with a table setting out the fees payable, is annexed hereto as **Annexure XI (Colly)**.

WHEREAS on 28th August 2007, TRAI revisited the issue of new licenses, allocation of Spectrum, Spectrum charges, entry fees and issued its recommendations, a copy of which is annexed hereto as **Annexure XII**. TRAI made further recommendations dated 16.07.2008 which is annexed hereto as **Annexure XIII**.

WHEREAS in 2007 and 2008, GoI issued Dual Technology Licences, where under the terms of the existing licenses were amended to allow licensees to hold a license as well as Spectrum for providing services through both GSM and CDMA network. First amendment was issued in December, 2007. All licensees who opted for Dual Technology Licences paid the same entry fee, which was an amount equal to the amount prescribed as entry fee for getting a new UAS licence in the same service area. The amendment to the license inter-alia mentioned that initially a cumulative maximum of upto 4.4 MHz + 4.4 MHz was to be allocated in the case of TDMA based systems (@ 200 KHz per carrier or 30 KHz per carrier) and a maximum of 2.5 MHz + 2.5 MHz was to be allocated in the case of CDMA based systems (@ 1.25 MHz per carrier), on case by case basis subject to availability. It was also, inter-alia, mentioned that additional spectrum beyond the above stipulation may also be considered for allocation after ensuring optimal and efficient utilization of the already allocated spectrum taking

into account all types of traffic and guidelines/criteria prescribed from time to time. However, spectrum not more than 5 + 5 MHz in respect of CDMS system and 6.2 + 6.2 MHz in respect of TDMA based system was to be allocated to the licensee. There was no separate upfront charge for allocation of Spectrum. However, Dual Technology licensees were required to pay Spectrum usage charges in addition to the license fee on revenue share basis as a percentage of AGR. Spectrum to these licensees was allocated 10.01.2008 onwards.

WHEREAS Subscriber based criteria for CMTS was prescribed in the year 2002 for allocation of additional spectrum of 1.8 + 1.8 MHz beyond 6.2 + 6.2 MHz with a levy of additional spectrum usage charge of 1% of AGR. The allocation criteria was revised from time to time. A copy of the DoT letter dated 01.02.2002 in this regard is annexed hereto as **Annexure XIV**.

WHEREAS for the spectrum allotted beyond 6.2 MHz, in the frequency allocation letters issued by DoT May 2008 onwards, it was mentioned inter-alia that allotment of spectrum is subject to pricing as determined in future by the GoI for spectrum beyond 6.2 MHz + 6.2 MHz and the outcome of Court orders. However, annual spectrum usage charges were levied on the basis of AGR, as per the quantum of spectrum assigned. A sample copy of the frequency allocation letter is annexed hereto as **Annexure XV.**

WHEREAS Spectrum for the 3G Band (**i.e. 2100 MHz band**) was auctioned in 2010. The terms of the auction stipulated that, for successful new entrants, a fresh license agreement would be entered into and for existing licensees who were successful in the auction, the license agreement would be amended for use of Spectrum in the 3G band. A copy of the Notice inviting Applications and Clarifications thereto are annexed hereto and

marked as **Annexure XVI (Colly)**. The terms of the amendment letter provided, inter alia, that the 3G spectrum would stand withdrawn if the license stood terminated for any reason. A copy of the standard form of the amendment letter is annexed hereto and marked as **Annexure XVII**.

WHEREAS letters of intent were issued for 122 Licenses for providing 2G services on or after 10 January 2008, against which licenses (the "**2008 Licenses**") were subsequently issued. However, pursuant to the judgment of this Hon'ble Court dated 2nd February, 2012 in Writ Petition (Civil) No.423 of 2010 (the "**Judgment**"), the 2008 Licenses have been quashed. A copy of the judgment is annexed hereto and marked **Annexure XVIII**.

WHEREAS the GoI has also filed an Interlocutory Application for clarification of the Judgment, wherein the GoI has placed on record the manner in which the auction is proposed to be held pursuant to the Judgment and sought appropriate clarificatory orders/directions from the Hon'ble Court. A copy of the Interlocutory Application is annexed hereto and marked as **Annexure XIX**.

WHEREAS while the GoI is implementing the directions set out in the Judgment at paragraph 81 and proceeding with a fresh grant of licences and allocation of spectrum by auction, the GoI is seeking a limited review of the Judgment to the extent it impacts generally the method for allocation of national resources by the State. A copy of the Review Petition is annexed hereto and marked as **Annexure XX.**

WHEREAS by the Judgment, this Hon'ble Court directed TRAI to make fresh recommendations for grant of licenses and allocation of Spectrum in the 2G band by holding

an auction, as was done for the allocation of Spectrum for the 3G licenses.

WHEREAS, in terms of the directions of this Hon'ble Court, GoI would now be allocating Spectrum in the relevant 2G bands at prices discovered through auction.

WHEREAS based on the recommendations of TRAI dated 11.05.2010 followed by further clarifications and recommendations, the GoI has prescribed in February 2012, the limit for spectrum assignment in the Metro Service Areas as 2x10MHz/2x6.25 MHz and in rest of the Service Areas as 2x8MHz/2x5 MHz for GSM (900 MHz, 1800 MHz band)/CDMA(800 MHZ band), respectively subject to the condition that the Licensee can acquire additional spectrum beyond prescribed limit in the open market should there be an auction of spectrum subject to the further condition that total spectrum held by it does not exceed the limits prescribed for merger of licenses i.e. 25% of the total spectrum assigned in that Service Area by way of auction or otherwise. This limit for CDMS spectrum is 10 MHz.

WHEREAS, in view of the fact that Spectrum may need to be allocated to individual entities from time to time in accordance with criteria laid down by the GoI, such as subscriber base, availability of Spectrum in a particular circle, inter-se priority depending on whether the Spectrum comprises the initial allocation or additional allocation, etc., it may not always be possible to conduct an auction for the allocation of Spectrum.

AND WHEREAS in view of the aforesaid, the auctioning of Spectrum in the 2G bands may result in a situation where none of the Licensees, using the 2G bands of 800 MHz., 900 MHz and 1800 MHz would have paid any separate upfront fee for the allocation of Spectrum.

AND WHEREAS the Government of India has received various notices from companies based in other countries, invoking bilateral investment agreements and seeking damages against the Union of India by reason of the cancellation/threat of cancellation of the licenses.

AND WHEREAS in the circumstance certain questions of law of far reaching national and international implications have arisen, including in relation to the conduct of the auction and the regulation of the telecommunications industry in accordance with the Judgment and FDI into this country in the telecom industry and otherwise in other sectors.

Given that the issues which have arisen are of great public importance, and that questions of law have arisen of public importance and with such far reaching consequences for the development of the country that it is expedient to obtain the opinion of the Hon'ble Supreme Court of India thereon.

NOW THEREFORE, in exercise of powers conferred upon me by clause (1) of Article 143 of the Constitution of India, I, Pratibha Devisingh Patil, President of India, hereby refer the following questions to the Supreme Court of India for consideration and report thereon, namely:

Q.1 Whether the only permissible method for disposal of all natural resources across all sectors and in all circumstances is by the conduct of auctions?

Q.2 Whether a broad proposition of law that only the route of auctions can be resorted to for disposal of natural resources does not run contrary to several judgments of the Supreme Court including those of Larger Benches?

Q.3 Whether the enunciation of a broad principle, even though expressed as a matter of constitutional law, does not really amount to formulation of a policy and has the effect of unsettling policy decisions formulated and approaches taken by various successive governments over the years for valid considerations, including lack of public resources and the need to resort to innovative and different approaches for the development of various sectors of the economy?

Q.4 What is the permissible scope for interference by courts with policy making by the Government including methods for disposal of natural resources?

Q.5 Whether, if the court holds, within the permissible scope of judicial review, that a policy is flawed, is the court not obliged to take into account investments made under the said policy including investments made by foreign investors under multilateral/bilateral agreements?

Q.6 If the answers to the aforesaid questions lead to an affirmation of the judgment dated 02.02.2012 then the following questions may arise, viz.

(i) whether the judgment is required to be given retrospective effect so as to unsettle all licences issued and 2G spectrum (800, 900, and 1800 MHz bands) allocated in and after 1994 and prior to 10.01.2008?

(ii) whether the allocation of 2G spectrum in all circumstances and in all specific cases for different policy considerations would nevertheless have to be undone?

And specifically

(iii) Whether the telecom licences granted in 1994 would be affected?

(iv) Whether the Telecom licences granted by way of basic licences in 2001 and licences granted between the period 2003-2007 would be affected?

(v) Whether it is open to the Government of India to take any action to alter the terms of any licence to ensure a level playing field among all existing licensees?

(vi) Whether dual technology licences granted in 2007 and 2008 would be affected?

(vii) Whether it is necessary or obligatory for the Government of India to withdraw the Spectrum allocated to all existing licensees or to charge for the same with retrospective effect and if so on what basis and from what date?

Q.7 Whether, while taking action for conduct of auction in accordance with the orders of the Supreme Court, it would remain permissible for the Government to:

(i) Make provision for allotment of Spectrum from time to time at the auction discovered price and in accordance with laid down criteria during the period of validity of the auction determined price?

(ii) Impose a ceiling on the acquisition of Spectrum with the aim of avoiding the emergence of dominance in the market by any licensee/applicant duly taking into consideration TRAI recommendations in this regard?

(iii) Make provision for allocation of Spectrum at auction related prices in accordance with laid down criteria in bands where there may be inadequate or no competition (for e.g. there is expected to be a low level of competition for CDMA in 800 MHz band and TRAI has recommended an equivalence ratio of 1.5 or 1.3X1.5 for 800 MHz and 900 MHz bands depending upon the quantum of spectrum held by the licensee that can be applied to auction price in 1800 MHz band in the absence of a specific price for these bands)?

Q.8 What is the effect of the judgment on 3G Spectrum acquired by entities by auction whose licences have been quashed by the said judgment?

NEW DELHI;
DATED: 12 April 2012 PRESIDENT OF INDIA**"**

2. A bare reading of the Reference shows that it is occasioned by the decision of this Court, rendered by a bench of two learned Judges on 2nd February, 2012 in ***Centre for Public Interest Litigation & Ors.*** *Vs.* ***Union of India & Ors.***[1] (for brevity "**2G Case**").

3. On receipt of the Reference, vide order dated 9th May, 2012, notice was issued to the Attorney General for India. Upon hearing the learned Attorney General, it was

[1] (2012) 3 SCC 1

directed vide order dated 11th May, 2012, that notice of the Reference shall be issued to all the States through their Standing Counsel; on Centre for Public Interest Litigation (CPIL) and Dr. Subramanian Swamy (petitioners in the **2G Case**); as also on the Federation of Indian Chambers of Commerce and Industry (FICCI) and Confederation of Indian Industry (CII), as representatives of the Indian industry. On the suggestion of the learned Attorney General, it was also directed (though not recorded in the order), that the reference shall be dealt with in two parts *viz.* in the first instance, only questions No. 1 to 5 would be taken up for consideration and the remaining questions shall be taken up later in the light of our answers to the first five questions.

4. At the commencement of the hearing of the Reference on 10th July, 2012, a strong objection to the maintainability of the Reference was raised by the writ petitioners in the **2G Case**. Accordingly, it was decided to first hear the learned counsel on the question of validity of the Reference.

SUBMISSIONS ON MAINTAINABILITY:

5. Mr. Soli Sorabjee, learned senior counsel, appearing for CPIL, strenuously urged that in effect and substance, the Reference seeks to question the correctness of the judgment in the **2G Case**, which is not permissible once this Court has pronounced its authoritative opinion on the question of law now sought to be raised. The learned counsel argued that reference under Article 143(1) of the Constitution does not entail appellate or review jurisdiction, especially in respect of a judgment which has attained finality. According to the learned counsel, it is evident from the format of the Reference that it does not express or suggest any 'doubt' as regards the question of fact or law relating to allocation of all natural resources, a *sine-qua-non* for a valid reference. In support of the proposition, learned counsel placed reliance on observations in earlier references ***- In Re: The Delhi Laws Act, 1912, the Ajmer-Merwara (Extension of Laws) Act, 1947 And The Part C States (Laws) Act, 1950[2], In Re: The Berubari Union and Exchange of Enclaves Reference Under Article 143(1) of the Constitution of India[3], In Re: The***

[2] [1951] S.C.R. 747
[3] [1960] 3 S.C.R. 250

Kerala Education Bill, 195,7 In Reference Under Article 143(1) Of The Constitution of India[4], Special Reference No.1 of 1964[5] (commonly referred to as "***Keshav Singh***"), ***In Re: Presidential Poll[6], In Re: The Special Courts Bill, 1978[7], In the Matter of*** : ***Cauvery Water Disputes Tribunal[8]*** (hereinafter referred to as "**Cauvery-II**") and ***Special Reference No.1 of 1998 Re.[9]***

6. Next, it was contended by the learned senior counsel that if for any reason, the Executive feels that the **2G Case** does not lay down a correct proposition of law, it is open to it to persuade another bench, before which the said judgment is relied upon, to refer the issue to a larger bench for reconsideration. In short, the submission was that an authoritative pronouncement, like the one in the **2G Case**, cannot be short circuited by recourse to Article 143(1).

[4] [1959] S.C.R. 995
[5] [1965] 1 S.C.R. 413
[6] (1974) 2 SCC 33
[7] (1979) 1 SCC 380
[8] 1993 Supp (1) SCC 96 (II)
[9] (1998) 7 SCC 739

7. Learned counsel also contended that the Reference as framed is of an omnibus nature, seeking answers on hypothetical and vague questions, and therefore, must not be answered. Commending us to ***In Re: The Special Courts Bill, 1978*** (supra) and several other decisions, learned counsel urged that a reference under Article 143(1) of the Constitution for opinion has to be on a specific question or questions. It was asserted that by reason of the construction of the terms of Reference, the manner in which the questions have been framed and the nature of the answers proposed, this Court would be entitled to return the Reference unanswered by pointing out the aforesaid impediments in answering it. Lastly, it was fervently pleaded that if the present Reference is entertained, it would pave the way for the Executive to circumvent or negate the effect of inconvenient judgments, like the decision in the **2G Case**, which would not only set a dangerous and unhealthy precedent, but would also be clearly contrary to the ratio of the decision in ***Cauvery II***.

8. Mr. Prashant Bhushan, learned senior counsel, while adopting the arguments advanced by Mr. Soli Sorabjee, reiterated that from the format of questions No.1 to 5, as well as from the review petition filed by the Government in the **2G Case**, it is clear that the present Reference seeks to overrule the decision in the **2G Case** by reading down the direction that allowed only 'auction' as the permissible means for allocation of all natural resource, in paragraphs 94 to 96 of the **2G Case**, to the specific case of spectrum. It was argued by the learned counsel that it is apparent from the grounds urged in the review petition filed by the Government that it understood the ratio of the **2G Case**, binding them to the form of procedure to be followed while alienating precious natural resources belonging to the people, and yet it is seeking to use the advisory jurisdiction of this Court as an appeal over its earlier decision. It was contended that even if it be assumed that a doubt relating to the disposal of all natural resources has arisen on account of conflict of decisions on the point, such a conflict cannot be resolved by way of a Presidential reference; that would amount to

holding that one or the other judgments is incorrectly decided, which, according to the learned counsel, is beyond the scope of Article 143(1). Learned counsel alleged that the language in which the Reference is couched, exhibits *mala fides* on the part of the Executive. He thus, urged that we should refrain from giving an opinion.

9. Dr. Subramanian Swamy, again vehemently objecting to the maintainability of the Reference, on similar grounds, added that the present Reference is against the very spirit of Article 143(1), which, according to the constituent assembly debates, was meant to be invoked sparingly, unlike the case here. It was pleaded that the Reference is yet another attempt to delay the implementation of the directions in the **2G Case**. Relying on the decision of this Court in ***Dr. M. Ismail Faruqui & Ors.*** *Vs.* ***Union of India & Ors.***[10], Dr. Swamy submitted that we will be well advised to return the Reference unanswered.

[10] (1994) 6 SCC 360

10. Mr. G.E. Vahanvati, the learned Attorney General for India, defending the Reference, submitted that the plea regarding non-maintainability of the Reference on the ground that it does not spell out a 'doubt', is fallacious on a plain reading of the questions framed therein. According to him, Article 143(1) uses the word 'question' which arises only when there is a 'doubt' and the very fact that the President has sought the opinion of this Court on the questions posed, shows that there is a doubt in the mind of the Executive on those issues. It was stressed that merely because the Reference does not use the word 'doubt' in the recitals, as in other cited cases, does not imply that in substance no doubt is entertained in relation to the mode of alienation of all natural resources, other than spectrum, more so when the questions posed for opinion have far reaching national and international implications. It was urged that the content of the Reference is to be appreciated in proper perspective, keeping in view the context and not the form.

11. It was urged that maintainability and the discretion to decline to answer a reference are two

entirely different things. The question of maintainability arises when *ex-facie*, the Presidential reference does not meet the basic requirements of Article 143(1), contrastive to the question of discretion, which is the power of the Court to decline to answer a reference, for good reasons, once the reference is maintainable. In support of the proposition, reliance was placed on ***In Re: The Kerala Education Bill, 1957*** (supra), ***Keshav Singh*** and ***In Re: The Special Courts Bill, 1978*** (supra). According to the learned counsel, the question as to whether the reference is to be answered or not, is not an aspect of maintainability, and is to be decided only after hearing the reference on merits.

12. Learned Attorney General, while contesting the plea that in a reference under Article 143(1), correctness or otherwise of earlier decisions can never be gone into, submitted that in a Presidential reference, there is no constitutional embargo against reference to earlier decisions in order to clarify, restate or even to form a fresh opinion on a principle of law, as long as an *inter partes* decision is left unaffected. In support of the

contention that in the past, references have been made on questions in relation to the correctness of judgments, learned counsel placed reliance on the decisions of this Court /***In Re: The Delhi Laws Act, 1912*** (supra), ***Special Reference No.1 of 1998*** (supra), ***Keshav Singh*** (supra) and of the Privy Council ***In re Piracy Jure Gentium***[11]. It was asserted that it has been repeatedly clarified on behalf of the Executive that the decision in the **2G Case** has been accepted and is not being challenged. The Reference was necessitated by certain observations made as a statement of law in the said judgment which require to be explicated. Referring to certain observations in ***Re: The Berubari Union and Exchange of Enclaves*** (supra), learned counsel submitted that this Court had accepted that a reference could be answered to avoid protracted litigation.

13. Learned Attorney General also contended that withdrawal of the review petition by the Government is of no consequence ; its withdrawal does not imply that the question about the permissible manner of disposal of

[11] [1934] A.C. 586

other natural resources, and the issues regarding the environment for investment in the country, stood settled. Stoutly refuting the allegation that the reference is *mala fide,* learned counsel submitted that in ***In Re Presidential Poll*** (supra), it is clearly laid down that the Court cannot question the *bona fides* of the President making the reference.

14. Mr. T.R. Andhyarujina, learned senior counsel, voiced concerns arising out of an apparent conflict between provisions of the statutes and the judgment delivered in the **2G Case**; specifically with reference to Sections 10 and 11 of the Mines and Minerals (Regulation and Development) Act, 1957 (for short, "MMRD Act"), which prescribe a policy of preferential treatment and first come first served, unlike the **2G Case**, which according to the learned counsel only mandates auction for all natural resources. He thus, urged this Court to dispel all uncertainties regarding the true position of law after the judgment in the **2G Case**, by holding it as *per incuriam* in light of the provisions of the MMRD Act and other statutes.

15. Mr. Harish Salve, learned senior counsel, appearing on behalf of CII, while supporting the Reference, fervently urged that the contention that the Reference deserves to be returned unanswered due to the absence of the use of the word 'doubt' in the recitals of the Reference, is untenable. According to the learned counsel, under Article 143(1), the President can seek an opinion on any question of law or fact that has arisen, or is likely to arise, which is of such a nature and such public importance that it is expedient to seek the opinion of this Court. There is no additional condition that there should be any 'doubt' in the mind of the President. It was submitted by the learned counsel that the need for a Presidential reference may also arise to impart certainty to certain questions of law or fact which are of such a nature and of such moment as to warrant seeking opinion of this Court. It was urged that a pedantic interpretation, by which a Presidential reference would be declined on semantic considerations, such as the failure to use the word 'doubt' in the reference, should be eschewed.

16. Learned counsel contended that at the stage of making a reference, it is the satisfaction of the President in relation to the nature of the question and its importance that is relevant. As a matter of comity of institutions, this Court has always declined to go behind the reasons that prevailed upon the President to make a reference and its *bona fides*. Nevertheless, this Court always has the discretion not to answer any such reference or the questions raised therein for good reasons. It was stressed that since this Court does not sit in review over the satisfaction of the President, the question of jurisdiction and of maintainability does not arise.

17. Learned counsel also argued that the premise that earlier judgments of this Court are binding in reference jurisdiction, and thus any reference, which impinges upon an earlier judgment should be returned unanswered, is equally fallacious. It was argued that the principle of *stare decisis* and the doctrine of precedent are generally accepted and followed as rules of judicial discipline and not jurisdictional fetters and, therefore, this Court is not prevented from re-examining the correctness

of an earlier decision. On the contrary, the precedents support the proposition that this Court can, when exercising its jurisdiction under Article 143(1), examine the correctness of past precedents. According to the learned counsel, in ***Keshav Singh***, this Court did examine the correctness of the judgment in ***Pandit M.S.M. Sharma*** *Vs.* ***Shri Sri Krishna Sinha & Ors.***[12] *(hereinafter referred to as "**Sharma**").* Explaining the ratio of the decision in ***Cauvery-II***, learned counsel submitted that it is clear beyond any pale of doubt that the said pronouncement does not lay down, as an abstract proposition of law, that under Article 143(1), this Court cannot consider the correctness of any precedent. What it lays down is that once a lis between the parties is decided, the operative decree can only be opened by way of a review. According to the learned counsel, overruling a judgment — as a precedent — does not tantamount to reopening the decree.

18. Arguing on similar lines, Mr. C.A. Sundaram, learned senior counsel appearing on behalf of FICCI,

[12] [1959] Supp. 1 S.C.R. 806

contended that if the observations in the **2G Case** are read as applying to all natural resources and not limited to spectrum, it would tantamount to *de facto* policy formulation by the Court, which is beyond the scope of judicial review. He also took a nuanced stance on this Court's power of reconsideration over its precedents. It was submitted that a precedent can be sliced into two parts viz. the decision or operative part of an order or decree pertaining to the *inter partes* dispute and the ratio with respect to the position of law; the former being beyond this Court's powers of review once an earlier bench of this Court has pronounced an authoritative opinion on it, but not the latter. He thus, urged that this Court does have the power to reconsider the principles of law laid down in its previous pronouncements even under Article 141.

19. Mr. Darius Khambata, learned Advocate General of Maharashtra, submitted that observations in the **2G Case** were made only with regard to spectrum thus, leaving it open to this Court to examine the issue with regard to alienation of other natural resources. It was

urged that even if broader observations were made with respect to all natural resources, it would still be open to this Court under Article 143(1) to say otherwise. He also pointed to certain State legislations that prescribe methods other than auction and thus, urged this Court to answer the first question in the negative lest all those legislations be deemed unconstitutional.

20. Mr. Sunil Gupta, learned senior counsel, appearing on behalf of the State of U.P., added that when Article 143(1) of the Constitution unfolds a high prerogative of a constitutional authority, namely, the President, to consult this Court on question of law or fact, it contains a no less high prerogative of this Court to report to the President its opinion on the question referred, either by making or declining to give an answer to the question. In other words, according to the learned counsel, the issue of a reference being maintainable at the instance of the President is an issue different from the judicial power of this Court to answer or not to answer the question posed in the reference.

21. Mr. Ravindra Shrivastava, learned senior counsel appearing on behalf of the State of Chhattisgarh, contended that neither history supports nor reality warrants auction to be a rule of disposal of all natural resources in all situations. He referred to decisions of this Court that unambiguously strike a just balance between considerations of power of the State and duty towards public good, by leaving the choice of method of allocation of natural resources to the State, as long as it conforms to the requirements of Article 14. It was pleaded that the State be allowed the choice of methodology of allocation, especially in cases where it intends to incentivize investments and job creation in backward regions that would otherwise have been left untouched by private players if resources were given at market prices.

22. To sum up, the objections relating to the maintainability of the Reference converge mainly on the following points: (i) the foundational requirement for reference under Article 143(1) *viz.* a genuine 'doubt' about questions of fact or law that the executive labours under, is absent; (ii) the filing and withdrawal of a review petition

whose recitals pertain to the **2G Case** would be an impediment in the exercise of discretion under Article 143(1); (iii) the language in which the Reference is couched exhibits *mala fides* on the part of the Executive; (iv) in light of enunciation of law on the point in ***Cauvery II***, entertaining a Presidential reference on a subject matter, which has been decided upon directly and with finality, is barred; (v) the present Reference is an attempt to overturn the judgment of this Court in the **2G Case**, which is against the spirit of Article 143(1) of the Constitution and (vi) the Executive is adopting the route of this Reference to wriggle out of the directions in the **2G Case** as the same are inconvenient for them to follow.

DISCUSSION:

23. Before we evaluate the rival stands on the maintainability of the Reference, it would be necessary to examine the scope and breadth of Article 143 of the Constitution, which reads thus:

> "**143. Power of President to consult Supreme Court.—**(1) If at any time it appears to the President that a question of law or fact has arisen, or is likely to arise, which is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme

> Court upon it, he may refer the question to that Court for consideration and the Court may, after such hearing as it thinks fit, report to the President its opinion thereon.
>
> (2) The President may, notwithstanding anything in the proviso to article 131, refer a dispute of the kind mentioned in the said proviso to the Supreme Court for opinion and the Supreme Court shall, after such hearing as it thinks fit, report to the President its opinion thereon."

A bare reading at the Article would show that it is couched in broad terms. It is plain from the language of Article 143(1) that it is not necessary that the question on which the opinion of the Supreme Court is sought must have actually arisen. The President can make a reference under the said Article even at an anterior stage, namely, at the stage when the President is satisfied that the question is likely to arise. The satisfaction whether the question meets the pre-requisites of Article 143(1) is essentially a matter for the President to decide. Upon receipt of a reference under Article 143(1), the function of this Court is to consider the reference; the question(s) on which the President has made the reference, on the facts as stated

in the reference and report to the President its opinion thereon.

24. Nevertheless, the usage of the word "may" in the latter part of Article 143(1) implies that this Court is not bound to render advisory opinion in every reference and may refuse to express its opinion for strong, compelling and good reasons. In ***Keshav Singh***, highlighting the difference in the phraseology used in clauses (1) and (2) of Article 143, P.B. Gajendragadkar, C.J., speaking for the majority, held as follows:

> "…whereas in the case of reference made under Article 143 (2) it is the constitutional obligation of this Court to make a report on that reference embodying its advisory opinion, in a reference made under Article 143 (1) there is no such obligation. In dealing with this latter class of reference, it is open to this Court to consider whether it should make a report to the President giving its advisory opinion on the questions under reference."

25. Further, even in an earlier judgment in ***In re: Allocation of Lands and Buildings Situate in a Chief Commissioner's Province and in the matter of Reference by the Governor-General under S. 213,***

Government of India Act, 1935[13]***,*** the Federal Court had said that even though the Court is within its authority to refuse to answer a question on a reference, it must be unwilling to exercise its power of refusal "*except for good reasons.*" A similar phrase was used in ***In Re: The Kerala Education Bill, 1957*** (supra) when this Court observed that opinion on a reference under Article 143(1), may be declined in a "proper case" and "for good reasons". In ***Dr. M. Ismail Faruqui & Ors.*** (supra), it was added that a reference may not be answered when the Court is not competent to decide the question which is based on expert evidence or is a political one.

26. Having noted the relevant contours of Article 143(1) of the Constitution, we may now deal with the objections to the maintainability of the Reference.

27. There is no denying the fact that in the entire Reference the word 'doubt' has not been used. It is also true that in all previous references, noted in para 5

[13] A.I.R. (30) 1943 FC 13

(supra), it had been specifically mentioned that doubts had arisen about various issues. Nonetheless, the fact remains that Article 143(1) does not use the term 'doubt'. No specific format has been provided in any of the Schedules of the Constitution as to how a reference is to be drawn. The use of the word 'doubt' in a reference is also not a constitutional command or mandate. Needless to emphasise that the expression, 'doubt', which refers to a state of uncertainty, may be with regard to a fact or a principle. In ***P. Ramanatha Aiyar's, The Major Law Lexicon, 4th Edition***, the words 'doubt' and 'question' have been dealt with in the following manner:-

> "Doubt, Question. These terms express the act of the mind in staying its decision. *Doubt* lies altogether in the mind; it is a less active feeling than *question*; by the former we merely suspend decision; by the latter we actually demand proofs in order to assist us in deciding. We may *doubt* in silence. We cannot *question* without expressing it directly or indirectly. He who suggests *doubts* does it with caution: he who makes a question throws in difficulties with a degree of confidence. We doubt the truth of a *position;* we question the veracity of an author. (Crabb.)"

As per the ***Concise Oxford Dictionary (Tenth Edition)***, 'question' means : "a doubt; the raising of a doubt or objection; a problem requiring solution".

In ***Black's Law Dictionary*** 'doubt', as a verb, has been defined as follows:

> "To question or hold questionable."

The word 'doubt', as a noun, has been described as under:-

> "Uncertainty of mind; the absence of a settled opinion or conviction; the attitude of mind towards the acceptance of or belief in a proposition, theory, or statement, in which the judgment is not at rest but inclines alternately to either side."

28. The afore-extracted recitals of the instant Reference state that in the current circumstances, certain questions of law with far reaching national and international implications have arisen, including in relation to conduct of the auction and the regulation of the telecommunications industry in accordance with the judgment (**2G Case**) that may affect the flow of FDI in the telecom industry and otherwise in other sectors into this country. Thereafter, it is also stated that questions of law

that have arisen are of great public importance and are of far reaching consequences for the development of the country and hence, it is thought expedient to obtain the opinion of this Court. Question No.1 of the reference reads as follows:-

> "Whether the only permissible method for disposal of all natural resources across all sectors and in all circumstances is by the conduct of auctions?"

29. At this juncture, reference may profitably be made to the decision in ***In Re: The Special Courts Bill, 1978*** (supra), an opinion by a Bench of seven learned Judges, wherein it was observed as follows:

> "27. We were, at one stage of the arguments, so much exercised over the undefined breadth of the reference that we were considering seriously whether in the circumstances it was not advisable to return the reference unanswered. But the written briefs filed by the parties and the oral arguments advanced before us have, by their fullness and ability, helped to narrow down the legal controversies surrounding the Bill and to crystallize the issues which arise for our consideration. We propose to limit our opinion to the points specifically raised before us. It will be convenient to indicate at this stage what those points are."

While expressing the hope that, in future, specific questions would be framed for the opinion of this Court, Y.V. Chandrachud (as his Lordship then was), speaking for the majority, said:

> "30. We hope that in future, whenever a reference is made to this Court under Article 143 of the Constitution, care will be taken to frame specific questions for the opinion of the Court. Fortunately, it has been possible in the instant reference to consider specific questions as being comprehended within the terms of the reference but the risk that a vague and general reference may be returned unanswered is real and ought to engage the attention of those whose duty it is to frame the reference. Were the Bill not as short as it is, it would have been difficult to infuse into the reference the comprehension of the two points mentioned by us above and which we propose to decide. A long Bill would have presented to us a rambling task in the absence of reference on specific points, rendering it impossible to formulate succinctly the nature of constitutional challenge to the provisions of the Bill."

30. From the afore-extracted paragraphs, three broad principles emerge: (i) a reference should not be vague, general and undefined, (ii) this Court can go through the written briefs and arguments to narrow down the legal controversies, and (iii) when the question becomes unspecific and incomprehensible, the risk of

returning the reference unanswered arises. In ***Keshav Singh***, this Court while dealing with the validity of the reference, referred to earlier decisions and opined as follows:

> "...It would thus be seen that the questions so far referred by the President for the Advisory opinion of this Court under Article 143(1) do not disclose a uniform pattern and that is quite clearly consistent with the broad and wide words used in Article 143(1)."

31. An analysis of the afore-noted cases, indicates that neither has a particular format been prescribed nor any specific pattern been followed in framing references. The first principle relates to the 'form' and the second pertains to the 'pattern of content'. Holistically understood, on the ground of form or pattern alone, a reference is not to be returned unanswered. It requires appropriate analysis, understanding and appreciation of the content or the issue on which doubt is expressed, keeping in view the concept of constitutional responsibility, juridical propriety and judicial discretion.

32. Thus, we find it difficult to accept the stand that use of the word 'doubt' is a necessary condition for a reference to be maintainable under Article 143(1). That apart, in our view, question No.1, quoted above, is neither vague nor general or unspecific, but is in the realm of comprehension which is relatable to a question of law. It expresses a 'doubt' and seeks the opinion of the Court on that question, besides others.

33. In so far as the impact of filing and withdrawal of the review application by the Union of India, against the decision in the **2G Case** on the maintainability of the instant Reference is concerned, it is a matter of record that in the review petition, certain aspects of the grounds for review which have been stated in the recitals of the Reference as well as in some questions, were highlighted. However, there is a gulf of difference between the jurisdiction exercised by this Court in a review and the discretion exercised in answering a reference under Article 143(1) of the Constitution. A review is basically guided by the well-settled principles for review of a judgment and a

decree or order passed *inter se* parties. The Court in exercise of power of review may entertain the review under the acceptable and settled parameters. But, when an opinion of this Court is sought by the Executive taking recourse to a constitutional power, needless to say, the same stands on a different footing altogether. A review is lis specific and the rights of the parties to the controversy are dealt with therein, whereas a reference is answered keeping in view the terms of the reference and scrutinising whether the same satisfies the requirements inherent in the language employed under Article 143(1) of the Constitution. In our view, therefore, merely because a review had been filed and withdrawn and in the recital the narration pertains to the said case, the same would not be an embargo or impediment for exercise of discretion to answer the Reference.

34. As far as the allegation of *mala fide* is concerned, it is trite that this Court is neither required to go into the truth or otherwise of the facts of the recitals nor can it go into the question of *bona fides* or otherwise

of the authority making a reference. [See: ***In Re: Presidential Poll*** (supra)]. To put it differently, the constitutional power to seek opinion of this Court rests with the President. The only discretion this Court has is either to answer the reference or respectfully decline to send a report to the President. Therefore, the challenge on the ground of *mala fide,* as raised, is unsustainable.

35. The principal objection to the maintainability of the Reference is that it is an indirect endeavour to unsettle and overturn the verdict in the **2G Case**, which is absolutely impermissible. The stand of the objectors is that the **2G Case** is an authoritative precedent in respect of the principle or proposition of law that all natural resources are to be disposed of by way of public auction and, therefore, the Reference should be held as not maintainable. Emphasis in this behalf was on paragraphs 85 and 94 to 96 of the said judgment. In support of the proposition, heavy reliance was placed on ***Cauvery II*****.**

36. At the outset, we may note that the learned Attorney General has more than once stated that the Government of India is not questioning the correctness of the directions in the **2G Case**, in so far as the allocation of spectrum is concerned, and in fact the Government is in the process of implementing the same, in letter and spirit. Therefore, in the light of the said statement, we feel that it would be unnecessary to comment on the submission that the Reference is an attempt to get an opinion to unsettle the decision and directions of this Court in the **2G Case**. Nevertheless, since in support of the aforesaid submission, the opinion of this Court in ***Cauvery II*** has been referred to and relied upon *in extenso*, it would be appropriate to decipher the true ratio of ***Cauvery II***, the lynchpin of the opposition to maintainability of the present Reference.

37. ***Cauvery II*** was preceded by ***State of Tamil Nadu*** *Vs.* ***State of Karnataka & Ors.***[14] (hereinafter referred to as "***Cauvery I***"), which dwelled on the issue whether the Cauvery Water Disputes Tribunal (for short "the Tribunal") had the power to grant interim relief. In

[14] 1991 Supp (1) SCC 240

that case, applications filed by the State of Tamil Nadu for urgent interim reliefs were rejected by the Tribunal on the ground that they were not maintainable. This order was challenged, resulting in the judgment dated 26th April, 1991 by this Court, where it was held as follows:

> "15. Thus, we hold that this Court is the ultimate interpreter of the provisions of the Interstate Water Disputes Act, 1956 and has an authority to decide the limits, powers and the jurisdiction of the Tribunal constituted under the Act. This Court has not only the power but obligation to decide as to whether the Tribunal has any jurisdiction or not under the Act, to entertain any interim application till it finally decides the dispute referred to it..."

38. The Tribunal had ruled that since it was not like other courts with inherent powers to grant interim relief, only in case the Central Government referred a case for interim relief to it, would it have the jurisdiction to grant the same. *Inter-alia*, the Court observed that the Tribunal was wrong in holding that the Central Government had not made any reference for granting any interim relief, and concluded that the interim reliefs prayed for clearly fell within the purview of the dispute referred by the Central Government. Accordingly, the appeals preferred by the

State of Tamil Nadu were allowed and the Tribunal was directed to decide the applications for interim relief. However, the Court did not decide the larger question of whether a Tribunal, constituted under the Interstate Water Disputes Act, 1956 had the power to grant an interim relief, though the answer to the same may be deduced from the final direction.

39. In pursuance of these directions, the Tribunal decided the application and vide its order dated 25th June, 1991, proceeded to issue certain directions to the State of Karnataka. Thereafter, on 25th July 1991, the Governor of Karnataka issued an Ordinance named "The Karnataka Cauvery Basin Irrigation Protection Ordinance, 1991". Hot on the heels of the Ordinance, the State of Karnataka also instituted a suit under Article 131 of the Constitution against the State of Tamil Nadu for a declaration that the Tribunal's order granting interim relief was without jurisdiction and, therefore, null and void, etc. The Ordinance was replaced by Act 27 of 1991. In the context of these developments, the President made a reference to

this Court under Article 143(1) of the Constitution, posing three questions for opinion. The third question of the reference, relevant for the present Reference, was :-

> "**3.** Whether a Water Disputes Tribunal constituted under the Act is competent to grant any interim relief to the parties to the dispute."

However, while dealing with the reference in ***Cauvery II***, the Court split the question, viz., whether a Water Disputes Tribunal constituted under the Act is competent to grant any interim relief into two parts: (i) when a reference for grant of interim relief is made to the Tribunal, and (ii) when no such reference is made to it. It was contended by the States of Karnataka and Kerala that if the Tribunal did not have power to grant interim relief, the Central Government would be incompetent to make a reference for the purpose in the first place and the Tribunal in turn would have no jurisdiction to entertain such reference, if made. Dealing with the said submission, after making a reference to the earlier order, this Court observed that once the Central Government had made a

reference to the Tribunal for consideration of the claim for interim relief, prayed for by the State of Tamil Nadu, the Tribunal had jurisdiction to consider the said request being a part of the reference itself. Implicit in the said decision was the finding that the subject of interim relief was a matter connected with or relevant to the water dispute within the meaning of Section 5(1) of the said Act. It was held that the Central Government could refer the matter for granting interim relief to the Tribunal for adjudication.

40. The consequence of the Court in coming to the conclusion, while replying to the third question was that the Tribunal did not have the jurisdiction to make an interim award or grant interim relief, would have not only resulted in the Court overruling its earlier decision between the two contending parties i.e. the two States, but it would have also then required the Court to declare the order of the Tribunal as being without jurisdiction. The Court therefore, said :

> **"83**...Although this Court by the said decision has kept open the question, viz., whether the Tribunal has incidental, ancillary, inherent or implied power to grant the interim relief when

> no reference for grant of such relief is made to it, it has in terms concluded the second part of the question. We cannot, therefore, countenance a situation whereby question 3 and for that matter questions 1 and 2 may be so construed as to invite our opinion on the said decision of this Court. That would obviously be tantamount to our sitting in appeal on the said decision which it is impermissible for us to do even in adjudicatory jurisdiction. Nor is it competent for the President to invest us with an appellate jurisdiction over the said decision through a Reference under Article 143 of the Constitution."

These observations would suggest that the Court declined to construe Article 143 as a power any different from its adjudicative powers and for that reason, said that what could not be done in the adjudicatory process would equally not be achieved through the process of a reference.

41. The expression, "sitting in appeal" was accurately used. An appellate court vacates the decree (or writ, order or direction) of the lower court when it allows an appeal - which is what this Court was invited to do in ***Cauvery I.*** This Court, in that appeal decided earlier, held that the Tribunal had the jurisdiction to pass the interim order sought by the State of Tamil Nadu. To nullify the interim order passed by the Tribunal, pursuant to a

direction of the Supreme Court, on the ground that it was without jurisdiction, would necessarily require vacating the direction of the Supreme Court to the Tribunal to exercise its jurisdiction and decide the interim matter. Para 85 of that decision puts the matter beyond any pale of doubt:

> "**85**... In the first instance, the language of clause (1) of Article 143 far from supporting Shri Nariman's contention is opposed to it. The said clause empowers the President to refer for this Court's opinion a question of law or fact which has arisen or is likely to arise. When this Court in its adjudicatory jurisdiction pronounces its authoritative opinion on a question of law, it cannot be said that there is any doubt about the question of law or the same is *res integra* so as to require the President to know what the true position of law on the question is. The decision of this Court on a question of law is binding on all courts and authorities. Hence under the said clause the President can refer a question of law only when this Court has not decided it. Secondly, a decision given by this Court can be reviewed only under Article 137 read with Rule 1 of Order 40 of the Supreme Court Rules, 1966 and on the conditions mentioned therein. When, further, this Court overrules the view of law expressed by it in an earlier case, it does not do so sitting in appeal and exercising an appellate jurisdiction over the earlier decision. It does so in exercise of its inherent power and only in exceptional circumstances such as when the earlier decision is *per incuriam* or is delivered in the absence of relevant or material facts or if it is manifestly wrong *and* productive of public

mischief. [See: *Bengal Immunity Company Ltd.* v. *State of Bihar (1955) 2 SCR 603*]. Under the Constitution such appellate jurisdiction does not vest in this Court, nor can it be vested in it by the President under Article 143. To accept Shri Nariman's contention would mean that the advisory jurisdiction under Article 143 is also an appellate jurisdiction of this Court over its own decision between the same parties and the executive has a power to ask this Court to revise its decision. If such power is read in Article 143 it would be a serious inroad into the independence of judiciary."

42. Eventually, the reference was answered in respect of question No.3 in the following terms:-

"*Question No.3:* (i) A Water Disputes Tribunal constituted under the Act is competent to grant any interim relief to the parties to the dispute when a reference for such relief is made by the Central Government;

(ii) whether the Tribunal has power to grant interim relief when no reference is made by the Central Government for such relief is a question which does not arise in the facts and circumstances under which the Reference is made. Hence we do not deem it necessary to answer the same."

43. The main emphasis of Mr. Soli Sorabjee was on the second part of paragraph 85, which, according to him, prohibits this Court from overruling a view expressed by it

previously under Article 143(1). We are not persuaded to agree with the learned senior counsel. The paragraph has to be read carefully. Sawant J. first considers the case of a "decision" of this Court whereas in the subsequent sentence he considers a "view of law" expressed by the Court, and attempts to explain the difference between the approaches to these two situations. These words are sometimes used interchangeably but not hereinabove. We believe that Justice Sawant consciously draws a difference between the two by using the words "When, further, this Court overrules the view of law..." after discussing the case of a "decision".

44. ***Black's Law Dictionary*** defines a "decision" as "a determination arrived at after consideration of facts, and, in legal context, law"; an "opinion" as "the statement by a judge or court of the decision reached in regard to a cause tried or argued before them, expounding the law as applied to the case, and detailing the reasons upon which the judgment is based"; and explains the difference between a "decision" and "opinion" as follows:

> "Decision is not necessarily synonymous with 'opinion'. A decision of the Court is its judgment; the opinion is the reasons given for that judgment, or the expression of the views of the judge."

45. Therefore, references in Para 85 to "decision" and "view of law" must be severed from each other. The learned Judge observes that in case of a decision, the appellate structure is exhausted after a pronouncement by the Supreme Court. Therefore, the only option left to the parties is of review or curative jurisdiction (a remedy carved out in the judgment in ***Rupa Ashok Hurra*** *Vs.* ***Ashok Hurra & Anr.***[15]). After the exercise of those limited options, the concerned parties have absolutely no relief with regard to the dispute; it is considered settled for eternity in the eyes of the law. However what is not eternal and still malleable in the eyes of law is the opinion or "view of law" pronounced in the course of reaching the decision. Justice Sawant clarifies that unlike this Court's appellate power, its power to overrule a previous precedent is an outcome of its inherent power when he says, "...it does not do so sitting in appeal and exercising

[15] (2002) 4 SCC 388

an appellate jurisdiction over the earlier decision. It does so in exercise of its inherent power and only in exceptional circumstances....” This Court has pointed out the difference between the two expressions in ***Rupa Ashok Hurra*** (supra), in the following words:

> “24. There is no gainsaying that the Supreme Court is the court of last resort — the final court on questions both of fact and of law including constitutional law. The law declared by this Court is the law of the land; it is precedent for itself and for all the courts/tribunals and authorities in India. In a judgment there will be declaration of law and its application to the facts of the case to render a decision on the dispute between the parties to the lis. It is necessary to bear in mind that the principles in regard to the highest court departing from its binding precedent are different from the grounds on which a final judgment between the parties, can be reconsidered. Here, we are mainly concerned with the latter. However, when reconsideration of a judgment of this Court is sought the finality attached both to the law declared as well as to the decision made in the case, is normally brought under challenge...”

Therefore, there are two limitations - one jurisdictional and the other self-imposed.

46. The first limitation is that a decision of this Court can be reviewed only under Article 137 or a Curative Petition and in no other way. It was in this context that in

para 85 of ***Cauvery II***, this Court had stated that the President can refer a question of law when this Court has not decided it. Mr. Harish Salve, learned senior counsel, is right when he argues that once a lis between parties is decided, the operative decree can only be opened in review. Overruling the judgment - as a precedent - does not reopen the decree.

47. The second limitation, a self imposed rule of judicial discipline, was that overruling the opinion of the Court on a legal issue does not constitute sitting in appeal, but is done only in exceptional circumstances, such as when the earlier decision is *per incuriam* or is delivered in the absence of relevant or material facts or if it is manifestly wrong and capable of causing public mischief. For this proposition, the Court relied upon the judgment in the ***Bengal Immunity*** case (supra) wherein it was held that when Article 141 lays down that the law declared by this Court shall be binding on all courts within the territory of India, it quite obviously refers to courts other than this Court; and that the Court would normally follow past

precedents save and except where it was necessary to reconsider the correctness of law laid down in that judgment. In fact, the overruling of a principle of law is not an outcome of appellate jurisdiction but a consequence of its inherent power. This inherent power can be exercised as long as a previous decree vis-à-vis lis *inter partes* is not affected. It is the attempt to overturn the decision of a previous case that is problematic which is why the Court observes that "under the Constitution such appellate jurisdiction does not vest in this Court, nor can it be vested in it by the President under Article 143."

48. Therefore, the controversy in ***Cauvery II*** was covered by the decision rendered by this Court in ***Cauvery I*** between the parties and the decision operated as *res judicata* and hence, it was opined that discretion under Article 143(1) could not be exercised. It has also been observed that this Court had analysed the relevant provisions of the Inter-State Water Disputes Act, 1956 and thereafter had come to the conclusion that the Tribunal had jurisdiction to grant interim relief if the question of

granting interim relief formed part of the reference. On this bedrock it was held that the decision operated as *res judicata.* It is, therefore, manifest from ***Cauvery II*** that the Court was clearly not opposed to clarifying the ratio of a previous judgment in ***Cauvery I,*** in the course of an advisory jurisdiction. Afore-extracted para 85 of ***Cauvery II***, restricts this Court's advisory jurisdiction on the limited point of overturning a decided issue vis-à-vis a 'dispute' or *lis inter partes*.

49. Finally a seven Judge Bench of this Court has clearly held that this Court, under Article 143(1), does have the power to overrule a previous view delivered by it. Justice Chandrachud, C.J. in ***In re: The Special Courts Bill*** (supra) held:

> "101...We are inclined to the view that though it is always open to this Court to re-examine the question already decided by it and to overrule, if necessary, the view earlier taken by it, insofar as all other courts in the territory of India are concerned they ought to be bound by the view expressed by this Court even in the exercise of its advisory jurisdiction under Article 143(1) of the Constitution."

50. There is a catena of pronouncements in which this Court has either explained, clarified or read down the ratio of previous judgments. In the very first reference, ***In Re: Delhi Laws Act, 1912*** (supra), the reference was made by reason of a judgment of the Federal Court in ***Jatindra Nath Gupta*** *Vs.* ***The Province of Bihar & Ors.***[16]. The background of that reference was explained by Mukherjea, J. as under:

> "The necessity of seeking the advisory opinion of this Court is stated to have arisen from the fact that because of the decision of the Federal Court in *Jatindra Nath Gupta v. The Province of Bihar*, which held the proviso to sub-section (3) of Section 1 of the Bihar Maintenance of Public Order Act, 1947, ultra vires the Bihar Provincial Legislature, by reason of its amounting to a delegation of its legislative powers to an extraneous authority, doubts have arisen regarding the validity of the three legislative provisions mentioned above, the legality of the first and the second being actually called in question in certain judicial proceedings which are pending before some of the High Courts in India."

Justice Das in the same opinion, while noting that reliance was placed by learned counsel for the interveners on the judgment of the Federal Court in ***Jatindra Nath Gupta*** (supra), recorded that the learned Attorney General had

[16] [1949-50] F.C.R. 595

strenuously challenged the correctness of the decision of the majority of the Federal Court in that case. *Inter-alia,* observing that the reference was in a way occasioned by that decision, the learned Judge held as follows:

> "I feel bound to say, with the utmost humility and for reasons given already, that the observations of the majority of the Federal Court in that case went too far and, in agreement with the learned Attorney-General, I am unable to accept them as correct exposition of the principles relating to the delegation of legislative power."

51. In this context, it would be beneficial to refer to ***Keshav Singh's case.*** In the said case, a reference was made by the President which fundamentally pertained to the privileges of the Legislative Assembly and exercise of jurisdiction by a Bench of the High Court. The High Court entertained a writ petition under Article 226 of the Constitution, challenging the decision of the Assembly committing one Keshav Singh, who was not one of its members, to prison for its contempt. The issue was whether by entertaining the writ petition, the Judges of the High Court were in contempt of the Legislature for infringement of its privileges and immunities. For the

same, this Court proceeded to construe the relevant provisions contained in Article 194(3) and its harmonization with other Articles of the Constitution, especially Articles 19(1)(a), 21 & 22. In that context, the decision in ***"Sharma"*** (supra) came up for consideration. One of the questions that arose in ***Sharma's*** case was the impact of Articles 19(1)(a) and 21 on the provisions contained in the latter part of Article 194(3). The majority view was that the privilege in question was subsisting at the relevant time and must, therefore, deemed to be included under the latter part of Article 194(3). It was held that Article 19(1)(a) did not apply under the rule of harmonious construction, where Article 19(1)(a) was in direct conflict with Article 194(3). The particular provision in the latter Article would prevail over the general provision contained in the former. It was further held that though Article 21 applied, it had not been contravened. The minority view, on the other hand, held that the privilege in question had not been established; even assuming the same was established and it was to be included in the latter part of Article 194(3), yet it must be

controlled by Article 19(1)(a) on the ground that Fundamental Rights guaranteed by Part III of the Constitution were of paramount importance and must prevail over a provision like the one contained in Article 194(3) which may be inconsistent with them. The majority decision also commented on the decision in ***Gunupati Keshavram Reddy*** *Vs.* ***Nafisul Hasan & the State of U.P.***[17] and observed that the said decision was based entirely on a concession and could not, therefore, be deemed to be a considered decision of this Court.

52. The decision in ***Keshavram Reddy*** (supra) dealt with the applicability of Article 22(2) to a case falling under the latter part of Article 194(3). It is worth noting that the minority opinion of ***Sharma*** treated ***Keshavram Reddy***, as expressing a considered opinion, which was binding on the Court. In ***Keshav Singh*** it was opined that in ***Sharma's*** case, the majority decision held in terms that Article 21 was applicable to the contents of Article 194(3), but on merits, it came to the conclusion that the alleged contravention had not been proved. Commenting

[17] AIR 1954 SC 636

on the minority view it was opined that it was unnecessary to consider whether Article 21 as such applied because the said view treated all the Fundamental Rights guaranteed by Part III as paramount, and therefore, each one of them could control the provisions of Article 194(3).

53. At that juncture, the Bench stated that in the case of ***Sharma***, contentions urged by the petitioner did not raise a general issue as to the relevance and applicability of all the fundamental rights guaranteed by Part III at all. The contravention of only two Articles was pleaded and they were Articles 19(1)(a) and 21. Strictly speaking, it was, therefore, unnecessary to consider the larger issue as to whether the latter part of Article 194(3) was subject to the fundamental rights in general, and indeed, even on the majority view it could not be said that the said view excluded the application of all fundamental rights, for the obvious and simple reason that Article 21 was held to be applicable and the merits of the petitioner's arguments about its alleged contravention in his case were examined and rejected. Therefore, it was

not right to read the majority decision as laying down a general proposition that whenever there is a conflict between the provisions of the latter part of Article 194(3) and any of the provisions of the fundamental rights guaranteed by Part III, the latter must always yield to the former. It was further observed that the majority decision had incidentally commented on the decision in ***Keshavram Reddy's*** case (supra). Apart from that there was no controversy about the applicability of Article 22 in that case, and, therefore, the comment made by the majority judgment on the earlier decision was partly not accurate. Their Lordships adverted to the facts in ***Sharma's*** case wherein the majority judgment had observed that it "proceeded entirely on a concession of counsel and cannot be regarded as a considered opinion on the subject." After so stating, the Bench opined thus:

> "...There is no doubt that the first part of this comment is not accurate. A concession was made by the Attorney-General not on a point of law which was decided by the Court, but on a point of fact; and so, this part of the comment cannot strictly be said to be justified. It is, however, true that there is no discussion about the merits of the contention raised on behalf of Mr. Mistry and to that extent, it may have been permissible to the majority judgment to say that

it was not a considered opinion of the Court. But, as we have already pointed out, it was hardly necessary for the majority decision to deal with the point pertaining to the applicability of Article 22(2), because that point did not arise in the proceedings before the Court in Pandit Sharma's case. That is why we wish to make it clear that the *obiter* observations made in the majority judgment about the validity or correctness of the earlier decision of this Court in *Gunupati Keshavram Reddy's* case should not be taken as having decided the point in question. In other words, the question as to whether Article 22(2) would apply to such a case may have to be considered by this Court if and when it becomes necessary to do so."

54. From the aforesaid decision it is clear that while exercising jurisdiction under Article 143(1) of the Constitution this Court can look into an earlier decision for the purpose of whether the contentions urged in the previous decision did raise a general issue or not; whether it was necessary to consider the larger issue that did not arise; and whether a general proposition had been laid down. It has also been stated that where no controversy arose with regard to applicability of a particular facet of constitutional law, the comments made in a decision could be treated as not accurate; and further it could be opined

that in an earlier judgment there are certain obiter observations.

55. Thus, in ***Keshav Singh,*** a seven-Judge Bench, while entertaining a reference under Article 143(1), dealt with a previous decision in respect of its interpretation involving a constitutional principle in respect of certain Articles, and proceeded to opine that the view expressed in ***Sharma's*** case, in relation to a proposition laid down in ***Keshavram Reddy's*** case, was inaccurate.

56. At this stage, it is worthy to refer to ***Supreme Court Advocates-on-Record Association and Ors.*** *Vs.* ***Union of India***[18]. J.S. Verma, J., (as his Lordship then was) speaking for the majority, apart from other conclusions relating to appointment of Judges and the Chief Justices, while dealing with transfer, expressed thus:

> "(8) Consent of the transferred Judge/Chief Justice is not required for either the first or any subsequent transfer from one High Court to another.

[18] (1993) 4 SCC 441

(9) Any transfer made on the recommendation of the Chief Justice of India is not to be deemed to be punitive, and such transfer is not justiciable on any ground.

(10) In making all appointments and transfers, the norms indicated must be followed. However, the same do not confer any justiciable right in anyone.

(11) Only limited judicial review on the grounds specified earlier is available in matters of appointments and transfers."

As far as the ground of limited judicial review is concerned the majority opined thus:

"481. These guidelines in the form of norms are not to be construed as conferring any justiciable right in the transferred Judge. Apart from the constitutional requirement of a transfer being made only on the recommendation of the Chief Justice of India, the issue of transfer is not justiciable on any other ground, including the reasons for the transfer or their sufficiency. The opinion of the Chief Justice of India formed in the manner indicated is sufficient safeguard and protection against any arbitrariness or bias, as well as any erosion of the independence of the judiciary.

482. …Except on the ground of want of consultation with the named constitutional functionaries or lack of any condition of eligibility in the case of an appointment, or of a transfer being made without the recommendation of the Chief Justice of India,

these matters are not justiciable on any other ground, including that of bias, which in any case is excluded by the element of plurality in the process of decision-making."

57. In ***Special Reference No. 1 of 1998,*** (commonly referred as the "**Second Judges Case**"), question No. 2 reads as follows:

> "(2) Whether the transfer of Judges is judicially reviewable in the light of the observation of the Supreme Court in the aforesaid judgment that 'such transfer is not justiciable on any ground' and its further observation that limited judicial review is available in matters of transfer, and the extent and scope of judicial review."

While answering the same, the Bench opined thus:

> **"37.** It is to our mind imperative, given the gravity involved in transferring High Court Judges, that the Chief Justice of India should obtain the views of the Chief Justice of the High Court from which the proposed transfer is to be effected as also the Chief Justice of the High Court to which the transfer is to be effected. This is in accord with the majority judgment in the *Second Judges case* which postulates consultation with the Chief Justice of another High Court. The Chief Justice of India should also take into account the views of one or more Supreme Court Judges who are in a position to provide material which would assist in the process of deciding whether or not a proposed transfer should take place. These views should be expressed in writing and should be considered by the Chief Justice of India and the four seniormost puisne Judges of the Supreme

Court. These views and those of each of the four seniormost puisne Judges should be conveyed to the Government of India along with the proposal of transfer. Unless the decision to transfer has been taken in the manner aforestated, it is not decisive and does not bind the Government of India."

In the conclusion their Lordships clearly state as follows:

"1. The expression "consultation with the Chief Justice of India" in Articles 217(1) and 222(1) of the Constitution of India requires consultation with a plurality of Judges in the formation of the opinion of the Chief Justice of India. The sole individual opinion of the Chief Justice of India does not constitute "consultation" within the meaning of the said articles.

2. The transfer of puisne Judges is judicially reviewable only to this extent: that the recommendation that has been made by the Chief Justice of India in this behalf has not been made in consultation with the four seniormost puisne Judges of the Supreme Court and/or that the views of the Chief Justice of the High Court from which the transfer is to be effected and of the Chief Justice of the High Court to which the transfer is to be effected have not been obtained."

58. From the aforesaid, it is demonstrable that while entertaining the reference under Article 143(1), this Court had analysed the principles enunciated in the earlier judgment and also made certain modifications. The said

modifications may be stated as one of the mode or method of inclusion by way of modification without changing the *ratio decidendi.* For the purpose of validity of a reference, suffice it to say, dwelling upon an earlier judgment is permissible. That apart, one cannot be oblivious of the fact that the scope of limited judicial review, in the **Second Judges Case,** which otherwise is quite restricted, was slightly expanded in the Court's opinion to the Presidential reference.

59. It is of some interest to note that almost every reference, filed under Article 143(1), has witnessed challenge as to its maintainability on one ground or the other, but all the same, the references have been answered, except in ***Dr. M. Ismail Faruqui & Ors.*** (supra), which was returned unanswered, mainly on the ground that the reference did not serve a constitutional purpose.

60. From the aforesaid analysis, it is quite vivid that this Court would respectfully decline to answer a reference

if it is improper, inadvisable and undesirable; or the questions formulated have purely socio-economic or political reasons, which have no relation whatsoever with any of the provisions of the Constitution or otherwise are of no constitutional significance; or are incapable of being answered; or would not subserve any purpose; or there is authoritative pronouncement of this Court which has already decided the question referred.

61. In the case at hand, it is to be scrutinized whether the **2G Case** is a decision which has dealt with and decided the controversy encapsulated in question No. 1 or meets any of the criteria mentioned above. As we perceive, the question involves interpretation of a constitutional principle inherent under Article 14 of the Constitution and it is of great public importance as it deals with allocation/alienation/disposal/ distribution of natural resources. Besides, the question whether the **2G Case** is on authoritative pronouncement in that regard, has to be looked into and only then an opinion can be expressed.

For the said purpose all other impediments do not remotely come into play in the present Reference.

62. We are, therefore, of the view that as long as the decision with respect to the allocation of spectrum licenses is untouched, this Court is within its jurisdiction to evaluate and clarify the ratio of the judgment in the **2G Case**. For the purpose of this stage of argumentation, it needs little emphasis, that we have the jurisdiction to clarify the ratio of the judgment in **2G Case**, irrespective of whether we actually choose to do so or not. Therefore, the fact that this Reference may require us to say something different to what has been enunciated in the **2G Case** as a proposition of law, cannot strike at the root of the maintainability of the Reference. Consequently, we reject the preliminary objection and hold that this Reference is maintainable, notwithstanding its effect on the ratio of the **2G Case**, as long as the decision in that case qua lis *inter partes* is left unaffected.

ON MERITS:

63. This leads us to the merits of the controversy disclosed in the questions framed in the Reference for our advisory opinion.

64. As already pointed out, the judgment in the **2G Case** triggered doubts about the validity of methods other than 'auction' for disposal of natural resources which, ultimately led to the filing of the present Reference. Therefore, before we proceed to answer question No.1, it is imperative to understand what has been precisely stated in the **2G Case** and decipher the law declared in that case.

65. All the counsel agreed that paragraphs 94 to 96 in the said decision are the repository of the ratio vis-à-vis disposal of natural resources in the **2G Case**. On the one hand it was argued that these paragraphs lay down, as a proposition of law, that all natural resources across all sectors, and in all circumstances are to be disposed of by way of public auction, and on the other, it was urged that the observations therein were made only qua spectrum.

Before examining the strength of the rival stands, we may briefly recapitulate the principles that govern the determination of the 'law declared' by a judgment and its true ratio.

66. Article 141 of the Constitution lays down that the 'law declared' by the Supreme Court is binding upon all the courts within the territory of India. The 'law declared' has to be construed as a principle of law that emanates from a judgment, or an interpretation of a law or judgment by the Supreme Court, upon which, the case is decided. [See: ***Fida Hussain & Ors.*** *Vs.* ***Moradabad Development Authority & Anr.***[19]]. Hence, it flows from the above that the 'law declared' is the principle culled out on the reading of a judgment as a whole in light of the questions raised, upon which the case is decided. [Also see**:** ***Ambica Quarry Works*** *Vs.* ***State of Gujarat & Ors.***[20] and ***Commissioner of Income Tax*** *Vs.* ***Sun Engineering*** **Works *(P) Ltd.***[21]]. In other words, the 'law declared' in a judgment, which is binding upon courts, is the *ratio decidendi* of the judgment. It is the essence of a

[19] (2011) 12 SCC 615
[20] (1987) 1 SCC 213
[21] (1992) 4 SCC 363

decision and the principle upon which, the case is decided, which has to be ascertained in relation to the subject-matter of the decision.

67. Each case entails a different set of facts and a decision is a precedent on its own facts; not everything said by a Judge while giving a judgment can be ascribed precedental value. The essence of a decision that binds the parties to the case is the principle upon which the case is decided and for this reason, it is important to analyse a decision and cull out from it, the *ratio decidendi*. In the matter of applying precedents, the erudite Justice Benjamin Cardozo in "***The Nature of a Judicial Process***", had said that "if the judge is to pronounce it wisely, some principles of selection there must be to guide him along all potential judgments that compete for recognition" and "almost invariably his first step is to examine and compare them;" "it is a process of search, comparison and little more" and ought not to be akin to matching "the colors of the case at hand against the colors of many sample cases" because in that case "the man who had the best card index of the cases would also

be the wisest judge". Warning against comparing precedents with matching colours of one case with another, he summarized the process, in case the colours don't match, in the following wise words:-

> "It is when the colors do not match, when the references in the index fail, when there is no decisive precedent, that the serious business of the judge begins. He must then fashion law for the litigants before him. In fashioning it for them, he will be fashioning it for others. The classic statement is Bacon's: "For many times, the things deduced to judgment may be meum and tuum, when the reason and consequence thereof may trench to point of estate. The sentence of today will make the right and wrong of tomorrow."

68. With reference to the precedential value of decisions, in ***State of Orissa & Ors.*** *Vs.* ***Md. Illiyas***[22] this Court observed:

> "...According to the well-settled theory of precedents, every decision contains three basic postulates: (*i*) findings of material facts, direct and inferential. An inferential finding of facts is the inference which the Judge draws from the direct, or perceptible facts; (*ii*) statements of the principles of law applicable to the legal problems disclosed by the facts; and (*iii*) judgment based on the combined effect of the above. A decision is an authority for what it actually decides. What is of the essence in a

[22] (2006) 1 SCC 275

decision is its ratio and not every observation found therein nor what logically flows from the various observations made in the judgment..."

69. Recently, in ***Union of India*** *Vs.* ***Amrit Lal Manchanda & Anr.***[23], this Court has observed as follows:

> "...Observations of courts are neither to be read as Euclid's theorems nor as provisions of the statute and that too taken out of their context. These observations must be read in the context in which they appear to have been stated. Judgments of courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for Judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes."

70. It is also important to read a judgment as a whole keeping in mind that it is not an abstract academic discourse with universal applicability, but heavily grounded in the facts and circumstances of the case. Every part of a judgment is intricately linked to others constituting a larger whole and thus, must be read keeping the logical thread intact. In this regard, in ***Islamic***

[23] (2004) 3 SCC 75

Academy of Education & Anr. *Vs.* ***State of Karnataka & Ors.***[24], the Court made the following observations:

> "The *ratio decidendi* of a judgment has to be found out only on reading the entire judgment. In fact, the ratio of the judgment is what is set out in the judgment itself. The answer to the question would necessarily have to be read in the context of what is set out in the judgment and not in isolation. In case of any doubt as regards any observations, reasons and principles, the other part of the judgment has to be looked into. By reading a line here and there from the judgment, one cannot find out the entire *ratio decidendi* of the judgment."

71. The ratio of the **2G Case** must, therefore, be understood and appreciated in light of the above guiding principles.

72. In the **2G Case**, the Bench framed five questions. Questions No. (ii) and (v) pertain to the factual matrix and are not relevant for settling the controversy at hand. The remaining three questions are reproduced below:

> "(i) Whether the Government has the right to alienate, transfer or distribute natural resources/national assets otherwise than by following a fair and transparent method

[24] (2003) 6 SCC 697

consistent with the fundamentals of the equality clause enshrined in the Constitution?

(iii) Whether the exercise undertaken by DoT from September 2007 to March 2008 for grant of UAS licences to the private respondents in terms of the recommendations made by TRAI is vitiated due to arbitrariness and mala fides and is contrary to public interest?

(iv) Whether the policy of first-come-first-served followed by DoT for grant of licences is ultra vires the provisions of Article 14 of the Constitution and whether the said policy was arbitrarily changed by the Minister of Communications and Information Technology (hereinafter referred to as "the Minister of Communications and Information Technology"), without consulting TRAI, with a view to favour some of the applicants?"

73. While dealing with question No.(i), the Court observed that the State is empowered to distribute natural resources as they constitute public property/national assets. Thereafter, the Bench observed as follows:

"75.…while distributing natural resources the State is bound to act in consonance with the principles of equality and public trust and ensure that no action is taken which may be detrimental to public interest. Like any other State action, constitutionalism must be reflected at every stage of the distribution of natural resources. In Article 39(*b*) of the Constitution it has been provided that the ownership and control of the material resources of the community should be so distributed so as to best subserve the common good, but no comprehensive legislation has been enacted to

generally define natural resources and a framework for their protection..."

74. The learned Judges adverted to the 'public trust doctrine' as enunciated in ***The Illinois Central Railroad Co.*** *Vs.* ***The People of the State of Illinois***[25]*;* ***M.C. Mehta*** *Vs.* ***Kamal Nath & Ors.***[26]*;* ***Jamshed Hormusji Wadia*** *Vs.* ***Board of Trustees, Port of Mumbai & Anr.***[27]*;* ***Intellectuals Forum, Tirupathi*** *Vs.* ***State of A.P. & Ors.***[28]*;* ***Fomento Resorts And Hotels Limited & Anr.*** *Vs.* ***Minguel Martins & Ors.***[29] and ***Reliance Natural Resources Limited*** *Vs.* ***Reliance Industries Limited***[30] and held:

> "85. As natural resources are public goods, the doctrine of equality, which emerges from the concepts of justice and fairness, must guide the State in determining the actual mechanism for distribution of natural resources. In this regard, the doctrine of equality has two aspects: *first*, it regulates the rights and obligations of the State vis-à-vis its people and demands that the people be granted equitable access to natural resources and/or its products and that they are adequately compensated for the transfer of the resource to the private domain; and *second*, it regulates the rights and obligations of the State vis-à-vis private parties seeking to acquire/use the resource and demands that the procedure

[25] 36 L ED 1018 : 146 U.S. 387 (1892)
[26] (1997) 1 SCC 388
[27] (2004) 3 SCC 214
[28] (2006) 3 SCC 549
[29] (2009) 3 SCC 571
[30] (2010) 7 SCC 1

adopted for distribution is just, non-arbitrary and transparent and that it does not discriminate between similarly placed private parties."

Referring to the decisions of this Court in ***Akhil Bhartiya Upbhokta Congress*** *Vs.* ***State of Madhya Pradesh & Ors.***[31] and ***Sachidanand Pandey & Anr.*** *Vs.* ***State of West Bengal & Ors.***[32]**,** the Bench ultimately concluded thus:

"89. In conclusion, we hold that the State is the legal owner of the natural resources as a trustee of the people and although it is empowered to distribute the same, the process of distribution must be guided by the constitutional principles including the doctrine of equality and larger public good."

75. On a reading of the above paragraphs, it can be noticed that the doctrine of equality; larger public good, adoption of a transparent and fair method, opportunity of competition; and avoidance of any occasion to scuttle the claim of similarly situated applicants were emphasised upon. While dealing with alienation of natural resources like spectrum, it was stated that it is the duty of the State to ensure that a non-discriminatory method is adopted for

[31] (2011) 5 SCC 29
[32] (1987) 2 SCC 295

distribution and alienation which would necessarily result in the protection of national/public interest.

76. Paragraphs 85 and 89, while referring to the concept of 'public trust doctrine', lay emphasis on the doctrine of equality, which has been segregated into two parts – one is the substantive part and the other is the regulatory part. In the regulatory facet, paragraph 85 states that the procedure adopted for distribution should be just and non-arbitrary and must be guided by constitutional principles including the doctrine of equality and larger public good. Similarly, in paragraph 89 stress has been laid on transparency and fair opportunity of competition. It is further reiterated that the burden of the State is to ensure that a non-discriminatory method is adopted for distribution and alienation which would necessarily result in the protection of national and public interest.

77. Dealing with Questions No.(iii) and (iv) in paragraphs 94 to 96 of the judgment, the Court opined as follows:

"94. There is a fundamental flaw in the first-come-first-served policy inasmuch as it involves an element of pure chance or accident. In matters involving award of contracts or grant of licence or permission to use public property, the invocation of first-come-first-served policy has inherently dangerous implications. Any person who has access to the power corridor at the highest or the lowest level may be able to obtain information from the government files or the files of the agency/instrumentality of the State that a particular public property or asset is likely to be disposed of or a contract is likely to be awarded or a licence or permission is likely to be given, he would immediately make an application and would become entitled to stand first in the queue at the cost of all others who may have a better claim.

95. This Court has repeatedly held that wherever a contract is to be awarded or a licence is to be given, the public authority must adopt a transparent and fair method for making selections so that all eligible persons get a fair opportunity of competition. To put it differently, the State and its agencies/ instrumentalities must always adopt a rational method for disposal of public property and no attempt should be made to scuttle the claim of worthy applicants. When it comes to alienation of scarce natural resources like spectrum, etc. it is the burden of the State to ensure that a non-discriminatory method is adopted for distribution and alienation, which would necessarily result in protection of national/public interest.

96. In our view, a duly publicised auction conducted fairly and impartially is perhaps the best method for discharging this burden and the methods like first-come-first-served when used for alienation of natural resources/public

> property are likely to be misused by unscrupulous people who are only interested in garnering maximum financial benefit and have no respect for the constitutional ethos and values. In other words, while transferring or alienating the natural resources, the State is duty-bound to adopt the method of auction by giving wide publicity so that all eligible persons can participate in the process."

78. Our reading of these paragraphs suggests that the Court was not considering the case of auction in general, but specifically evaluating the validity of those methods adopted in the distribution of spectrum from September 2007 to March 2008. It is also pertinent to note that reference to auction is made in the subsequent paragraph (96) with the rider 'perhaps'. It has been observed that "a duly publicized auction conducted fairly and impartially is ***perhaps*** the best method for discharging this burden." We are conscious that a judgment is not to be read as a statute, but at the same time, we cannot be oblivious to the fact that when it is argued with vehemence that the judgment lays down auction as a constitutional principle, the word "perhaps" gains significance. This suggests that the recommendation of auction for alienation of natural resources was never

intended to be taken as an absolute or blanket statement applicable across all natural resources, but simply a conclusion made at first blush over the attractiveness of a method like auction in disposal of natural resources. The choice of the word 'perhaps' suggests that the learned Judges considered situations requiring a method other than auction as conceivable and desirable.

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

80. Moreover, if the judgment is to be read as holding auction as the only permissible means of disposal

of all natural resources, it would lead to the quashing of a large number of laws that prescribe methods other than auction, e.g., the MMRD Act. While dealing with the merits of the Reference, at a later stage, we will discuss whether or not auction can be a constitutional mandate under Article 14 of the Constitution, but for the present, it would suffice to say that no court would ever implicitly, indirectly, or by inference, hold a range of laws as *ultra vires* the Constitution, without allowing every law to be tested on its merits. One of the most profound tenets of constitutionalism is the presumption of constitutionality assigned to each legislation enacted. We find that the **2G Case** does not even consider a plethora of laws and judgments that prescribe methods, other than auction, for dispensation of natural resources; something that it would have done, in case, it intended to make an assertion as wide as applying auction to all natural resources. Therefore, we are convinced that the observations in Paras 94 to 96 could not apply beyond the specific case of spectrum, which according to the law declared in the **2G**

Case, is to be alienated only by auction and no other method.

81. Thus, having come to the conclusion that the **2G Case** does not deal with modes of allocation for natural resources, other than spectrum, we shall now proceed to answer the first question of the Reference pertaining to other natural resources, as the question subsumes the essence of the entire reference, particularly the set of first five questions.

82. The President seeks this Court's opinion on the limited point of permissibility of methods other than auction for alienation of natural resources, other than spectrum. The question also harbours several concepts, which were argued before us through the hearing of the Reference, that require to be answered in order to derive a comprehensive answer to the parent question. Are some methods *ultra vires* and others *intra vires* the Constitution of India, especially Article 14? Can disposal through the method of auction be elevated to a

Constitutional principle? Is this Court entitled to direct the executive to adopt a certain method because it is the 'best' method? If not, to what extent can the executive deviate from such 'best' method? An answer to these issues, in turn, will give an answer to the first question which, as noted above, will answer the Presidential Reference.

83. Before proceeding to answer these questions, we would like to dispose of a couple of minor objections. The first pertained to the classification of resources made in the **2G Case**. Learned counsel appearing for CPIL argued that all that the judgment in the **2G Case** has done is to carve out a special category of cases where public auction is the only legally sustainable method of alienation viz. natural resources that are scarce, valuable and are allotted to private entities for commercial exploitation. The learned Attorney General, however, contested this claim and argued that no such proposition was laid down in the 2G judgment. He pointed out that the words "commercial exploitation" were not even used

anywhere in the judgment except in an extract from another judgment in a different context. We agree that the judgment itself does not carve out any special case for scarce natural resources only meant for commercial exploitation. However, we feel, despite that, in this Reference, CPIL is not barred from making a submission drawing a distinction between natural resources meant for commercial exploitation and those meant for other purposes. This Court has the jurisdiction to classify the subject matter of a reference, if a genuine case for it exists.

84. Mr. Shanti Bhushan, learned Senior Counsel, in support of his stand that the first question of the Reference must be answered in a way so as to allow auction as the only mode for the disposal of natural resources, submitted that a combined reading of Article 14, which dictates non- arbitrariness in State action and equal opportunity to those similarly placed; Article 39(b) which is a Directive Principle of State Policy dealing with distribution of natural resources for the common good of the people; and the "trusteeship"

principle found in the Preamble which mandates that the State holds all natural resources in the capacity of a trustee, on behalf of the people, would make auction a constitutional mandate under Article 14 of the Constitution. It is imperative, therefore, that we evaluate each of these principles before coming to any conclusion on the constitutional verdict on auction.

85. In the **2G Case**, two concepts namely, "public trust doctrine" and "trusteeship" have been adverted to, which were also relied upon by learned counsel for CPIL, in defence of the argument that the State holds natural resources in a fiduciary relationship with the people. As far as "trusteeship" is concerned, there is no cavil that the State holds all natural resources as a trustee of the public and must deal with them in a manner that is consistent with the nature of such a trust. However, what was asserted on behalf of CPIL was that all natural resources fall within the domain of the "public trust doctrine", and therefore, there is an obligation on the Government to ensure that their transfer or alienation for commercial

exploitation is in a fair and transparent manner and only in pursuit of public good. The learned Attorney General on the other hand, zealously urged that the subject matter of the doctrine and the nature of restrictions, it imposes, are of limited scope; that the applicability of the doctrine is restricted to certain common properties pertaining to the environment, like rivers, seashores, forest and air, meant for free and unimpeded use of the general public and the restrictions it imposes is in the term of a complete embargo on any alienation of such resources, for private ownership. According to him, the extension of the public trust doctrine to all natural resources has led to a considerable confusion and needs to be clarified.

86. The doctrine of public trust enunciated more thoroughly by the United States Supreme Court in ***Illinois*** (supra) was introduced to Indian environmental jurisprudence by this Court in ***M.C. Mehta*** (supra). Speaking for the majority, Kuldip Singh, J. observed as follows :

"25. The Public Trust Doctrine primarily rests on the principle that certain resources like air, sea, waters and the forests have such a great importance to the people as a whole that it would be wholly unjustified to make them a subject of private ownership. The said resources being a gift of nature, they should be made freely available to everyone irrespective of the status in life. The doctrine enjoins upon the Government to protect the resources for the enjoyment of the general public rather than to permit their use for private ownership or commercial purposes. According to Professor Sax the Public Trust Doctrine imposes the following restrictions on governmental authority:

> 'Three types of restrictions on governmental authority are often thought to be imposed by the public trust: first, the property subject to the trust must not only be used for a public purpose, but it must be held available for use by the general public; second, the property may not be sold, even for a fair cash equivalent; and third the property must be maintained for particular types of uses'."

The learned Judge further observed:-

"34. Our legal system — based on English common law — includes the public trust doctrine as part of its jurisprudence. The State is the trustee of all natural resources which are by nature meant for public use and enjoyment. Public at large is the beneficiary of the sea-shore, running waters, airs, forests and ecologically fragile lands. The State as a trustee is under a legal duty to protect the natural resources. These resources meant for public use cannot be converted into private ownership."

87. The judgment in ***Kamal Nath's*** case (supra) was explained in ***Intellectuals Forum*** (supra). Reiterating that the State is the trustee of all natural resources which are by nature meant for public use and enjoyment, the Court observed thus:

> ***"76.*** The Supreme Court of California, in ***National Audubon Society*** *Vs.* ***Superior Court of Alpine Country*** also known as ***Mono Lake case*** summed up the substance of the doctrine. The Court said:
>
> > "Thus the public trust is more than an affirmation of State power to use public property for public purposes. It is an affirmation of the duty of the State to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering the right only in those rare cases when the abandonment of the right is consistent with the purposes of the trust."
>
> This is an articulation of the doctrine from the angle of the affirmative duties of the State with regard to public trust. Formulated from a negatory angle, the doctrine does not exactly *prohibit* the alienation of the property held as a public trust. However, when the State holds a resource that is freely available for the use of the public, it provides for a high degree of judicial scrutiny on any action of the Government, no matter how consistent with the existing legislations, that attempts to restrict such free use. To properly scrutinise such actions of the Government, the courts must make a distinction between the Government's general obligation to act for the public benefit, and the special, more demanding

obligation which it may have as a trustee of certain public resources…"

It was thus, held that when the affirmative duties are set out from a nugatory angle, the doctrine does not exactly prohibit the alienation of property held as a public trust, but mandates a high degree of judicial scrutiny.

88. In ***Fomento*** (supra), the Court was concerned with the access of the public to a beach in Goa. Holding that it was a public beach which could not be privatized or blocked denying traditional access, this Court reiterated the public trust doctrine as follows:

> **"52.** The matter deserves to be considered from another angle. The public trust doctrine which has been invoked by Ms Indira Jaising in support of her argument that the beach in question is a public beach and the appellants cannot privatise the same by blocking/ obstructing traditional access available through Survey No. 803 (new No. 246/2) is implicitly engrafted by the State Government in Clause 4(*ix*) of the agreement. That doctrine primarily rests on the principle that certain resources like air, sea, waters and the forests have such a great importance to the people as a whole that it would be wholly unjustified to make them a subject of private ownership. These resources are gift of nature, therefore, they should be freely available to everyone irrespective of one's status in life."

89. In ***Reliance Natural Resources*** (supra), it has been observed that even though the doctrine of pubic trust has been applied in cases dealing with environmental jurisprudence, "it has broader application". Referring to ***Kamal Nath*** (supra), the Court held that it is the duty of the Government to provide complete protection to the natural resources as a trustee of the people at large.

90. The public trust doctrine is a specific doctrine with a particular domain and has to be applied carefully. It has been seriously debated before us as to whether the doctrine can be applied beyond the realm of environmental protection. Richard J. Lazarus in his article, "**Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine"**, while expressing scepticism over the 'liberation' of the doctrine, makes the following observations:-

> "The strength of the public trust doctrine necessarily lies in its origins; navigable waters and submerged lands are the focus of the doctrine, and the basic trust interests in navigation, commerce, and fishing are the object of its guarantee of public access. Commentators and judges alike have made efforts to "liberate", "expand", and "modify" the doctrine's scope yet its basic focus remains relatively unchanged. Courts still repeatedly return to the doctrine's historical function to determine its present role. When the doctrine is expanded, more often than not the expansions require tortured constructions of the present rather than repudiations of the doctrine's past."

However, we feel that for the purpose of the present opinion, it is not necessary to delve deep into the issue as in ***Intellectuals Forum*** (supra), the main departure from the principle explained by Joseph. L. Sax in his Article **"The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention"** is that public trust mandates a high degree of judicial scrutiny, an issue that we will anyway elaborately discuss while enunciating the mandate of Article 14 of the Constitution.

91. We would also like to briskly deal with a similar argument made by Mr. Shanti Bhushan. The learned

senior counsel submitted that the repository of sovereignty in our framework is the people of this country since the opening words of the Constitution read "We The People of India... do hereby adopt, enact and give to ourselves this Constitution," and therefore the government, as the agent of the Sovereign, the people, while alienating natural resources, must heed to judicial care and due process. Firstly, this Court has held in ***Raja Ram Pal*** *Vs.* ***Hon'ble Speaker, Lok Sabha & Ors.***[33] that the "Constitution is the *supreme lex* in this country" and "all organs of the State derive their authority, jurisdiction and powers from the Constitution and owe allegiance to it". Further, the notion that the Parliament is an agent of the people was squarely rebutted in ***In Re: Delhi Laws Act, 1912*** (supra), where it was observed that "the legislature as a body cannot be seen to be an agency of the electorate as a whole" and "acts on its own authority or power which it derives from the Constitution".

[33] (2007) 3 SCC 184; Para 21

92. In ***Municipal Corporation of Delhi*** *Vs.* ***Birla Cotton, Spinning and Weaving Mills, Delhi & Anr.***[34] this Court held that "the doctrine that it (the Parliament) is a delegate of the people coloured certain American decision does not arise here" and that in fact the "Parliament which by a concentration of all the powers of legislation derived from all the three Legislative Lists becomes the most competent and potent legislature it is possible to erect under our Constitution." We however, appreciate the concern of Mr. Shanti Bhushan that the lack of any such power in the hands of the people must not be a sanction for recklessness during disposal of natural resources. The legislature and the Executive are answerable to the Constitution and it is there where the judiciary, the guardian of the Constitution, must find the contours to the powers of disposal of natural resources, especially Article 14 and Article 39(b).

[34] [1968] 3 SCR 251

MANDATE OF ARTICLE 14:

93. Article 14 runs as follows:

> "**14. Equality before law.** – The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

94. The underlying object of Article 14 is to secure to all persons, citizens or non-citizens, the equality of status and opportunity referred to in the preamble to our Constitution. The language of Article 14 is couched in negative terms and is in form, an admonition addressed to the State. It does not directly purport to confer any right on any person as some of the other Articles, e.g., Article 19, do. The right to equality before law is secured from all legislative and executive tyranny by way of discrimination since the language of Article 14 uses the word "State" which as per Article 12, includes the executive organ. [See: ***Basheshar Nath*** *Vs.* ***The Commissioner of Income Tax, Delhi & Rajasthan & Anr.***[35]]. Besides, Article 14 is expressed in absolute terms

[35] 1959 Supp (1) SCR 528- "Coming then to the language of the Article it must be noted, first and foremost that this Article is, in form, an admonition addressed to

and its effect is not curtailed by restrictions like those imposed on Article 19(1) by Articles 19(2)-(6). However, notwithstanding the absence of such restrictions, certain tests have been devised through judicial decisions to test if Article 14 has been violated or not.

95. For the first couple of decades after the establishment of this Court, the 'classification' test was adopted which allowed for a classification between entities as long as it was based on an intelligible differentia and displayed a rational nexus with the ultimate objective of the policy. ***Budhan Choudhry & Ors.*** *Vs.* ***State of Bihar***[36] referred to in ***Shri Ram Krishna Dalmiya*** *Vs.* ***Shri Justice S.R. Tendolkar and Ors.***[37] explained it in the following terms:

> "It is now well established that while article 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. In order, however, to pass the test of

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the State and does not directly purport to confer any right on any person as some of the other Articles, e.g., Article 19, do. The obligation thus imposed on the State, no doubt, ensures for the benefit of all persons, for, as a necessary result of the operation of this Article, they all enjoy equality before the law. That is, however, the indirect, though necessary and inevitable, result of the mandate. The command of the Article is directed to the State and the reality of the obligation thus imposed on the State is the measure of the fundamental right which every person within the territory of India is to enjoy."

[36] AIR 1955 SC 191

[37] [1959] 1 SCR 279

permissible classification two conditions must be fulfilled, namely, (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and, (ii) that that differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification may be founded on different bases, namely, geographical, or according to objects or occupations or the like. What is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration. It is also well established by the decisions of this Court that article 14 condemns discrimination not only by a substantive law but also by a law of procedure."

96. However, after the judgment of this Court in ***E.P. Royappa*** *Vs.* ***State of Tamil Nadu & Anr***[38] the 'arbitrariness' doctrine was introduced which dropped a pedantic approach towards equality and held the mere existence of arbitrariness as violative of Article 14, however equal in its treatment. Justice Bhagwati (as his Lordship was then) articulated the dynamic nature of equality and borrowing from Shakespeare's Macbeth, said that the concept must not be "cribbed, cabined and confined" within doctrinaire limits: -

"85. ...Now, what is the content and reach of this great equalising principle? It is a founding faith, to

[38] (1974) 4 SCC 3

use the words of Bose. J., "a way of life", and it must not be subjected to a narrow pedantic or lexicographic approach. We cannot countenance any attempt to truncate its all-embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be "cribbed, cabined and confined" within traditional and doctrinaire limits."

His Lordship went on to explain the length and breadth of Article 14 in the following lucid words:

"85... From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14, and if it effects any matter relating to public employment, it is also violative of Article 16. Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment. They require that State action must be based on valid relevant principles applicable alike to all similarly situate and it must not be guided by any extraneous or irrelevant considerations because that would be denial of equality. Where the operative reason for State action, as distinguished from motive inducing from the antechamber of the mind, is not legitimate and relevant but is extraneous and outside the area of permissible considerations, it would amount to mala fide exercise of power and that is hit by Articles 14 and 16. Mala fide exercise of power and arbitrariness are different lethal radiations emanating from the same vice: in fact the latter

comprehends the former. Both are inhibited by Articles 14 and 16."

97. Building upon his opinion delivered in ***Royappa's case*** (supra)***,*** Bhagwati, J., held in ***Maneka Gandhi*** *Vs.* ***Union of India & Anr.***[39]:

> "The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non- arbitrariness pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14. It must be "right and just and fair" and not arbitrary, fanciful or oppressive."

98. In ***Ajay Hasia & Ors.*** *Vs.* ***Khalid Mujib Sehravardi & Ors.***[40], this Court said that the 'arbitrariness' test was lying "latent and submerged" in the "simple but pregnant" form of Article 14 and explained the switch from the 'classification' doctrine to the 'arbitrariness' doctrine in the following words:

> "16...The doctrine of classification which is evolved by the courts is not paraphrase of Article 14 nor is it the objective and end of that article. It is merely a judicial formula for determining whether the legislative or executive action in question is arbitrary and therefore constituting denial of equality. If the classification is not reasonable and does not satisfy the two conditions

[39] (1978) 1 SCC 248
[40] (1981) 1 SCC 722

referred to above, the impugned legislative or executive action would plainly be arbitrary and the guarantee of equality under Article 14 would be breached. Wherever therefore there is arbitrariness in State action whether it be of the legislature or of the executive or of an 'authority' under Article 12, Article 14 immediately springs into action and strikes down such State action. In fact, the concept of reasonableness and non-arbitrariness pervades the entire constitutional scheme and is a golden thread which runs through the whole of the fabric of the Constitution."

99. ***Ramana Dayaram Shetty*** *Vs.* ***International Airport Authority of India & Ors.***[41] explained the limitations of Article 14 on the functioning of the Government as follows: -

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

[41] (1979) 3 SCC 489 : AIR 1979 SC 1628

but was based on some valid principle which in itself was not irrational, unreasonable or discriminatory."

100. Equality and arbitrariness were thus, declared "sworn enemies" and it was held that an arbitrary act would fall foul of the right to equality. Non-arbitrariness was equated with the rule of law about which Jeffrey Jowell in his seminal article "**The Rule of Law Today**" said: -

> "Rule of law principle primarily applies to the power of implementation. It mainly represents a state of *procedural fairness*. When the rule of law is ignored by an official it may on occasion be enforced by courts."

101. As is evident from the above, the expressions 'arbitrariness' and 'unreasonableness' have been used interchangeably and in fact, one has been defined in terms of the other. More recently, in ***Sharma Transport*** *Vs.* ***Government of A.P. & Ors.***[42], this Court has observed thus:

> "25…In order to be described as arbitrary, it must be shown that it was not reasonable and manifestly arbitrary. The expression "arbitrarily" means: in an unreasonable manner, as fixed or done capriciously or at pleasure, without adequate determining principle, not founded in the nature of

[42] (2002) 2 SCC 188

things, non-rational, not done or acting according to reason or judgment, depending on the will alone."

102. Further, even though the 'classification' doctrine was never overruled, it has found less favour with this Court as compared to the 'arbitrariness' doctrine. In ***Om Kumar & Ors.*** *Vs.* ***Union of India***[43], this Court held thus:

> "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."

103. However, this Court has also alerted against the arbitrary use of the 'arbitrariness' doctrine. Typically, laws are struck down for violating Part III of the Constitution of India, legislative incompetence or excessive delegation. However, since ***Royappa's case*** (supra), the doctrine has been loosely applied. This Court in ***State of A.P. & Ors.***

[43] (2001) 2 SCC 386

Vs. ***McDowell & Co. & Ors.***[44] stressed on the need for an objective and scientific analysis of arbitrariness, especially while striking down legislations. Justice Jeevan Reddy observed:

> "43…The power of Parliament or for that matter, the State Legislatures is restricted in two ways. A law made by Parliament or the legislature can be struck down by courts on two grounds and two grounds alone, viz., (1) lack of legislative competence and (2) violation of any of the fundamental rights guaranteed in Part III of the Constitution or of any other constitutional provision. There is no third ground. We do not wish to enter into a discussion of the concepts of procedural unreasonableness and substantive unreasonableness — concepts inspired by the decisions of United States Supreme Court. Even in U.S.A., these concepts and in particular the concept of substantive due process have proved to be of unending controversy, the latest thinking tending towards a severe curtailment of this ground (substantive due process). The main criticism against the ground of substantive due process being that it seeks to set up the courts as arbiters of the wisdom of the legislature in enacting the particular piece of legislation. It is enough for us to say that by whatever name it is characterised, the ground of invalidation must fall within the four corners of the two grounds mentioned above. In other words, say, if an enactment is challenged as violative of Article 14, it can be struck down only if it is found that it is violative of the equality clause/equal protection clause enshrined therein. Similarly, if an enactment is challenged as violative of any of the fundamental rights guaranteed by clauses (a) to (g) of Article 19(1), it can be struck down only if it

[44] (1996) 3 SCC 709

is found not saved by any of the clauses (s) to (6) of Article 19 and so on. No enactment can be struck down by just saying that it is arbitrary** or unreasonable. Some or other constitutional infirmity has to be found before invalidating an Act. An enactment cannot be struck down on the ground that court thinks it unjustified. Parliament and the legislatures, composed as they are of the representatives of the people, are supposed to know and be aware of the needs of the people and what is good and bad for them. The court cannot sit in judgment over their wisdom. In this connection, it should be remembered that even in the case of administrative action, the scope of judicial review is limited to three grounds, viz., (i) unreasonableness, which can more appropriately be called irrationality, (ii) illegality and (iii) procedural impropriety (see Council of Civil Service Unions v. Minister for Civil Service which decision has been accepted by this Court as well).

An expression used widely and rather indiscriminately — an expression of inherently imprecise import. The extensive use of this expression in India reminds one of what Frankfurter, J said in ***Hattie Mae Tiller v. Atlantic Coast Line Railroad Co.,* 87 L ED 610 : 318 US 54 (1943). "The phrase begins life as a literary expression; its felicity leads to its lazy repetition and repetition soon establishes it as a legal formula, undiscriminatingly used to express different and sometimes contradictory ideas", said the learned Judge."

104. Therefore, ever since the ***Royappa*** era, the conception of 'arbitrariness' has not undergone any significant change. Some decisions have commented on

the doctrinal looseness of the arbitrariness test and tried keeping its folds within permissible boundaries. For instance, cases where legislation or rules have been struck down as being arbitrary in the sense of being unreasonable [See: ***Air India*** *Vs.* ***Nergesh Meerza***[45] (SCC at pp. 372-373)] only on the basis of "arbitrariness", as explained above, have been doubted in ***McDowell's case*** (supra). But otherwise, the subject matter, content and tests for checking violation of Article 14 have remained, more or less, unaltered.

105. From a scrutiny of the trend of decisions it is clearly perceivable that the action of the State, whether it relates to distribution of largesse, grant of contracts or allotment of land, is to be tested on the touchstone of Article 14 of the Constitution. A law may not be struck down for being arbitrary without the pointing out of a constitutional infirmity as ***McDowell's case*** (supra) has said. Therefore, a State action has to be tested for constitutional infirmities qua Article 14 of the Constitution. The action has to be fair, reasonable, non-discriminatory,

[45] (1981) 4 SCC 335

transparent, non-capricious, unbiased, without favouritism or nepotism, in pursuit of promotion of healthy competition and equitable treatment. It should conform to the norms which are rational, informed with reasons and guided by public interest, etc. All these principles are inherent in the fundamental conception of Article 14. This is the mandate of Article 14 of the Constitution of India.

WHETHER 'AUCTION' A CONSTITUTIONAL MANDATE:

106. Such being the constitutional intent and effect of Article 14, the question arises - can auction as a method of disposal of natural resources be declared a constitutional mandate under Article 14 of the Constitution of India? We would unhesitatingly answer it in the negative since any other answer would be completely contrary to the scheme of Article 14. Firstly, Article 14 may imply positive and negative rights for an individual, but with respect to the State, it is only couched in negative terms; like an admonition against the State which prohibits the State from taking up actions that may be arbitrary, unreasonable, capricious or discriminatory.

Article 14, therefore, is an injunction to the State against taking certain type of actions rather than commanding it to take particular steps. Reading the mandate of auction into its scheme would thus, be completely contrary to the intent of the Article apparent from its plain language.

107. Secondly, a constitutional mandate is an absolute principle that has to be applied in all situations; it cannot be applied in some and not tested in others. The absolute principle is then applied on a case by case basis to see which actions fulfill the requirements of the constitutional principle and which do not.

108. Justice K. Subba Rao in his lectures compiled in a book titled "**Some Constitutional Problems**", critically analyzing the trends of Indian constitutional development, stated as follows:

> "If the Courts, instead of limiting the scope of the articles by construction, exercise their jurisdiction in appropriate cases, I have no doubt that the arbitrariness of the authorities will be minimised. If these authorities entrusted with the discretionary powers, realize that their illegal orders infringing the rights of the people would be quashed by the appropriate authority, they would rarely pass

> orders in excess of their powers. If they knew that not only the form but the substance of the orders would be scrutinized in open court, they would try to keep within their bounds. The fear of ventilation of grievance in public has always been an effective deterrent. The apprehension that the High Courts would be swamped with writs has no basis."

109. Similar sentiments were expressed by Justice K. K. Mathew in series of lectures incorporated in the form of a book titled "**Democracy, Equality and Freedom**" in which it is stated that "the strength of judicial review lies in case to case adjudication." This is precisely why this Court in ***His Holiness Kesavananda Bharti Sripadagalvaru*** *Vs.* ***State of Kerala & Anr.***[46] quoting from an American decision, observed as follows***:***

> "1695...The reason why the expression "due process" has never been defined is that it embodies a concept of fairness which has to be decided with reference to the facts and circumstances of each case and also according to the mores for the time being in force in a society to which the concept has to be applied. As Justice Frankfurter said, "due process" is not a technical conception with a fixed content unrelated to time, place and circumstances [See ***Joint Anti-Fascist Refugee Committee v. McGrath*** 341 U.S. 123]".

110. Equality, therefore, cannot be limited to mean only auction, without testing it in every scenario. In ***The***

[46] (1973) 4 SCC 225

State of West Bengal *Vs.* ***Anwar Ali Sarkar***[47], this Court, quoting from ***Kotch*** *Vs.* ***Pilot Comm'rs***[48] , had held that "the constitutional command for a State to afford equal protection of the laws sets a goal not attainable by the invention and application of a precise formula. This Court has never attempted that impossible task". One cannot test the validity of a law with reference to the essential elements of ideal democracy, actually incorporated in the Constitution. (See: ***Indira Nehru Gandhi*** *Vs.* ***Raj Narain***[49]). The Courts are not at liberty to declare a statute void, because in their opinion it is opposed to the spirit of the Constitution. Courts cannot declare a limitation or constitutional requirement under the notion of having discovered some *ideal norm*. Further, a constitutional principle must not be limited to a precise formula but ought to be an abstract principle applied to precise situations. The repercussion of holding auction as a constitutional mandate would be the voiding of every action that deviates from it, including social endeavours, welfare schemes and promotional policies,

[47] 1952 SCR 284 at pp. 297
[48] 330 U.S. 552
[49] 1975 (Supp) SCC 1

even though CPIL itself has argued against the same, and asked for making auction mandatory only in the alienation of scarce natural resources meant for private and commercial business ventures. It would be odd to derive auction as a constitutional principle only for a limited set of situations from the wide and generic declaration of Article 14. The strength of constitutional adjudication lies in case to case adjudication and therefore auction cannot be elevated to a constitutional mandate.

111. Finally, reading auction as a constitutional mandate would be impermissible because such an approach may distort another constitutional principle embodied in Article 39(b). The said article enumerating certain principles of policy, to be followed by the State, reads as follows:

> "The State shall, in particular, direct its policy towards securing –
>
> (a) ... ...
>
> (b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;

... ..."

The disposal of natural resources is a facet of the use and distribution of such resources. Article 39(b) mandates that the ownership and control of natural resources should be so distributed so as to best subserve the common good. Article 37 provides that the provisions of Part IV shall not be enforceable by any Court, but the principles laid down therein are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.

112. Therefore, this Article, in a sense, is a restriction on 'distribution' built into the Constitution. But the restriction is imposed on the object and not the means. The overarching and underlying principle governing 'distribution' is furtherance of common good. But for the achievement of that objective, the Constitution uses the generic word 'distribution'. Distribution has broad contours and cannot be limited to meaning only one method i.e. auction. It envisages all such methods available for

distribution/allocation of natural resources which ultimately subserve the "common good".

113. In ***State of Tamil Nadu & Ors.*** *Vs.* ***L. Abu Kavur Bai & Ors.***[50]**,** this Court explained the broad-based concept of 'distribution' as follows:

> "89. …The word 'distribution' used in Article 39(b) must be broadly construed so that a court may give full and comprehensive effect to the statutory intent contained in Article 39 (b). A narrow construction of the word 'distribution' might defeat or frustrate the very object which the Article seeks to subserve…"

114. After noting definitions of 'distribution' from different dictionaries, this Court held:

> "92. It is obvious, therefore, that in view of the vast range of transactions contemplated by the word 'distribution' as mentioned in the dictionaries referred to above, it will not be correct to construe the word 'distribution' in a purely literal sense so as to mean only division of a particular kind or to particular persons. The words, apportionment, allotment, allocation, classification, clearly fall within the broad sweep of the word 'distribution'. So construed, the word 'distribution' as used in Article 39(b) will include various facets, aspects, methods and terminology of a broad-based concept of distribution…"

[50] (1984) 1 SCC 515

115. It can thus, be seen from the afore-quoted paragraphs that the term “distribute” undoubtedly, has wide amplitude and encompasses all manners and methods of distribution, which would include classes, industries, regions, private and public sections, etc. Having regard to the basic nature of Article 39(b), a narrower concept of equality under Article 14 than that discussed above, may frustrate the broader concept of distribution, as conceived in Article 39(b). There cannot, therefore, be a cavil that “common good’ and “larger public interests” have to be regarded as constitutional reality deserving actualization.

116. Learned counsel for CPIL argued that revenue maximization during the sale or alienation of a natural resource for commercial exploitation is the only way of achieving public good since the revenue collected can be channelized to welfare policies and controlling the burgeoning deficit. According to the learned counsel, since the best way to maximize revenue is through the

route of auction, it becomes a constitutional principle even under Article 39(b). However, we are not persuaded to hold so. Auctions may be the best way of maximizing revenue but revenue maximization may not always be the best way to subserve public good. "Common good" is the sole guiding factor under Article 39(b) for distribution of natural resources. It is the touchstone of testing whether any policy subserves the "common good" and if it does, irrespective of the means adopted, it is clearly in accordance with the principle enshrined in Article 39(b).

117. In ***The State of Karnataka and Anr.*** *Vs.* ***Shri Ranganatha Reddy and Anr.***[51], Justice Krishna Iyer observed that keeping in mind the purpose of an Article like 39(b), a broad rather than a narrow meaning should be given to the words of that Article. In his inimitable style, his Lordship opined thus:

> "83. Two conclusions strike us as quintessential. Part IV, especially Article 39(b) and (c), is a futuristic mandate to the state with a message of transformation of the economic and social order. Firstly, such change calls for collaborative effort from all the legal institutions of the

[51] (1977) 4 SCC 471

> system: the legislature, the judiciary and the administrative machinery. Secondly and consequentially, loyalty to the high purpose of the Constitution, viz., social and economic justice in the context of material want and utter inequalities on a massive scale, compels the court to ascribe expansive meaning to the pregnant words used with hopeful foresight, not to circumscribe their connotation into contradiction of the objectives inspiring the provision. To be Pharisaic towards the Constitution through ritualistic construction is to weaken the social-spiritual thrust of the founding fathers' dynamic faith."

118. In the case of ***Bennett Coleman & Co. and Ors.*** *Vs.* ***Union of India and Ors***[52]**.**, it has been held by this Court that "the only norm which the Constitution furnishes for distribution of material resources of the community is elastic norm of common good." Thus "common good" is a norm in Article 39(b) whose applicability was considered by this Court on the facts of the case. Even in that case, this Court did not evolve economic criteria of its own to achieve the goal of "common good" in Article 39(b), which is part of the Directive Principles.

[52] (1972) 2 SCC 788

119. The norm of "common good" has to be understood and appreciated in a holistic manner. It is obvious that the manner in which the common good is best subserved is not a matter that can be measured by any constitutional yardstick - it would depend on the economic and political philosophy of the government. Revenue maximization is not the only way in which the common good can be subserved. Where revenue maximization is the object of a policy, being considered qua that resource at that point of time to be the best way to subserve the common good, auction would be one of the preferable methods, though not the only method. Where revenue maximization is not the object of a policy of distribution, the question of auction would not arise. Revenue considerations may assume secondary consideration to developmental considerations.

120. Therefore, in conclusion, the submission that the mandate of Article 14 is that any disposal of a natural resource for commercial use must be for revenue maximization, and thus by auction, is based neither on law

nor on logic. There is no constitutional imperative in the matter of economic policies- Article 14 does not pre-define any economic policy as a constitutional mandate. Even the mandate of 39(b) imposes no restrictions on the means adopted to subserve the public good and uses the broad term 'distribution', suggesting that the methodology of distribution is not fixed. Economic logic establishes that alienation/allocation of natural resources to the highest bidder may not necessarily be the only way to subserve the common good, and at times, may run counter to public good. Hence, it needs little emphasis that disposal of all natural resources through auctions is clearly not a constitutional mandate.

LEGITIMATE DEVIATIONS FROM AUCTION

121. As a result, this Court has, on a number of occasions, delivered judgments directing means for disposal of natural resources other than auction for different resources in different circumstances. It would be profitable to refer to a few cases and appreciate the

reasons this Court has adopted for deviating from the method of auction.

122. In ***M/s Kasturi Lal Lakshmi Reddy*** *Vs.* ***State of Jammu & Kashmir & Anr.***[53]***,*** while comparing the efficacy of auction in promoting a domestic industry, P.N. Bhagwati, J. observed: -

> "22. ...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, wee whether any other offers are forthcoming and then after considering all offers, decide whether I

[53] (1980) 4 SCC 1

should let you set up the industry"...The State must be free in such a case to negotiate with a private entrepreneur with a view to inducing him to set up an industry within the State and if the State enters into a contract with such entrepreneur for providing resources and other facilities for setting up an industry, the contract cannot be assailed as invalid so long as the State has acted bona fide, reasonably and in public interest. If the terms and conditions of the contract or the surrounding circumstances show that the State has acted mala fide or out of improper or corrupt motive or in order to promote the private interests of someone at the cost of the State, the court will undoubtedly interfere and strike down State action as arbitrary, unreasonable or contrary to public interest. But so long as the State action is bona fide and reasonable, the court will not interfere merely on the ground that no advertisement was given or publicity made or tenders invited."

123. In ***Sachidanand Pandey*** (supra) after noticing ***Kasturi Lal's case*** (supra)***,*** it was concluded as under:

"40. On a consideration of the relevant cases cited at the Bar the following propositions may be taken as well established: State-owned or public-owned property is not to be dealt with at the absolute discretion of the executive. Certain precepts and principles have to be observed. Public interest is the paramount consideration. One of the methods of securing the public interest, when it is considered necessary to dispose of a property, is to sell the property by public auction or by inviting tenders. Though that is the ordinary rule, it is not an invariable rule.

> There may be situations where there are compelling reasons necessitating departure from the rule but then the reasons for the departure must be rational and should not be suggestive of discrimination. Appearance of public justice is as important as doing justice. Nothing should be done which gives an appearance of bias, jobbery or nepotism."

124. In ***Haji T.M. Hassan Rawther*** *Vs.* ***Kerala Financial Corpn.***[54]***,*** after an exhaustive review of the law including the decisions in ***Kasturi Lal*** (supra) and ***Sachidanand Pandey*** (supra), it was held that public disposal of State owned properties is not the only rule. It was, *inter-alia*, observed that:

> "14. The public property owned by the State or by any instrumentality of the State should be generally sold by public auction or by inviting tenders. This Court has been insisting upon that rule, not only to get the highest price for the property but also to ensure fairness in the activities of the State and public authorities. They should undoubtedly act fairly. Their actions should be legitimate. Their dealings should be aboveboard. Their transactions should be without aversion or affection. Nothing should be suggestive of discrimination. Nothing should be done by them which gives an impression of bias, favouritism or nepotism. Ordinarily these factors would be absent if the matter is brought to public auction or sale by tenders. That is why the court repeatedly stated and reiterated that the State-owned properties are required to be disposed of publicly. But that is not the only rule. As O.

[54] 1988) 1 SCC 166

> Chinnappa Reddy, J. observed "that though that is the ordinary rule, it is not an invariable rule". There may be situations necessitating departure from the rule, but then such instances must be justified by compulsions and not by compromise. It must be justified by compelling reasons and not by just convenience."

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

125. In ***M.P. Oil Extraction and Anr.*** *Vs.* ***State of M.P. & Ors.***[55]***,*** this Court held as follows:

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

[55] (1997) 7 SCC 592

at concessional rate of royalty to the industrial units covered by the agreements on being selected on valid and objective considerations."

126. In ***Netai Bag & Ors.*** *Vs.* ***State of W.B. & Ors.***[56]**,** this Court observed that non- floating of tenders or not holding of public auction would, not in all cases, be deemed to be the result of the exercise of the executive power in an arbitrary manner. It was stated:

"19. ...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.

This Court once again pointed out that there can be exceptions from auction; the ultimate test is only that of

[56] (2000) 8 SCC 262

fairness of the decision making process and compliance with Article 14 of the Constitution.

127. In ***M & T Consultants, Secunderabad*** *Vs.* ***S.Y. Nawab[57],*** this Court again reiterated that non-floating of tenders does not always lead to the conclusion that the exercise of the power is arbitrary:

> "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 favour 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."

128. In ***Villianur Iyarkkai Padukappu Maiyam*** *Vs.* ***Union of India & Ors.[58],*** a three Judge Bench of this

[57] (2003) 8 SCC 100
[58] (2009) 7 SCC 561

Court was concerned with the development of the Port of Pondicherry where a contractor had been selected without floating a tender or holding public auction. It was held as under:

> "164. The plea raised by the learned counsel for the appellants that the Government of Pondicherry was arbitrary and unreasonable in switching the whole public tender process into a system of personal selection and, therefore, the appeals should be accepted, is devoid of merits. It is well settled that non-floating of tenders or not holding of public auction would not in all cases be deemed to be the result of the exercise of the executive power in an arbitrary manner.
>
> 171. In a case like this where the State is allocating resources such as water, power, raw materials, etc. for the purpose of encouraging development of the port, this Court does not think that the State is bound to advertise and tell the people that it wants development of the port in a particular manner and invite those interested to come up with proposals for the purpose. The State may choose to do so if it thinks fit and in a given situation it may turn out to be advantageous for the State to do so, but if any private party comes before the State and offers to develop the port, the State would not be committing breach of any constitutional obligation if it negotiates with such a party and agrees to provide resources and other facilities for the purpose of development of the port."

129. Hence, it is manifest that there is no constitutional mandate in favour of auction under Article

14. The Government has repeatedly deviated from the course of auction and this Court has repeatedly upheld such actions. The judiciary tests such deviations on the limited scope of arbitrariness and fairness under Article 14 and its role is limited to that extent. Essentially whenever the object of policy is anything but revenue maximization, the Executive is seen to adopt methods other than auction.

130. A fortiori, besides legal logic, mandatory auction may be contrary to economic logic as well. Different resources may require different treatment. Very often, exploration and exploitation contracts are bundled together due to the requirement of heavy capital in the discovery of natural resources. A concern would risk undertaking such exploration and incur heavy costs only if it was assured utilization of the resource discovered; a prudent business venture, would not like to incur the high costs involved in exploration activities and then compete for that resource in an open auction. The logic is similar to that applied in patents. Firms are given incentives to

invest in research and development with the promise of exclusive access to the market for the sale of that invention. Such an approach is economically and legally sound and sometimes necessary to spur research and development. Similarly, bundling exploration and exploitation contracts may be necessary to spur growth in a specific industry.

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

POTENTIAL OF ABUSE

132. It was also argued that even if the method of auction is not a mandate under Article 14, it must be the only permissible method, due to the susceptibility of other methods to abuse. This argument, in our view, is contrary

to an established position of law on the subject cemented through a catena of decisions.

133. In ***R.K. Garg*** *Vs.* ***Union of India & Ors.***[59]**,** Justice P. N. Bhagwati, speaking for a Constitution Bench of five learned Judges, held:

> "8....The Court must always remember that "legislation is directed to practical problems, that the economic mechanism is highly sensitive and complex, that many problems are singular and contingent, that laws are not abstract propositions and do not relate to abstract units and are not to be measured by abstract symmetry"; "that exact wisdom and nice adaption of remedy are not always possible" and that "judgment is largely a prophecy based on meager and uninterpreted experience". Every legislation particularly in economic matters is essentially empiric and it is based on experimentation or what one may call trial and error method and therefore it cannot provide for all possible situations or anticipate all possible abuses. There may be crudities and inequities in complicated experimental economic legislation but on that account alone it cannot be struck down as invalid. The courts cannot, as pointed out by the United States Supreme Court in ***Secretary of Agriculture v. Central Reig Refining Company***[60] be converted into tribunals for relief from such crudities and inequities. There may even be possibilities of abuse, but that too cannot of itself be a ground for invalidating the legislation, because it is not possible for any legislature to anticipate as if by some divine prescience, distortions and abuses of its legislation

[59] (1981) 4 SCC 675
[60] 94 L Ed 381 : 338 US 604 (1950)

which may be made by those subject to its provisions and to provide against such distortions and abuses. Indeed, howsoever great may be the care bestowed on its framing, it is difficult to conceive of a legislation which is not capable of being abused by perverted human ingenuity. The Court must therefore adjudge the constitutionality of such legislation by the generality of its provisions and not by its crudities or inequities or by the possibilities of abuse of any of its provisions. If any crudities, inequities or possibilities of abuse come to light, the legislature can always step in and enact suitable amendatory legislation. That is the essence of pragmatic approach which must guide and inspire the legislature in dealing with complex economic issues."

134. Then again, in ***D. K. Trivedi & Sons & Ors.*** *Vs.* ***State of Gujarat & Ors.***[61]**,** while upholding the constitutional validity of Section 15(1) of the MMRD Act, this Court explained the principle in the following words:

"50. Where a statute confers discretionary powers upon the executive or an administrative authority, the validity or constitutionality of such power cannot be judged on the assumption that the executive or such authority will act in an arbitrary manner in the exercise of the discretion conferred upon it. If the executive or the administrative authority acts in an arbitrary manner, its action would be bad in law and liable to be struck down by the courts but the possibility of abuse of power or arbitrary exercise of power cannot invalidate the statute conferring the power or the power which has been conferred by it."

[61] (1986) Supp SCC 20

135. Therefore, a potential for abuse cannot be the basis for striking down a method as *ultra vires* the Constitution. It is the actual abuse itself that must be brought before the Court for being tested on the anvil of constitutional provisions. In fact, it may be said that even auction has a potential of abuse, like any other method of allocation, but that cannot be the basis of declaring it as an unconstitutional methodology either. These drawbacks include cartelization, "winners curse" (the phenomenon by which a bidder bids a higher, unrealistic and unexecutable price just to surpass the competition; or where a bidder, in case of multiple auctions, bids for all the resources and ends up winning licenses for exploitation of more resources than he can pragmatically execute), etc. However, all the same, auction cannot be called *ultra vires* for the said reasons and continues to be an attractive and preferred means of disposal of natural resources especially when revenue maximization is a priority. Therefore, neither auction, nor any other method

of disposal can be held *ultra vires* the Constitution, merely because of a potential abuse.

JUDICIAL REVIEW OF POLICY DECISIONS

136. The learned Attorney General also argued that dictating a method of distribution for natural resources violates the age old established principle of non-interference by the judiciary in policy matters. Even though the contours of the power of judicial review of policy decisions has become a trite subject, as the Courts have repeatedly delivered opinions on it, we wish to reiterate some of the principles in brief, especially with regard to economic policy choices and pricing.

137. One of the earliest pronouncements on the subject came from this Court in ***Rustom Cavasjee Cooper*** *Vs.* ***Union of India***[62] (commonly known as "***Bank Nationalization Case"***) wherein this Court held that it is not the forum where conflicting policy claims may be debated; it is only required to adjudicate the

[62] (1970) 1 SCC 248

legality of a measure which has little to do with relative merits of different political and economic theories. The Court observed:

> "63. This Court is not the forum in which these conflicting claims may be debated. Whether there is a genuine need for banking facility in the rural sector, whether certain classes of the community are deprived of the benefit of the resources of the banking industry, whether administration by the Government of the commercial banking sector will not prove beneficial to the community and will lead to rigidity in the administration, whether the Government administration will eschew the profit-motive, and even if it be eschewed, there will accrue substantial benefits to the public, whether an undue accent on banking as a means of social regeneration, especially in the backward areas, is a doctrinaire approach to a rational order of priorities for attaining the national objectives enshrined in our Constitution, and whether the policy followed by the Government in office or the policy propounded by its opponents may reasonably attain the national objectives are matters which have little relevance in determining the legality of the measure. It is again not for this Court to consider the relative merits of the different political theories or economic policies. The Parliament has under Entry 45, List I the power to legislate in respect of banking and other commercial activities of the named banks necessarily incidental thereto: it has the power to legislate for acquiring the undertaking of the named banks under Entry 42, List III. Whether by the exercise of the power vested in the Reserve Bank under the pre-existing laws, results could be achieved which it is the object of the Act to achieve, is, in our judgment, not relevant in considering whether the Act amounts to abuse of legislative power. This Court has the power to

> strike down a law on the ground of want of authority, but the Court will not sit in appeal over the policy of the Parliament in enacting a law. The Court cannot find fault with the Act merely on the ground that it is inadvisable to take over the undertaking of banks which, it is said by the petitioner, by thrift and efficient management had set up an impressive and efficient business organization serving large sectors of industry."

138. In ***R.K. Garg*** (supra), this Court even observed that greater judicial deference must be shown towards a law relating to economic activities due to the complexity of economic problems and their fulfillment through a methodology of trial and error. As noted above, it was also clarified that the fact that an economic legislation may be troubled by crudities, inequities, uncertainties or the possibility of abuse cannot be the basis for striking it down. The following observations which refer to a couple of American Supreme Court decisions are a limpid enunciation on the subject :

> "8. Another rule of equal importance is that laws relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion etc. It has been said by no less a person than Holmes, J., that the legislature should be allowed some play in the joints, because it has to deal with complex problems which do not admit of solution through

any doctrinaire or strait-jacket formula and this is particularly true in case of legislation dealing with economic matters, where, having regard to the nature of the problems required to be dealt with, greater play in the joints has to be allowed to the legislature. The court should feel more inclined to give judicial deference to legislative judgment in the field of economic regulation than in other areas where fundamental human rights are involved. Nowhere has this admonition been more felicitously expressed than in ***Morey v. Doud***[63] where Frankfurter, J., said in his inimitable style:

> 'In the utilities, tax and economic regulation cases, there are good reasons for judicial self-restraint if not judicial deference to legislative judgment. The legislature after all has the affirmative responsibility. The courts have only the power to destroy, not to reconstruct. When these are added to the complexity of economic regulation, the uncertainty, the liability to error, the bewildering conflict of the experts, and the number of times the judges have been overruled by events — self-limitation can be seen to be the path to judicial wisdom and institutional prestige and stability'..."

139. In ***Premium Granites & Anr.*** *Vs.* ***State of T.N. & Ors.***[64] this Court clarified that it is the validity of a law and not its efficacy that can be challenged:

> "54. It is not the domain of the court to embark upon unchartered ocean of public policy in an

[63] 354 US 457
[64] (1994) 2 SCC 691

exercise to consider as to whether a particular public policy is wise or a better public policy can be evolved. Such exercise must be left to the discretion of the executive and legislative authorities as the case may be. The court is called upon to consider the validity of a public policy only when a challenge is made that such policy decision infringes fundamental rights guaranteed by the Constitution of India or any other statutory right..."

140. In ***Delhi Science Forum & Ors.*** *Vs.* ***Union of India & Anr.***[65] a Bench of three learned Judges of this Court, while rejecting a claim against the opening up of the telecom sector reiterated that the forum for debate and discourse over the merits and demerits of a policy is the Parliament. It restated that the services of this Court are not sought till the legality of the policy is disputed, and further, that no direction can be given or be expected from the courts, unless while implementing such policies, there is violation or infringement of any of the constitutional or statutory provisions. It held thus:

"7. What has been said in respect of legislations is applicable even in respect of policies which have been adopted by Parliament. They cannot be tested in Court of Law. The courts cannot express their opinion as to whether at a particular juncture

[65] (1996) 2 SCC 405

> or under a particular situation prevailing in the country any such national policy should have been adopted or not. There may be views and views, opinions and opinions which may be shared and believed by citizens of the country including the representatives of the people in Parliament. But that has to be sorted out in Parliament which has to approve such policies..."

141. In ***BALCO Employees' Union (Regd.)*** *Vs.* ***Union of India & Ors.[66],*** this Court further pointed out that the Court ought to stay away from judicial review of efficacy of policy matters, not only because the same is beyond its jurisdiction, but also because it lacks the necessary expertise required for such a task. Affirming the previous views of this Court, the Court observed that while dealing with economic legislations, the Courts, while not jettisoning its jurisdiction to curb arbitrary action or unconstitutional legislation, should interfere only in those cases where the view reflected in the legislation is not possible to be taken at all. The Court went on to emphasize that_unless the economic decision, based on economic expediencies, is demonstrated to be so violative of constitutional or legal limits on power or so abhorrent to reason, that the courts would decline to interfere.

[66] (2002) 2 SCC 333

142. In ***BALCO*** (supra)***,*** the Court took notice of the judgment in ***Peerless General Finance and Investment Co. Ltd. & Anr.*** *Vs.* ***Reserve Bank of India***[67] and observed that some matters like price fixation are based on such uncertainties and dynamics that even experts face difficulty in making correct projections, making it all the more necessary for this Court to exercise non- interference:

> "31. The function of the Court is to see that lawful authority is not abused but not to appropriate to itself the task entrusted to that authority. It is well settled that a public body invested with statutory powers must take care not to exceed or abuse its power. It must keep within the limits of the authority committed to it. It must act in good faith and it must act reasonably. Courts are not to interfere with economic policy which is the function of experts. It is not the function of the courts to sit in judgment over matters of economic policy and it must necessarily be left to the expert bodies. In such matters even experts can seriously and doubtlessly differ. Courts cannot be expected to decide them without even the aid of experts."

143. In an earlier case in ***M/s Prag Ice & Oil Mills & Anr.*** *Vs.* ***Union of India***[68]***,*** this Court had observed as under: (SCC p. 478, Para 24)

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[67] (1992) 2 SCC 343

[68] [1978] 3 SCC 459

> "We do not think that it is the function of this Court or of any court to sit in judgment over such matters of economic policy as must necessarily be left to the government of the day to decide. Many of them, as a measure of price fixation must necessarily be, are matters of prediction of ultimate results on which even experts can seriously err and doubtlessly by differ. Courts can certainly not be expected to decide them without even the aid of experts."

144. In ***State of Madhya Pradesh*** *Vs.* ***Narmada Bachao Andolan & Anr.***[69], this Court said that the judiciary cannot engage in an exercise of comparative analysis over the fairness, logical or scientific basis, or wisdom of a policy. It held that the Court cannot strike down a policy decision taken by the Government merely because it feels that another decision would have been fairer, or more scientific or logical, or wiser. The wisdom and advisability of the policies are ordinarily not amenable to judicial review unless the policies are contrary to statutory or constitutional provisions or arbitrary or irrational or an abuse of power.

145. Mr. Subramanian Swamy also brought to our notice a Report on Allocation of Natural Resources,

[69] (2011) 7 SCC 639

prepared by a Committee, chaired by Mr. Ashok Chawla (hereinafter referred to as the "Chawla Committee Report"), which has produced a copious conceptual framework for the Government of India on the allocation and pricing of scarce natural resources viz. coal, minerals, petroleum, natural gas, spectrum, forests, land and water. He averred to observations of the report in favour of auction as a means of disposal. However, since the opinion rendered in the Chawla Committee Report is pending acceptance by the Government, it would be inappropriate for us to place judicial reliance on it. Besides, the Report conducts an economic, and not legal, analysis of the means of disposal of natural resources. The purpose of this Reference would be best served if this Court gave a constitutional answer rather than economic one.

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

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

requirement of Article 14 of the Constitution, the Court would not hesitate in striking it down.

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

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

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

150. In conclusion, our answer to the first set of five questions is that auctions are not the only permissible method for disposal of all natural resources across all sectors and in all circumstances.

151. As regards the remaining questions, we feel that answer to these questions would have a direct bearing on the mode of alienation of Spectrum and therefore, in light of the statement by the learned Attorney General that the Government is not questioning the correctness of judgment in the **2G Case**, we respectfully decline to answer these questions. The Presidential Reference is answered accordingly.

152. This opinion shall be transmitted to the President in accordance with the procedure prescribed in Part V of the Supreme Court Rules, 1966.

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(S.H. KAPADIA, CJI)

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(D.K. JAIN, J.)

.....

(DIPAK MISRA, J.)

.....

(RANJAN GOGOI, J.)

NEW DELHI;

SEPTEMBER 27, 2012.

ARS/RS

IN THE SUPREME COURT OF INDIA

ADVISORY JURISDICTION

SPECIAL REFERENCE NO.1 OF 2012

IN THE MATTER OF:

Special Reference under Article 143(1)

Of the Constitution of India

O P I N I O N

JAGDISH SINGH KHEHAR, J.

1. I have had the privilege of perusing the opinion rendered by my esteemed brother, D.K. Jain, J. Every bit of the opinion (which shall hereinafter be referred to by me, as the "main opinion") is based on settled propositions of law declared by this Court. There can, therefore, be no question of any disagreement therewith. I fully endorse the opinion expressed therein.

2. The first question posed in the Presidential reference, is in fact the reason, for my having to record, some other nuances on the subject whereof advice has been sought. The first question in the Presidential reference requires the Supreme Court to tender advice on, "Whether the only permissible method for disposal of all natural resources across all sectors and in all circumstances, is by the conduct of auctions?". It is of utmost importance to understand, the tenor of the first question in the Presidential reference. Take for instance a hypothetical situation where,

the legality of 100 instances of disposal of different types of natural resources is taken up for consideration. If the first question is taken in its literal sense, as to whether the method of disposal of all natural resources in all circumstances is by auction alone, then, even if 99 out of the aforesaid 100 different natural resources are such, which can only be disposed of by way of auction, the answer to the first question would still be in the negative. This answer in the negative would give the erroneous impression, that it is not necessary to dispose of natural resources by way of auction. Surely, the Presidential reference has not been made, to seek such an innocuous advice. The instant reference has been made despite the Central Government being alive to the fact, that there are natural resources which can only be disposed of by way of auction. A mining lease for coal under Section 11A of the Mines and Minerals (Development and Regulation) Act, 1957 can be granted, only by way of selection through auction by competitive bidding. Furthermore, the learned Attorney General for India informed us, about a conscious decision having been taken by the Central Government to henceforth allot spectrum only through competitive bidding by way of auction. Such instances can be multiplied. It is therefore obvious, that Government is alive to the fact, that disposal of some natural resources have to be made only by auction. If that is so, the first question in the reference does not seek a literal response. The first question must be understood to seek this Court's opinion on whether there are circumstances in which natural resources ought to be disposed of only by auction. Tendering an opinion, without a response to this facet of the

matter, would not make the seeker of advice, any wiser. It is this aspect alone, which will be the main subject of focus of my instant opinion.

3. Before venturing into the area of consideration expressed in the foregoing paragraph, it is necessary to record, that there was extensive debate during the course of hearing, on whether, maximization of revenue must be the sole permissible consideration, for disposal of all natural resources, across all sectors and in all circumstances. During the course of this debate, the learned Attorney General for India acknowledged, that auction by way of competitive bidding, was certainly an indisputable means, by which maximization of revenue returns is assured. It is not as if, one would like to bind the learned Attorney General to the acquiesced proposition. During the course of the days and weeks of erudite debate, learned counsel emphasized, that disposal of assets by processes of tender, tender-cum-auction and auction, could assure maximization of revenue returns. Of course, there are a large variety of tender and auction processes, each one with its own nuances. And we were informed, that a rightful choice, would assure maximization of revenue returns. The term "auction" expressed in my instant opinion, may therefore be read as a means to maximize revenue returns, irrespective of whether the means adopted should technically and correctly be described as tender, tender-cum-auction, or auction.

4. The concept of equality before the law and equal protection of the laws, emerges from the fundamental right expressed in Article 14 of the Constitution of India. Equality is a definite concept. The variation in its

understanding may at best have reference to the maturity and evolution of the nation's thought. To start with, breach of equality was a plea advanced by individuals claiming fair treatment. Challenges were raised also on account of discriminatory treatment. Equality was sought by those more meritorious, when benefits were bestowed on those with lesser caliber. Gradually, judicial intervention came to be sought for equitable treatment, even for a section of the society put together. A jurisdiction, which in due course, came to be described as public interest litigation. It all started with a demand for the basic rights for respectable human existence. Over the years, the concept of determination of societal rights, has traversed into different directions and avenues. So much so, that now rights in equity, sometimes even present situations of conflict between individual rights and societal rights. The present adjudication can be stated to be a dispute of such nature. In a maturing society, individual rights and plural rights have to be balanced, so that the oscillating pendulum of rights, fairly and equally, recognizes their respective parameters. For a country like India, the pendulum must be understood to balance the rights of one citizen on the one side, and 124,14,91,960 (the present estimated population of India) citizens of the country on the other. The true effect of the Article 14 of the Constitution of India is to provide equality before the law and equal protection of the laws not only with reference to individual rights, but also by ensuring that its citizens on the other side of the balance are likewise not deprived of their right to equality before the law, and their right to equal protection of the laws. An individual citizen cannot be a beneficiary, at the

cost of the country (the remaining 124,14,91,960 citizens) i.e., the plurality. Enriching one at the cost of all others would amount to deprivation to the plurality i.e., the nation itself. The gist of the first question in the Presidential reference, raises the issue whether ownership rights over the nation's natural resources, vest in the citizens of the country. An answer to the instant issue in turn would determine, whether or not it is imperative for the executive while formulating a policy for the disposal of natural resources, to ensure that it subserves public good and public interest.

5. The introduction and acceptance of public interest litigation as a jurisprudential concept is a matter of extensive debate in India, and even more than that, outside India. This concept brings into focus the rights of the plurality (as against individual's right) specially when the plurality is, for one or the other reason, not in a position to seek redressal of its grievances. This inadequacy may not always emerge from financial constrains. It may sometimes arise out of lack of awareness. At other times merely from the overwhelming might of executive authority. The jurisprudential thought in this country, after the emergence of public interest litigation, is seeking to strike a balance between individual rights and the rights of the plurality. After all, all natural resources are the nation's collective wealth. This Court has had the occasion over the last few decades, to determine rights of citizens with reference to natural resources. The right of an individual citizen to those assets, as also, the

rights of the remaining citizens of the country, have now emerged on opposite sides in a common litigation. One will endeavour to delineate the legal position expressed in decisions rendered by this Court, on issues relatable to disposal of resources by the State, to determine whether the instant issue stands settled, by law declared by this Court.

6(a) First of all reference was made to the decision of this Court in S.G. Jaisinghani Vs. Union of India & Ors., AIR 1967 SC 1427, wherein this Court observed as under:

> **"**14. In this context it is important to emphasize that the absence of arbitrary power is the first essential of the rule of law upon which our whole constitutional system is based. In a system governed by rule of law, discretion, when conferred upon executive authorities, must be confined within clearly defined limits. The rule of law from this point of view means that decisions should be made by the application of known principles and rules and, in general, such decisions should be predictable and the citizen should know where he is. If a decision is taken without any principle or without any rule it is unpredictable and such a decision is the antithesis of a decision taken in accordance with the Rule of law. (See Dicey — *Law of the Constitution* — 10th Edn., Introduction cx). "Law has reached its finest moments," stated Douglas, J. in *United States* v. Wunderlich, (1951) 342 US 98, "when it has freed man from the unlimited discretion of some ruler.... Where discretion, is absolute, man has always suffered." It is in this sense that the rule of law may be said to be the sworn enemy of caprice. Discretion, as Lord Mansfield slated it in classic terms in the case of *John Wilkes*, (1770) 4 Burr 2528 at p. 2539 "means sound discretion guided by law. It must be governed by Rule, not by humour: it must not be arbitrary, vague, and fanciful." (emphasis is mine)

In the aforesaid case, it came to be emphasized that executive action should have clearly defined limits and should be predictable. In other words, the man on the street should know why the decision has been

taken in favour of a particular party. What came to be impressed upon was, that lack of transparency in the decision making process would render it arbitrary.

(b) Also cited for our consideration was the judgment in Rashbihari Panda etc. Vs. State of Orissa (1969) 1 SCC 414. In this case it was canvassed on behalf of the appellants, that the machinery devised by the Government for sale of *Kendu* leaves in which they had acquired a trade monopoly, was violative of the fundamental rights guaranteed under Articles 14 and 19(1)(*g*) of the Constitution. It was pointed out, that in the scheme of events the purchasers were merely nominees of the agents. It is also contended, that after the Supreme Court had struck down the policy under which the agents were to carry on business in *Kendu* leaves on their own and to make profit for themselves, the Government to help their party-men set up a body of persons who were to be purchasers to whom the monopoly sales were to be made at concessional rates and that the benefit which would have otherwise been earned by the State would now get diverted to those purchasers. It was held:

> **"15.** Section 10 of the Act is a counterpart of Section 3 and authorises the Government to sell or otherwise dispose of *Kendu* leaves in such manner as the Government may direct. If the monopoly of purchasing *Kendu* leaves by Section 3 is valid, insofar as it is intended to be administered only for the benefit of the State, the sale or disposal of *Kendu* leaves by the Government must also be in the public interest and not to serve the private interest of any person or class of persons. It is true that it is for the Government, having regard to all the circumstances, to act as a prudent businessman would, and to sell or otherwise dispose of *Kendu* leaves purchased under the monopoly acquired under Section 3, but the profit resulting from the sale must be for the public benefit and

not for private gain. Section 11 which provides that out of the net profits derived by the Government from the trade in *Kendu* leaves an amount not less than one half is to be paid to the *Samitis* and *Gram Panchayats* emphasises the concept that the machinery of sale or disposal of *Kendu* leaves must also be quashed to serve the public interest. If the scheme of disposal creates a class of middlemen who would purchase from the Government *Kendu* leaves at concessional rates and would earn large profits disproportionate to the nature of the service rendered or duty performed by them, it cannot claim the protection of Article 19(6)(*ii*).

16. Section 10 leaves the method of sale or disposal of *Kendu* leaves to the Government as they think fit. The action of the Government if conceived and executed in the interest of the general public is not open to judicial scrutiny. But it is not given to the Government thereby to create a monopoly in favour of third parties from their own monopoly.

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 therefrom is to enure 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,* (1963) Supp. 2 SCC 691, 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.

20. No explanation has been attempted on behalf of the State as to why an offer made by a well known manufacturer of *bidis*

interested in the trade to purchase the entire crop of *Kendu* leaves for the year 1968 for rupees three crores was turned down. If the interests of the State alone were to be taken into consideration, the State stood to gain more than rupees one crore by accepting that offer. We are not suggesting that merely because that offer was made, the Government was bound to accept it. The Government had to consider, as prudent businessman, whether, having regard to the circumstances, it should accept the offer, especially in the light of the financial position of the offeror, the security which he was willing to give and the effect which the acceptance of the offer may have on the other traders and the general public interest.

21. The learned Judges of the High Court have observed that in their view the exercise of the discretion was not shown to be arbitrary, nor was the action shown to be lacking in bona fides. But that conclusion is open to criticism that the Government is not shown to have considered the prevailing prices of *Kendu* leaves about the time when offers were made, the estimated crop of *Kendu* leaves, the conditions in the market and the likelihood of offerers at higher prices carrying out their obligations, and whether it was in the interests of the State to invite tenders in the open market from all persons whether they had or had not taken contracts in the previous year. If the Government was anxious to ensure due performance by those who submitted tenders for purchase of *Kendu* leaves, it was open to the Government to devise adequate safeguards in that behalf. In our judgment, the plea that the action of the Government was bona fide cannot be an effective answer to a claim made by a citizen that his fundamental rights were infringed by the action of the Government, nor can the claim of the petitioners be defeated on the plea that the Government in adopting the impugned scheme committed an error of judgment.

22. That plea would have assisted the Government if the action was in law valid and the objection was that the Government erred in the exercise of its discretion. It is unnecessary in the circumstances to consider whether the Government acted in the interest of their party-men and to increase party funds in devising the schemes for sale of *Kendu* leaves in 1968.

23. During the pendency of these proceedings the entire year for which the contracts were given has expired. The persons to whom the contracts were given are not before us, and we cannot declare the contracts which had been entered into by the Government for the sale of *Kendu* leaves for the year 1968 unlawful in these proceedings. Counsel for the appellants agrees that it would be sufficient if it be directed that the tenders for purchase of *Kendu* leaves be invited by the Government in the next season from all

> persons interested in the trade. We trust that in accepting tenders, the State Government will act in the interest of the general public and not of any class of traders so that in the next season the State may get the entire benefit of the monopoly in the trade in *Kendu* leaves and no disproportionate share thereof may be diverted to any private agency. Subject to these observations we make no further order in the petitions out of which these appeals arise."
>
> (emphasis is mine)

A perusal of the observations made by this Court reveal, that the Government must act as a prudent businessman, and that, the profit earned should be for public benefit and not for private gains. A plea of reasonable restriction raised under Article 19(6) of the Constitution of India to save the governmental action was rejected on the ground that the scheme created middlemen who would earn large disproportionate profits. This Court also held the action to be discriminatory because it excluded others like the petitioners from the zone of consideration. Finally, a direction came to be issued by this Court requiring the Government to act in the interest of the general public and to invite tenders so that the State may earn the entire benefit in a manner that no disproportionate profits are diverted to any private agency.

(c) Reliance was also placed on Ramana Dayaram Shetty Vs. International Airport Authority of India & Ors., (1979) 3 SCC 489, wherein this Court held as under:

> "21. This rule also flows directly from the doctrine of equality embodied in Article 14. It is now well-settled as a result of the decisions of this Court in *E.P. Royappa* v. *State of Tamil Nadu, (1974) 4 SCC 3,* and *Maneka Gandhi* v. *Union of India, (1978) 1 SCC 248,* that Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. It requires that State

action must not be arbitrary but must be based on some rational and relevant principle which is non-discriminatory: it must not be guided by any extraneous or irrelevant considerations, because that would be denial of equality. The principle of reasonableness and rationality which is legally as well as philosophically an essential element of equality or non-arbitrariness is projected by Article 14 and it must characterise every State action, whether it be under authority of law or in exercise of executive power without making of law. The State cannot, therefore, act arbitrarily in entering into relationship, contractual or otherwise with a third party, but its action must conform to some standard or norm which is rational and non-discriminatory. This principle was recognised and applied by a Bench of this Court presided over by Ray, C.J., in *Erusian Equipment and Chemicals Ltd.* v. *State of West Bengal (supra)* where the learned Chief Justice pointed out that-

> "the State can carry on executive function by making a law or without making a law. The exercise of such powers and functions in trade by the State is subject to Part III of the Constitution. Article 14 speaks of equality before the law and equal protection of the laws. Equality of opportunity should apply to matters of public contracts. The State has the right to trade. The State has there the duty to observe equality. An ordinary individual can choose not to deal with any person. The Government cannot choose to exclude persons by discrimination. The order of blacklisting has the effect of depriving a person of equality of opportunity in the matter of public contract. A person who is on the approved list is unable to enter into advantageous relations with the Government because of the order of blacklisting .... A citizen has a right to claim equal treatment to enter into a contract which may be proper, necessary and essential to his lawful calling .... It is true that neither the petitioner nor the respondent has any right to enter into a contract but they are entitled to equal treatment with others who offer tender or quotations for the purchase of the goods".

It must, therefore 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 any one, 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 the 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.

> 22. It is interesting to find that this rule was recognised and applied by a Constitution Bench of this Court in a case of sale of kendu leaves by the Government of Orissa in *Rashbihari Panda* v. *State of Orissa, (1969) 1 SCC 414…..* This decision wholly supports the view we are taking in regard to the applicability of the rule against arbitrariness in State action."
>
> (emphasis is mine)

An analysis of the aforesaid determination by this Court would lead to the inference that the State has the right to trade. In executing public contracts in its trading activity the State must be guided by relevant principles, and not by extraneous or irrelevant consideration. The same should be based on reasonableness and rationality as well as non-arbitrariness. It came to be concluded, that the State while entering into a contractual relationship, was bound to maintain the standards referred to above. And any departure from the said standards would be invalid unless the same is supported by good reasons.

(d) Our attention was also invited to the decision rendered in Kasturi Lal Lakshmi Reddy Vs. State of Jammu & Kashmir & Anr., (1980) 4 SCC 1, wherein the factual background as well as, the legal position came to be expressed in paragraph 19 of the judgment which is being set out below:

> "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 to the 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 removed outside the State. 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 State 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 huge 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 the neighbourhood of Rs.200 per quintal, but even if we take the cost at the minimum figure of Rs.175 per quintal, the total cost of extraction and collection would come to Rs.87,50,000 and on this investment of Rs.87,50,000 required to be made by the second respondents the amount of interest at the prevailing bank rate would work out to about Rs.13,00,000. Now, as against this expenditure of Rs 87,50,000 plus Rs.13,00,000 the second respondents would be entitled to claim from the State, in respect of 1500 metric tonnes of resin to be delivered to it only at the rate sanctioned by the Forest Department for the adjoining accessible forests which were being worked on wage-contract basis. It is stated in the counter-affidavits of Ghulam Rasul and Guran Devaya and this statement is not

seriously challenged on behalf of the petitioners, that the cost of extraction and collection as sanctioned by the Forest Department for the adjoining accessible forests given on wage-contract basis in the year 1978-79 was Rs.114 per quintal and the second respondents would, thus, be entitled to claim from the State no more than Rs.114 per quintal in respect of 1500 metric tonnes to be delivered to it and apart from bearing the difference between the actual cost of extraction and collection and the amount received from the State at the rate of Rs.114 per quintal in respect of 1500 metric tonnes, the second respondents would have to pay the price of the remaining 3500 metric tonnes to be retained by them at the rate of Rs.350 per quintal. On this reckoning, the cost of 3500 metric tonnes to be retained by the second respondents would work out at Rs.474 per quintal. The result would be that under the impugned Order the State would get 1500 metric tonnes of resin at the rate of Rs.114 per quintal while the second respondents would have to pay at the rate of Rs.474 per quintal for the balance of 3500 metric tonnes retained by them. Obviously, a large benefit would accrue to the State under the impugned Order. If the State were to get the blazes in these inaccessible areas tapped through wage contract, the minimum cost would be Rs.175 per quintal, without taking into account the additional expenditure on account of interest, but under the impugned Order the State would get 1500 metric tonnes of resin at a greatly reduced rate of Rs.114 per quintal without any risk or hazard. The State would also receive for 3500 metric tonnes of resin retained by the second respondents price or royalty at the rate of Rs.474 per quintal which would be much higher than the rate of Rs.260 per quintal at which the State was allotting resin to medium scale industrial units and the rate of Rs.320 per quintal at which it was allotting resin to small scale units within the State. It is difficult to see how on these facts the impugned Order could be said to be disadvantageous to the State or in any way favouring the second respondents at the cost of the State. The argument of the petitioners was that at the auctions held in December 1978, January 1979 and April 1979, the price of resin realised was as much as Rs.484, Rs.520 and Rs.700 per quintal respectively and when the market price was so high, it was improper and contrary to public interest on the part of the State to sell resin to the second respondents at the rate of Rs.320 per quintal under the impugned Order. This argument, plausible though it may seem, is fallacious because it does not take into account the policy of the State not to allow export of resin outside its territories but to allot it only for use in factories set up within the State. It is obvious that, in view of this policy, no resin would be auctioned by the State and there would be no question of sale of resin in the open market and in this situation, it would be totally irrelevant to import the concept of market price with reference to which the adequacy of the price charged by the State to the 2nd

> respondents could be judged. If the State were simply selling resin, there can be no doubt that the State must endeavour 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 sale 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, the 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."
>
> (emphasis is mine)

An examination of the factual position of the controversy dealt with in the judgment extracted above reveals, that the State Government formulated a policy to set up a factory within the State, which would result in creation of more job opportunities for the people of the State. The setting up of the

said factory would assure the State of atleast 1500 metric tones of resin without any financial involvement. This in turn would enable the State to set up another factory creating further employment opportunities for the people of the State. It is therefore, that this Court concluded that the impugned order passed by the State in favour of the second respondent could not be said to be disadvantageous to the State and favouring the second respondent. In a manner of understanding, this Court found no infirmity in the impugned order passed by the State Government because the State Government had given effect to a policy which would "best subserve the common good" of the inhabitants of the State (as in Article 39(b) of the Constitution of India) while assigning a material resource, though no reference was made to Article 39(b) of the Constitution of India in the judgment. What is also of importance is, that this Court expressly noticed, that if the State Government was simply selling resin, it was obliged to obtain the highest possible price.

(e) Reference was then made to Dwarkadas Marfatia and Sons Vs. Board of Trustees of the Port of Bombay, (1989) 3 SCC 293, wherein the case of the respondent was, that in his evidence it had been mentioned by Katara that the plot had been allotted to Dhanji Mavji since it was the policy of the Bombay Port Trust to allot a reconstituted plot to a person occupying a major portion of such plot. It was further asserted, that there was no challenge to this evidence in cross-examination. It was also asserted, that there was no evidence on the alleged policy of the Port Trust of giving plots on joint tenancy to all the occupants. According to learned counsel for

the respondent, in the letters addressed by the Port Trust and in the letters by and on behalf of the appellant and/or their alleged associate concerns they had specifically admitted, that there was a policy of the Port Trust to allot plots to the occupants of the major portions thereof and in fact a grievance was made by them, that in accordance with the said policy of the Bombay Port Trust, a plot was not being allotted to the associates of the appellant. In that view of the matter it was contended, that the issue whether the plot should have been given on joint tenancy or not, could not have been gone into by the court in exercise of its jurisdiction of judicial review. Reliance was placed on the observations of Lord Justice Diplock in *Council of Civil Service Unions* v. *Minister for the Civil Service, (1984) 3 All ER 935, 950,* where the learned Lord Justice classified 3 grounds subject to control of judicial review, namely, illegality, irrationality and procedural impropriety. In the aforesaid factual background this Court concluded as under:

> "21. We are unable to accept the submissions. Being a public body even in respect of its dealing with its tenant, it must act in public interest, and an infraction of that duty is amenable to examination either in civil suit or in writ jurisdiction.
>
> ….. …..
>
> 28. Learned Additional Solicitor General reiterated on behalf of the respondent that no question of mala fide had been alleged or proved in these proceedings. Factually, he is right. But it has to be borne in mind that governmental policy would be invalid as lacking in public interest, unreasonable or contrary to the professed standards and this is different from the fact that it was not done bona fide. It is true as learned Additional Solicitor General contended that there is always a presumption that a governmental action is reasonable and in public interest. It is for the party challenging its validity to show that the action is unreasonable, arbitrary or contrary to the professed

norms or not informed by public interest, and the burden is a heavy one.

….. …...

37. As we look upon the facts of this case, there was an implied obligation in respect of dealings with the tenants/occupants of the Port Trust authority to act in public interest/purpose. That requirement is fulfilled if it is demonstrated that the Port Trust authorities have acted in pursuance of a policy which is referable to public purpose. Once that norm is established whether that policy is the best policy or whether another policy was possible, is not relevant for consideration. It is, therefore, not necessary for our present purposes to dwell on the question whether the obligation of the Port Trust authorities to act in pursuance of a public purpose was a public law purpose or a private law purpose. Under the constitutional scheme of this country the Port Trust authorities were required by relevant law to act in pursuance of public purpose. We are satisfied that they have proceeded to so act.

(emphasis is mine)

In the instant matter, even though the controversy pertained to a tenancy issue, this Court held, that a public body was bound to act in public interest.

(f) In chronological sequence, learned counsel then cited Mahabir Auto Stores & Ors. Vs. Indian Oil Corporation & Ors. (1990) 3 SCC 752. Relevant observations made therein, with reference to the present controversy, are being placed below:

"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, (1977) 3 SCC 457.* 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, 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, (1974) 4 SCC 3*, *Maneka Gandhi* v. *Union of India, (1978) 1 SCC 248, Ajay Hasia* v. *Khalid Mujib Sehravardi, (1981) 1 SCC 722*, *R.D. Shetty* v. *International Airport Authority of India, (1979) 3 SCC 489,* and also *Dwarkadas Marfatia and Sons* v. *Board of Trustees of the Port of Bombay, (1989) 3 SCC 293*. 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 dealing as in the present case.

….. …..

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 strait-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.

19. Such transaction should continue as an administrative decision with the organ of the State. It may be contractual or statutory but in a situation of transaction between the parties for nearly two decades, such procedure should be followed which will be reasonable, fair and just, that is, the process which normally be accepted (*sic* is expected) to be followed by an organ of the State

and that process must be conscious and all those affected should be taken into confidence.

20. Having regard to the nature of the transaction, we are of the opinion that it would be appropriate to state that in cases where the instrumentality of the state enters the contractual field, it should be governed by the incidence of the contract. It is true that it may not be necessary to give reasons but, in our opinion, in the field of this nature fairness must be there to the parties concerned, and having regard to the large number or the long period and the nature of the dealings between the parties, the appellant should have been 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. We must, however, evolve such process which will work.

….. …..

23. It is not our decision which is important but a decision on the above basis should be arrived at which should be fair, just and reasonable — and consistent with good government — which will be arrived at fairly and should be taken after taking the persons concerned whose rights/obligations are affected, into confidence. Fairness in such action should be perceptible, if not transparent."

(emphasis is mine)

What came to be concluded in the judgment extracted above can be described as an extension of the applicability of Article 14 of the Constitution of India on the subject of contractual agreements. Hithertobefore, an act of awarding contracts was adjudged on the touchstone of fairness. For the first time, even a decision of not entering into a contractual arrangement has been brought under the scope of judicial review. The requirement of being fair, just and reasonable, i.e., principles applicable in good governance, have been held to be equally applicable for not entering into a contractual arrangement. Another facet of the aforesaid decision was, that this Court expressed, that the contracting party had the right to be informed (the right to know) why the

contractual arrangement which had continued for long years (from 1965 to 1983) was being terminated.

(g) Much emphasis was placed on the judgment rendered by this Court in Kumari Shrilekha Vidyarthi & Ors. Vs. State of U.P. & Ors. (1991) 1 SCC 212. Observations which relied upon during the course of hearing are being set out hereinunder:

> 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.

23. Thus, in a case like the present, if it is shown that the impugned State action is arbitrary and, therefore, violative of Article 14 of the Constitution, there can be no impediment in striking down the impugned act irrespective of the question whether an additional right, contractual or statutory, if any, is also available to the aggrieved persons.

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 fulfil 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.

25. In Wade: *Administrative Law* (6th edn.) after indicating that 'the powers of public authorities are essentially different from those of private persons', it has been succinctly stated at pp. 400-01 as under:

> "... *The whole conception of unfettered discretion is inappropriate to a public authority, which possesses powers solely in order that it may use them for the public good*.
>
> There is nothing paradoxical in the imposition of such legal limits. It would indeed be paradoxical if they were not imposed. Nor is this principle an oddity of British or American law: it is equally prominent in French law. Nor is it a special restriction which fetters only local authorities: it applies no less to ministers of the Crown. *Nor is it confined to the sphere of administration: it operates wherever discretion is given for some public purpose*, for example where a judge has a discretion to order jury trial. It is only where powers are given for the personal benefit of the person empowered that the discretion is absolute. Plainly this can have no application in public law.
>
> *For the same reasons there should in principle be no such thing as unreviewable administrative discretion, which should be just as much a contradiction in terms as unfettered discretion*. The question which has to be asked is what is the scope of judicial review, and in a few special cases the scope for the review of discretionary decisions may be minimal. It remains axiomatic that all discretion is capable of abuse, and that legal limits to every power are to be found somewhere.

The view, we are taking, is, therefore, in consonance with the current thought in this field. We have no doubt that the scope of judicial review may vary with reference to the type of matter involved, but the fact that the action is reviewable, irrespective of the sphere in which it is exercised, cannot be doubted.

26. A useful treatment of the subject is to be found in an article *"Judicial Review and Contractual Powers of Public Authorities", (1990) 106 LQR 277-92*. The conclusion drawn in the article on the basis of recent English decisions is that "public law principles designed to protect the citizens should apply because of the public nature of the body, and they may have some role in protecting the public interest". The trend now is towards judicial review of contractual powers and the other activities of the government. Reference is made also to the recent decision of the Court of Appeal

in *Jones* v. *Swansea City Council, (1990) 1 WLR 54,* where the court's clear inclination to the view that contractual powers should generally be reviewable is indicated, even though the Court of Appeal faltered at the last step and refrained from saying so. It is significant to note that emphasis now is on reviewability of every State action because it stems not from the nature of function, but from the public nature of the body exercising that function; and all powers possessed by a public authority, howsoever conferred, are possessed 'solely in order that it may use them for the public good'. The only exception limiting the same is to be found in specific cases where such exclusion may be desirable for strong reasons of public policy. This, however, does not justify exclusion of reviewability in the contractual field involving the State since it is no longer a mere private activity to be excluded from public view or scrutiny.

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.

28. Even assuming that it is necessary to import the concept of presence of some public element in a State action to attract Article 14 and permit judicial review, we have no hesitation in saying that the ultimate impact of all actions of the State or a public body being undoubtedly on public interest, the requisite public element for this purpose is present also in contractual matters. We, therefore, find it difficult and unrealistic to exclude the State actions in contractual matters, after the contract has been made, from the purview of judicial review to test its validity on the anvil of Article 14.

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, (1979) 3 SCC 489,* and *Kasturi Lal Lakshmi Reddy* v. *State of Jammu and Kashmir, (1980) 4 SCC 1]*. In *Col. A.S. Sangwan* v. *Union of India, (1980) Supp. SCC 559,* 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.

….. …..

33. No doubt, it is true, as indicated by us earlier, that there is a presumption of validity of the State action and the burden is on the person who alleges violation of Article 14 to prove the assertion. However, where no plausible reason or principle is indicated nor is it discernible and the impugned State action, therefore, appears to be ex facie arbitrary, the initial burden to prove the arbitrariness is discharged shifting onus on the State to justify its action as fair and reasonable. If the State is unable to produce material to justify its action as fair and reasonable, the burden on the person alleging arbitrariness must be held to be discharged. The scope of judicial review is limited as indicated in *Dwarkadas Marfatia case (supra)* to oversee the State action for the purpose of satisfying that it is not vitiated by the vice of arbitrariness and no more. The wisdom of the policy or the lack of it or the desirability of a better alternative is not within the permissible scope of judicial review in such cases. It is not for the courts to recast the policy or to substitute it with another which is considered to be more appropriate, once the attack on the ground of arbitrariness is successfully repelled by showing that the act which was done, was fair and reasonable in the facts and circumstances of the case. As indicated by Diplock, L.J., in *Council of Civil Service Unions* v. *Minister for the Civil Service, (1984) 3 All ER 935,* the power of judicial review is limited to the grounds of illegality, irrationality and procedural impropriety. In the case of arbitrariness, the defect of irrationality is obvious.

….. …..

> 36. The meaning and true import of arbitrariness is more easily visualized than precisely stated or defined. The question, whether an impugned act is arbitrary or not, is ultimately to be answered on the facts and in the circumstances of a given case. An obvious test to apply is to see whether there is any discernible principle emerging from the impugned act and if so, does it satisfy the test of reasonableness. Where a mode is prescribed for doing an act and there is no impediment in following that procedure, performance of the act otherwise and in a manner which does not disclose any discernible principle which is reasonable, may itself attract the vice of arbitrariness. Every State action must be informed by reason and it follows that an act uninformed by reason, is arbitrary. Rule of law contemplates governance by laws and not by humour, whims or caprices of the men to whom the governance is entrusted for the time being. It is trite that 'be you ever so high, the laws are above you'. This is what men in power must remember, always."
>
> (emphasis is mine)

The legal proposition laid down in the instant judgment may be summarized as follows. Firstly, State action in the contractual field are meant for public good and in public interest and are expected to be fair and just. Secondly, it would be alien to the constitutional scheme to accept the argument of exclusion of Article 14 of the Constitution of India in contractual matters. Thirdly, the fact that a dispute falls in the domain of contractual obligation, would make no difference, to a challenge raised under Article 14 of the Constitution of India on the ground that the impugned act is arbitrary, unfair and unreasonable. Fourthly, every State action must be informed of reason and it follows that an act uninformed by reason is arbitrary. Fifthly, where no plausible reason or principle is indicated (or is discernible), and where the impugned action ex facie appears to be arbitrary, the onus shifts on the State to justify its action as fair and reasonable. Sixthly, every holder of public office is accountable to

the people in whom the sovereignty vests. All powers vested in a public office, even in the field of contract, are meant to be exercised for public good and for promoting public interest. And Seventhly, Article 14 of the Constitution of India applies also to matters of governmental policy even in contractual matters, and if the policy or any action of the government fails to satisfy the test of reasonableness, the same would be unconstitutional.

(h) Thereafter our attention was invited to the decision rendered in Lucknow Development Authority Vs. M.K. Gupta, (1994) 1 SCC 243. Seriously, the instant judgment has no direct bearing to the issue in hand. The judgment determines whether compensation can be awarded to an aggrieved consumer under the Consumer Protection Act, 1986. It also settles who should shoulder the responsibility of paying the compensation awarded. But all the same it has some interesting observations which may be noticed in the context of the matter under deliberation. Portions of the observations emphasized upon are being noticed below:

> "8. ….. Under our Constitution sovereignty vests in the people. Every limb of the constitutional machinery is obliged to be people oriented. No functionary in exercise of statutory power can claim immunity, except to the extent protected by the statute itself. Public authorities acting in violation of constitutional or statutory provisions oppressively are accountable for their behaviour before authorities created under the statute like the commission or the courts entrusted with responsibility of maintaining the rule of law. Each hierarchy in the Act is empowered to entertain a complaint by the consumer for value of the goods or services and compensation. The word 'compensation' is again of very wide connotation. It has not been defined in the Act. According to dictionary it means, 'compensating or being compensated; thing given as recompense;'. In legal sense it may constitute actual loss or expected loss and may extend to physical, mental or even emotional suffering, insult or injury or loss. Therefore, when the Commission has been vested with the

jurisdiction to award value of goods or services and compensation it has to be construed widely enabling the Commission to determine compensation for any loss or damage suffered by a consumer which in law is otherwise included in wide meaning of compensation. The provision in our opinion enables a consumer to claim and empowers the Commission to redress any injustice done to him. Any other construction would defeat the very purpose of the Act. The Commission or the Forum in the Act is thus entitled to award not only value of the goods or services but also to compensate a consumer for injustice suffered by him.

….. …..

10. Who should pay the amount determined by the Commission for harassment and agony, the statutory authority or should it be realised from those who were responsible for it? Compensation as explained includes both the just equivalent for loss of goods or services and also for sufferance of injustice. For instance in Civil Appeal No. ... of 1993 arising out of SLP (Civil) No. 659 of 1991 the Commission directed the Bangalore Development Authority to pay Rs 2446 to the consumer for the expenses incurred by him in getting the lease-cum-sale agreement registered as it was additional expenditure for alternative site allotted to him. No misfeasance was found. The moment the authority came to know of the mistake committed by it, it took immediate action by alloting alternative site to the respondent. It was compensation for exact loss suffered by the respondent. It arose in due discharge of duties. For such acts or omissions the loss suffered has to be made good by the authority itself. But when the sufferance is due to mala fide or oppressive or capricious acts etc. of a public servant, then the nature of liability changes. The Commission under the Act could determine such amount if in its opinion the consumer suffered injury due to what is called misfeasance of the officers by the English Courts. Even in England where award of exemplary or aggravated damages for insult etc. to a person has now been held to be punitive, exception has been carved out if the injury is due to, 'oppressive, arbitrary or unconstitutional action by servants of the Government' (Salmond and Heuston on the *Law of Torts*). Misfeasance in public office is explained by Wade in his book on *Administrative Law* thus:

> "Even where there is no ministerial duty as above, and even where no recognised tort such as trespass, nuisance, or negligence is committed, public authorities or officers may be liable in damages for malicious, deliberate or injurious wrong-doing. There is thus a tort which has been called misfeasance in public office, and which includes malicious abuse of power, deliberate maladministration,

> and perhaps also other unlawful acts causing injury." (p. 777)

The jurisdiction and power of the courts to indemnify a citizen for injury suffered due to abuse of power by public authorities is founded as observed by Lord Hailsham in *Cassell & Co. Ltd.* v. *Broome, 1972 AC 1027,* on the principle that, 'an award of exemplary damages can serve a useful purpose in vindicating the strength of law'. An ordinary citizen or a common man is hardly equipped to match the might of the State or its instrumentalities. That is provided by the rule of law. It acts as a check on arbitrary and capricious exercise of power. In *Rookes* v. *Barnard, 1964 AC 1129,* it was observed by Lord Devlin, 'the servants of the government are also the servants of the people and the use of their power must always be subordinate to their duty of service'. A public functionary if he acts maliciously or oppressively and the exercise of power results in harassment and agony then it is not an exercise of power but its abuse. No law provides protection against it. He who is responsible for it must suffer it. Compensation or damage as explained earlier may arise even when the officer discharges his duty honestly and bona fide. But when it arises due to arbitrary or capricious behaviour then it loses its individual character and assumes social significance. Harassment of a common man by public authorities is socially abhorring and legally impermissible. It may harm him personally but the injury to society is far more grievous. Crime and corruption thrive and prosper in the society due to lack of public resistance. Nothing is more damaging than the feeling of helplessness. An ordinary citizen instead of complaining and fighting succumbs to the pressure of undesirable functioning in offices instead of standing against it. Therefore the award of compensation for harassment by public authorities not only compensates the individual, satisfies him personally but helps in curing social evil. It may result in improving the work culture and help in changing the outlook. Wade in his book *Administrative Law* has observed that it is to the credit of public authorities that there are simply few reported English decisions on this form of malpractice, namely, misfeasance in public offices which includes malicious use of power, deliberate maladministration and perhaps also other unlawful acts causing injury. One of the reasons for this appears to be development of law which, apart, from other factors succeeded in keeping a salutary check on the functioning in the government or semi-government offices by holding the officers personally responsible for their capricious or even ultra vires action resulting in injury or loss to a citizen by awarding damages against them. Various decisions rendered from time to time have been referred to by Wade on *Misfeasance by Public Authorities*. We shall refer to some of them to demonstrate how necessary it is for our society. In

Ashby v. *White, (1703) 2 LD Raym 938,* the House of Lords invoked the principle of *ubi jus ibi remedium* in favour of an elector who was wrongfully prevented from voting and decreed the claim of damages. The ratio of this decision has been applied and extended by English Courts in various situations.

11. Today the issue thus is not only of award of compensation but who should bear the brunt. The concept of authority and power exercised by public functionaries has many dimensions. It has undergone tremendous change with passage of time and change in socio-economic outlook. The authority empowered to function under a statute while exercising power discharges public duty. It has to act to subserve general welfare and common good. In discharging this duty honestly and bona fide, loss may accrue to any person. And he may claim compensation which may in circumstances be payable. But where the duty is performed capriciously or the exercise of power results in harassment and agony then the responsibility to pay the loss determined should be whose? In a modern society no authority can arrogate to itself the power to act in a manner which is arbitrary. It is unfortunate that matters which require immediate attention linger on and the man in the street is made to run from one end to other with no result. The culture of window clearance appears to be totally dead. Even in ordinary matters a common man who has neither the political backing nor the financial strength to match the inaction in public oriented departments gets frustrated and it erodes the credibility in the system. Public administration, no doubt involves a vast amount of administrative discretion which shields the action of administrative authority. But where it is found that exercise of discretion was mala fide and the complainant is entitled to compensation for mental and physical harassment then the officer can no more claim to be under protective cover. When a citizen seeks to recover compensation from a public authority in respect of injuries suffered by him for capricious exercise of power and the National Commission finds it duly proved then it has a statutory obligation to award the same. It was never more necessary than today when even social obligations are regulated by grant of statutory powers. The test of permissive form of grant is over. It is now imperative and implicit in the exercise of power that it should be for the sake of society. When the court directs payment of damages or compensation against the State the ultimate sufferer is the common man. It is the tax payers' money which is paid for inaction of those who are entrusted under the Act to discharge their duties in accordance with law. It is, therefore, necessary that the Commission when it is satisfied that a complainant is entitled to compensation for harassment or mental agony or oppression, which finding of course should be recorded carefully on material and convincing circumstances and not lightly, then it should further direct the

> department concerned to pay the amount to the complainant from the public fund immediately but to recover the same from those who are found responsible for such unpardonable behaviour by dividing it proportionately where there are more than one functionaries."
>
> (emphasis is mine)

The judgment brings out the foundational principle of executive governance. The said foundational principle is based on the realization that sovereignty vests in the people. The judgment therefore records that every limb of the constitutional machinery is obliged to be people oriented. The fundamental principle brought out by the judgment is, that a public authority exercising public power discharges a public duty, and therefore, has to subserve general welfare and common good. All power should be exercised for the sake of society. The issue which was the subject matter of consideration, and has been noticed along with the citation, was decided by concluding that compensation shall be payable by the State (or its instrumentality) where inappropriate deprivation on account of improper exercise of discretion has resulted in a loss, compensation is payable by the State (or its instrumentality). But where the public functionary exercises his discretion capriciously, or for considerations which are malafide, the public functionary himself must shoulder the burden of compensation held as payable. The reason for shifting the onus to the public functionary deserves notice. This Court felt, that when a court directs payment of damages or compensation against the State, the ultimate sufferer is the common man, because it is tax payers money out of which damages and costs are paid.

(i) Next cited for our consideration was the judgment in Common Cause, A Registered Society Vs. Union of India & Ors., (1996) 6 SCC 530. The instant case dealt with a challenge to the allotment of retail outlets for petroleum products (petrol pumps). Allotment was made in favour of 15 persons on the ground of poverty or unemployment. Rest of the relevant facts emerge from the extracts from the judgment reproduced below:

> "24. The orders of the Minister reproduced above read: "the applicant has no regular income to support herself and her family", "the applicant is an educated lady and belongs to Scheduled Tribe community", "the applicant is unemployed and has no regular source of income", "the applicant is an uneducated, unemployed Scheduled Tribe youth without regular source of livelihood", "the applicant is a housewife whose family is facing difficult financial circumstances" etc. etc. There would be literally millions of people in the country having these circumstances or worse. There is no justification whatsoever to pick up these persons except that they happen to have won the favour of the Minister on mala fide considerations. None of these cases fall within the categories placed before this Court in *Centre for Public Interest Litigation* v. *Union of India, 1995 Supp. (3) SCC 382, but even* if we assume for argument sake that these cases fall in some of those or similar guidelines the exercise of discretion was wholly arbitrary. Such a discretionary power which is capable of being exercised arbitrarily is not permitted by Article 14 of the Constitution of India. While Article 14 permits a reasonable classification having a rational nexus to the objective sought to be achieved, it does not permit the power to pick and choose arbitrarily out of several persons falling in the same category. A transparent and objective criteria/procedure has to be evolved so that the choice among the members belonging to the same class or category is based on reason, fair play and non-arbitrariness. It is essential to lay down as a matter of policy as to how preferences would be assigned between two persons falling in the same category. If there are two eminent sportsmen in distress and only one petrol pump is available, there should be clear, transparent and objective criteria/procedure to indicate who out of the two is to be preferred. Lack of transparency in the system promotes nepotism and arbitrariness. It is absolutely essential that the entire system should be transparent right from the stage of calling for the applications up to the stage of passing the orders of allotment. The names of the allottees, the orders and the reasons for allotment should be available for public knowledge and

> scrutiny. Mr Shanti Bhushan has suggested that the petrol pumps, agencies etc. may be allotted by public auction — category wise amongst the eligible and objectively selected applicants. We do not wish to impose any procedure on the Government. It is a matter of policy for the Government to lay down. We, however, direct that any procedure laid down by the Government must be transparent, just, fair and non-arbitrary.
>
> ….. …..
>
> 26. With the change in socio-economic outlook, the public servants are being entrusted with more and more discretionary powers even in the field of distribution of government wealth in various forms. We take it to be perfectly clear, that if a public servant abuses his office either by an act of omission or commission, and the consequence of that is injury to an individual or loss of public property, an action may be maintained against such public servant. No public servant can say "you may set aside an order on the ground of mala fide but you cannot hold me personally liable". No public servant can arrogate to himself the power to act in a manner which is arbitrary."
>
> (emphasis is mine)

This judgment has a direct bearing on the controversy in hand. It clearly delineates the manner in which discretion must be exercised, specially when the object of discretion is State largesse. A perusal of the observations reproduced above reveal, that the State largesse under reference (petrol pumps) were to be allotted on the ground of poverty and unemployment. Such an allotment was obviously based on a policy to "best subserve the common good" enshrined in Article 39(b) of the Constitution of India. This Court found no fault in the policy itself. The fault was with the manner of giving effect to the policy. It was held, that a transparent and objective criteria/procedure has to be evolved, so that the choice out of those who are eligible can be made fairly and without any arbitrariness. The exercise of discretion which enables the competent

authority to arbitrarily pick and choose out of several persons falling in the same category, according to the above decision would be arbitrary, and as such violative of Article 14 of the Constitution of India.

(j) Out of the more recent judgments our attention was invited to Meerut Development Authority Vs. Association of Management Studies & Anr. etc., (2009) 6 SCC 171. The controversy adjudicated upon in this case emerges from the decision of the appellant to allotment of 2 plots of land. For the said purpose the appellant invited tenders from interested persons. In response the respondent submitted its tender. After the allotment of one of the plots to the respondent, the respondent raised an objection that the appellant had fixed the reserved price of the second plot at a rate much higher than its adjoining plots. The respondent assailed the action of the appellant in issuing a fresh advertisement for the allotment of the second plot. In the course of determination of the aforesaid controversy this Court held:

> "26. A tender is an offer. It is something which invites and is communicated to notify acceptance. Broadly stated it must be unconditional; must be in the proper form, the person by whom tender is made must be able to and willing to perform his obligations. The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. However, a limited judicial review may be available in cases where it is established that the terms of the invitation to tender were so tailor-made to suit the convenience of any particular person with a view to eliminate all others from participating in the bidding process.
>
> 27. The bidders participating in the tender process have no other right except the right to equality and fair treatment in the matter of evaluation of competitive bids offered by interested persons in response to notice inviting tenders in a transparent manner and free from hidden agenda. One cannot challenge the terms and conditions

of the tender except on the abovestated ground, the reason being the terms of the invitation to tender are in the realm of the contract. No bidder is entitled as a matter of right to insist the authority inviting tenders to enter into further negotiations unless the terms and conditions of notice so provided for such negotiations.

28. It is so well settled in law and needs no restatement at our hands that disposal of the public property by the State or its instrumentalities partakes the character of a trust. The methods to be adopted for disposal of public property must be fair and transparent providing an opportunity to all the interested persons to participate in the process.

29. The Authority has the right not to accept the highest bid and even to prefer a tender other than the highest bidder, if there exist good and sufficient reasons, such as, the highest bid not representing the market price but there cannot be any doubt that the Authority's action in accepting or refusing the bid must be free from arbitrariness or favouritism.

….. …..

39. The law has been succinctly stated by Wade in his treatise, *Administrative Law*:

"The powers of public authorities are therefore essentially different from those of private persons. A man making his will may, subject to any rights of his dependants, dispose of his property just as he may wish. He may act out of malice or a spirit of revenge, but in law this does not affect his exercise of his power. In the same way a private person has an absolute power to allow whom he likes to use his land, to release a debtor, or, where the law permits, to evict a tenant, regardless of his motives. This is unfettered discretion. But a public authority may do none of these things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest. So a city council acted unlawfully when it refused unreasonably to let a local rugby football club use the city's sports ground, though a private owner could of course have refused with impunity. Nor may a local authority arbitrarily release debtors, and if it evicts tenants, even though in accordance with a contract, it must act reasonably and 'within the limits of fair dealing'. The whole conception of unfettered discretion is inappropriate to a public authority, which possesses powers solely in order that it may use them for the public good.", *Administrative Law, 9th Edn. H.W.R. Wade and C.F. Forsyth*.

40. There is no difficulty to hold that the authorities owe a duty to act fairly but it is equally well settled in judicial review, the court is

not concerned with the merits or correctness of the decision, but with the manner in which the decision is taken or the order is made. The court cannot substitute its own opinion for the opinion of the authority deciding the matter.

41. The distinction between appellate power and a judicial review is well known but needs reiteration. 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. The courts have inherent limitations on the scope of any such enquiry. 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 the court cannot act as an appellate court by substituting its opinion in respect of selection made for entering into such contract. But at the same time the courts can certainly examine whether the "decision-making process" was reasonable, rational, not arbitrary and violative of Article 14. (See *Sterling Computers Ltd. Vs. M&N Publications Ltd., (1993) 1 SCC 445).*

….. …..

50. We are, however, of the opinion that the effort, if any, made by MDA to augment its financial resources and revenue itself cannot be said to be an unreasonable decision. It is well said that the struggle to get for the State the full value of its resources is particularly pronounced in the sale of State-owned natural assets to the private sector. Whenever the Government or the authorities get less than the full value of the asset, the country is being cheated; there is a simple transfer of wealth from the citizens as a whole to whoever gets the assets "at a discount". Most of the times the wealth of the State goes to the individuals within the country rather than to multinational corporations; still, wealth slips away that ought to belong to the nation as a whole.

(emphasis is mine)

In the instant judgment this Court laid down, that in a tender process, a tenderer has the right to fair treatment and the right to be treated equally. The evaluation of tenders, it has been held, must be transparent and free from any hidden agenda. The view expressed in Wades Tretise on Administrative Law, that public authorities cannot act in a manner which is

open to private persons, was accepted. Public authorities, it was held, can neither act out of malice nor a spirit of revenge. A public authority is ordained to act, reasonably and in good faith and upon lawful and relevant grounds of public interest. Most importantly it was concluded, that the State "must" get the "full value" of the resources, specially when State owned assets are passed over to private individuals/entities. Not stopping there the Court added further, that whoever pays less than the full value, get the assets belonging to the citizens "at a discount", and as such the wealth that belongs to the nation slips away.

(k) Also cited for our consideration was the judgment in Reliance Natural Resources Ltd. Vs. Reliance Industries Ltd. etc., (2010) 7 SCC 1. The Court's attention was invited to the following:

> "33. Mr R.F. Nariman, learned Senior Counsel appearing for RIL concentrated his argument with reference to Sections 391 to 394 of the Companies Act. According to him, Section 392 of the Act had no predecessors either in English law or in the Companies Act of 1913. The reason why the legislature appears to have felt the necessity of enacting Section 392 is to bring Section 391 on a par with Section 394. Section 394 applies only to companies which are reconstructing and or amalgamating, involving the transfer of assets and liabilities to another company. It is thus, applicable to a species of the genus of company referred to under Section 391. Section 394, sub-section 1 specifically gives the Company Court the power not merely to sanction the compromise or arrangement but also gives the Company Court the power, by a subsequent order, to make provisions for "such incidental, consequential and supplemental matters as are necessary to secure that the reconstruction or amalgamation shall be fully and effectively carried out" [Section 394(1)(*vi*)]. This power is absent in Section 391, so that companies falling within Section 391, but not within Section 394, would not be amenable to the Company Court's jurisdiction to enforce a compromise or arrangement made under Section 391 and to see that they are fully carried out. Hence, the power under Section 392 has to be understood in the above context, and is of the same

quality as the power expressly given to the Company Court post-sanction under Section 394.

….. …..

122. From the above analysis, the following are the broad sustainable conclusions which can be derived from the position of the Union:

(*1*) The natural resources are vested with the Government as a matter of trust in the name of the people of India. Thus, it is the solemn duty of the State to protect the national interest.

(*2*) Even though exploration, extraction and exploitation of natural resources are within the domain of governmental function, the Government has decided to privatise some of its functions. For this reason, the constitutional restrictions on the Government would equally apply to the private players in this process. Natural resources must always be used in the interests of the country, and not private interests.

(*3*) The broader constitutional principles, the statutory scheme as well as the proper interpretation of the PSC mandates the Government to determine the price of the gas before it is supplied by the contractor.

(*4*) The policy of the Government, including the gas utilisation policy and the decision of EGOM would be applicable to the pricing in the present case.

(*5*) The Government cannot be divested of its supervisory powers to regulate the supply and distribution of gas.

….. …..

128. In a constitutional democracy like ours, the national assets belong to the people. The Government holds such natural resources in trust. Legally, therefore, the Government owns such assets for the purposes of developing them in the interests of the people. In the present case, the Government owns the gas till it reaches its ultimate consumer. A mechanism is provided under the PSC between the Government and the contractor (RIL, in the present case). The PSC shall override any other contractual obligation between the contractor and any other party.

….. …..

243. The structure of our Constitution is not such that it permits the reading of each of the Directive Principles of State Policy, that have been framed for the achievement of conditions of social, economic and political justice in isolation. The structural lines of logic, of ethical imperatives of the State and the lessons of history flow from one to

the other. In the quest for national development and unity of the nation, it was felt that the "ownership and control of the material resources of the community" if distributed in a manner that does not result in common good, it would lead to derogation from the quest for national development and the unity of the nation. Consequently, Article 39(*b*) of the Constitution should be construed in light of Article 38 of the Constitution and be understood as placing an affirmative obligation upon the State to ensure that distribution of material resources of the community does not result in heightening of inequalities amongst people and amongst regions. In line with the logic of the constitutional matrix just enunciated, and in the sweep of the quest for national development and unity, is another provision. Inasmuch as inequalities between people and regions of the nation are inimical to those goals, Article 39(*c*) posits that the "operation of the economic system" when left unattended and unregulated, leads to "concentration of wealth and means of production to the common detriment" and commands the State to ensure that the same does not occur.

….. …..

250 We hold that with respect to the natural resources extracted and exploited from the geographic zones specified in Article 297 the Union may not:

(*1*) transfer title of those resources after their extraction unless the Union receives just and proper compensation for the same;

(*2*) allow a situation to develop wherein the various users in different sectors could potentially be deprived of access to such resources;

(*3*) allow the extraction of such resources without a clear policy statement of conservation, which takes into account total domestic availability, the requisite balancing of current needs with those of future generations, and also India's security requirements;

(*4*) allow the extraction and distribution without periodic evaluation of the current distribution and making an assessment of how greater equity can be achieved, as between sectors and also between regions;

(*5*) allow a contractor or any other agency to extract and distribute the resources without the explicit permission of the Union of India, which permission can be granted only pursuant to a rationally framed utilisation policy; and

(*6*) no end user may be given any guarantee for continued access and of use beyond a period to be specified by the Government.

> Any contract including a PSC which does not take into its ambit stated principles may itself become vulnerable and fall foul of Article 14 of the Constitution.
>
> (emphasis is mine)

Interestingly, in this case the position adopted by the Union needs to be highlighted. This Court was informed, that natural resources are vested in the Government, as a matter of trust, in the name of the people of India. And that, it was the solemn duty of the State to protect the national interest. The most significant assertion expressed on behalf of the Union was, that natural resources must always be used in the interest of the country and not in private interest. It is in the background of the stance adopted by the Union, that this Court issued the necessary directions extracted above.

(l) Last of all reference was made to the decision of this Court in Akhil Bhartiya Upbhokta Congress Vs. State of Madhya Pradesh & Ors., (2011) 5 SCC 29:

> 65. What needs to be emphasised is that the State and/or its agencies/instrumentalities cannot give largesse to any person according to the sweet will and whims of the political entities and/or officers of the State. Every action/decision of the State and/or its agencies/instrumentalities to give largesse or confer benefit must be founded on a sound, transparent, discernible and well-defined policy, which shall be made known to the public by publication in the Official Gazette and other recognised modes of publicity and such policy must be implemented/executed by adopting a non-discriminatory and non-arbitrary method irrespective of the class or category of persons proposed to be benefited by the policy. The distribution of largesse like allotment of land, grant of quota, permit licence, etc. by the State and its agencies/instrumentalities should always be done in a fair and equitable manner and the element of favouritism or nepotism shall not influence the exercise of discretion,

if any, conferred upon the particular functionary or officer of the State.

66. We may add that there cannot be any policy, much less, a rational policy of allotting land on the basis of applications made by individuals, bodies, organisations or institutions dehors an invitation or advertisement by the State or its agency/instrumentality. By entertaining applications made by individuals, organisations or institutions for allotment of land or for grant of any other type of largesse the State cannot exclude other eligible persons from lodging competing claim. Any allotment of land or grant of other form of largesse by the State or its agencies/instrumentalities by treating the exercise as a private venture is liable to be treated as arbitrary, discriminatory and an act of favouritism and/or nepotism violating the soul of the equality clause embodied in Article 14 of the Constitution.

67. This, however, does not mean that the State can never allot land to the institutions/organisations engaged in educational, cultural, social or philanthropic activities or are rendering service to the society except by way of auction. Nevertheless, it is necessary to observe that once a piece of land is earmarked or identified for allotment to institutions/organisations engaged in any such activity, the actual exercise of allotment must be done in a manner consistent with the doctrine of equality. The competent authority should, as a matter of course, issue an advertisement incorporating therein the conditions of eligibility so as to enable all similarly situated eligible persons, institutions/organisations to participate in the process of allotment, whether by way of auction or otherwise. In a given case the Government may allot land at a fixed price but in that case also allotment must be preceded by a wholesome exercise consistent with Article 14 of the Constitution."

(emphasis is mine)

The observations of this Court in the judgment extracted above neither need any summarization, nor any further elaboration.

(m) Surely, there cannot be any escape from a reference to the judgment rendered by this Court in Centre for Public Interest Litigation and others v. Union of India & Ors., (2012) 3 SCC 1, which according to the preamble of the Presidential reference, seems to be the reason why the

reference came to be made. During the course of hearing extensive debate, between rival parties, ensued on the effect of the observations recorded by this Court in paragraphs 95 and 96 of the judgment. The aforesaid paragraphs are being extracted hereinbelow:

> "95. This Court has repeatedly held that wherever a contract is to be awarded or a licence is to be given, the public authority must adopt a transparent and fair method for making selections so that all eligible persons get a fair opportunity of competition. To put it differently, the State and its agencies/instrumentalities must always adopt a rational method for disposal of public property and no attempt should be made to scuttle the claim of worthy applicants. When it comes to alienation of scarce natural resources like spectrum etc., it is the burden of the State to ensure that a non-discriminatory method is adopted for distribution and alienation, which would necessarily result in protection of national/public interest.
>
> 96. In our view, a duly publicized auction conducted fairly and impartially is perhaps the best method for discharging this burden and the methods like first-come-first-served when used for alienation of natural resources/public property are likely to be misused by unscrupulous people who are only interested in garnering maximum financial benefit and have no respect for the constitutional ethos and values. In other words, while transferring or alienating the natural resources, the State is duty bound to adopt the method of auction by giving wide publicity so that all eligible persons can participate in the process."

In so far as the controversy in the aforesaid case is concerned, it would be relevant to mention that the petitioner approached this Court by invoking the extraordinary writ jurisdiction of this Hon'ble Court under Article 32 of the Constitution of India. The petition came to be filed as a cause in public interest. The reason which promoted the petitioner to approach this Court was that the Union had adopted the policy of "first come first serve" for allocation of licences of spectrum. It was alleged that the aforesaid policy involved the element of pure chance or accident. It was asserted on behalf

of the petitioners that invocation of the principles of "first come first serve" for permission to use natural resources had inherently dangerous implications. The implications expressed by the petitioners were duly taken into consideration and the plea raised on behalf of the petitioners was accepted. Thereupon, the following directions came to be issued in paragraph 102 of the judgment:

> "102. In the result, the writ petitions are allowed in the following terms:
>
> (i) The licences granted to the private Respondents on or after 10.1.2008 pursuant to two press releases issued on 10.1.2008 and subsequent allocation of spectrum to the licensees are declared illegal and are quashed.
>
> (ii) The above direction shall become operative after four months.
>
> (iii) Keeping in view the decision taken by the Central Government in 2011, TRAI shall make fresh recommendations for grant of licence and allocation of spectrum in 2G band in 22 Service Areas by auction, as was done for allocation of spectrum in 3G band.
>
> (iv) The Central Government shall consider the recommendations of TRAI and take appropriate decision within next one month and fresh licences be granted by auction.
>
> (v) Respondent Nos. 2, 3 and 9 who have been benefited at the cost of Public Exchequer by a wholly arbitrary and unconstitutional action taken by the DoT for grant of UAS Licences and allocation of spectrum in 2G band and who off-loaded their stakes for many thousand crores in the name of fresh infusion of equity or transfer of equity shall pay cost of Rs. 5 crores each. Respondent Nos. 4, 6, 7 and 10 shall pay cost of Rs. 50 lakhs each because they too had been benefited by the wholly arbitrary and unconstitutional exercise undertaken by the DoT for grant of UAS Licences and allocation of spectrum in 2G band. We have not imposed cost on the Respondents who had submitted their applications in 2004 and 2006 and whose applications were kept pending till 2007.

(vi) Within four months, 50% of the cost shall be deposited with the Supreme Court Legal Services Committee for being used for providing legal aid to poor and indigent litigants. The remaining 50% cost shall be deposited in the funds created for Resettlement and Welfare Schemes of the Ministry of Defence.

(vii) However, it is made clear that the observations made in this judgment shall not, in any manner, affect the pending investigation by the CBI, Directorate of Enforcement and Ors. agencies or cause prejudice to those who are facing prosecution in the cases registered by the CBI or who may face prosecution on the basis of chargesheet(s) which may be filed by the CBI in future and the Special Judge, CBI shall decide the matter uninfluenced by this judgment. We also make it clear that this judgment shall not prejudice any person in the action which may be taken by other investigating agencies under Income Tax Act, 1961, Prevention of Money Laundering Act, 2002 and other similar statutes."

It needs to be noticed that a review petition came to be filed by the Union against the instant judgment. The same, however, came to be withdrawn without any reservations. During the course of hearing of the instant petition, the Learned Attorney General for India informed this Court that the Union had decided to give effect to the judgment, in so far as the allocation of spectrum is concerned. In the above view of the matter, one only needs to notice the observations recorded by this Court in paragraphs 95 and 96 extracted hereinabove. A perusal of the aforesaid paragraphs reveals, that in line with the judgments rendered by this Court interpreting Article 14 of the Constitution of India, this Court yet again held, that while awarding a contact or a licence, the executive must adopt a transparent and fair method. The executive must ensure, that all eligible persons get a fair opportunity to compete. For awarding contracts or licences, the executive should adopt a rational method, so as to ensure that claims of worthy

applicants are not scuttled. On the subject of natural resources like spectrum, etc., this Court held that it was the bounden duty of the State to ensure the adoption of a non-discriminatory method which would result in protection of national/public interest. This Court also expressed the view that "perhaps" the best method for doing so would be through a duly publicized auction conducted fairly and impartially. Thus viewed, it was affirmed, that the State was duty bound to adopt the method of auction by giving wide publication while alienating natural resources, so as to ensure that all eligible persons can participate in the process.

7. The parameters laid by this Court on the scope of applicability of Article 14 of the Constitution of India, in matters where the State, its instrumentalities, and their functionaries, are engaged in contractual obligations (as they emerge from the judgments extracted in paragraph 6 above) are being briefly paraphrased. For an action to be able to withstand the test of Article 14 of the Constitution of India, it has already been expressed in the "main opinion" that it has to be fair, reasonable, non-discriminatory, transparent, non-capricious, unbiased, without favouritism or nepotism, in pursuit of promotion of healthy competition and equitable treatment. The judgments referred to, endorse all those requirements where the State, its instrumentalities, and their functionaries, are engaged in contractual transactions. Therefore, all "governmental policy" drawn with reference to contractual matters, it has been held, must conform to the aforesaid parameters. While Article 14 of the Constitution

of India permits a reasonable classification having a rational nexus to the object sought to be achieved, it does not permit the power of pick and choose arbitrarily out of several persons falling in the same category. Therefore, a criteria or procedure has to be adopted so that the choice among those falling in the same category is based on reason, fair play and non-arbitrariness. Even if there are only two contenders falling in the zone of consideration, there should be a clear, transparent and objective criteria or procedure to indicate which out of the two is to be preferred. It is this, which would ensure transparency.

8. Another aspect which emerges from the judgments (extracted in paragraph 6 above) is that, the State, its instrumentalities and their functionaries, while exercising their executive power in matters of trade or business etc. including making of contracts, should be mindful of public interest, public purpose and public good. This is so, because every holder of public office by virtue of which he acts on behalf of the State, or its instrumentalities, is ultimately accountable to the people in whom sovereignty vests. As such, all powers vested in the State are meant to be exercised for public good and in public interest. Therefore, the question of unfettered discretion in an executive authority, just does not arise. The fetters on discretion are - a clear, transparent and objective criteria or procedure which promotes public interest, public purpose and public good. A public authority is ordained, therefore to act, reasonably and in good faith and upon lawful and relevant grounds of public interest.

9. Observations recorded by this Court on the subject of revenue returns, during the course of the States engagements in commercial ventures (emerging from the judgments extracted in paragraph 6 above), are being summarized hereunder. It has been held, where the Sate is simply selling a product, there can be no doubt that the State must endeavour to obtain the highest price, subject of course to any other overriding public consideration. The validity of a trading agreement executed by the Government has to be judged by the test, that the entire benefit arising therefrom enures to the State, and is not used as a cloak for conferring private benefits on a limited class of persons. If a contract has been entered into, taking in account the interest of the State and the public, the same would not be interfered with by a Court, by assuming the position of an appellate authority. The endeavour to get the State the "full value" of its resources, it has been held, is particularly pronounced in the sale of State owned natural resources, to the private sector. Whenever the State gets less than the full value of the assets, it has been inferred, that the country has been cheated, in a much as, it amounts to a simple transfer of wealth, from the citizens as a whole, to whoever gets the assets at a discount. And in that sense, it has been concluded, the wealth that belongs to the nation is lost. In Reliance Natural Resources Ltd.'s case (supra), the Union of India adopted the position, that natural resources are vested in the State as a matter of trust, for and on behalf of the citizens of the country. It was also acknowledged, that it was the solemn duty of the State, to protect those natural resources. More importantly, it was

accepted, that natural resources must always be used in the common interest of the citizens of the country, and not for private interest.

10. Based on the legal/constitutional parameters/requirements culled out in the preceding three paragraphs, I shall venture an opinion on whether there are circumstances in which natural resources ought to be disposed of only by ensuring maximum returns. For this, I shall place reliance on a conclusion drawn in the "main opinion", namely, "Distribution of natural resources is a policy decision, and the means adopted for the same are thus, executive prerogatives. However, when such a policy decision is not backed by a social or welfare purpose, and precious and scarce natural resources are alienated for commercial pursuits of profit maximizing private entrepreneurs, adoption of means other than those that are competitive and maximize revenue, may be arbitrary and face the wrath of Article 14 of the Constitution." (refer to paragraph 149 of the "main opinion"). I am in respectful agreement with the aforesaid conclusion, and would accordingly opine, that when natural resources are made available by the State to private persons for commercial exploitation exclusively for their individual gains, the State's endeavour must be towards maximization of revenue returns. This alone would ensure, that the fundamental right enshrined in Article 14 of the Constitution of India (assuring equality before the law and equal protection of the laws), and the directive principle contained in Article 39(b) of the Constitution of India (that material

resources of the community are so distributed as best to subserve the common good), have been extended to the citizens of the country.

11. A similar conclusion would also emerge in a slightly different situation. This Court in a case dealing with a challenge to the allotment of retail outlets for petroleum products [Common Cause, A Registered Society Vs. Union of India & Ors., (1996) 6 SCC 530] has held, that Article 14 of the Constitution of India, does not countenance discretionary power which is capable of being exercised arbitrarily. While accepting that Article 14 of the Constitution of India permits a reasonable classification having a rational nexus to the object sought to be achieved, it was held that Article 14 of the Constitution of India does not permit the State to pick and choose arbitrarily out of several persons falling in the same category. A transparent and objective criteria/procedure has to be evolved so that the choice amongst those belonging to the same class or category is based on reason, fair play, and non-arbitrariness. Envisage a situation as the one expressed above, where by reasonable classification based on some public purpose, the choice is limited to a set of private persons, amongst whom alone, the State has decided to dispose of natural resources. Herein again, in my opinion, if the participation of private persons is for commercial exploitation exclusively for their individual gains, then the State's endeavour to maximize revenue alone, would satisfy the constitutional mandate contained in Articles 14 and 39(b) of the Constitution of India.

12. In the "main opinion", it has been concluded, that auction is not a constitutional mandate, in the nature of an absolute principle which has to be applied in all situations. And as such, auction cannot be read into Article 14 of the Constitution of India, so as to be applied in all situations (refer to paragraph 107 of the "main opinion"). Auction is certainly not a constitutional mandate in the manner expressed, but it can surely be applied in some situations to maximize revenue returns, to satisfy legal and constitutional requirements. It is, therefore, that I have chosen to express the manner of disposal of natural resources by using the words "maximization of revenue" in place of the term "auction", in the foregoing two paragraphs. But it may be pointed out, the Attorney General for India had acknowledged during the course of hearing, that auction by way of competitive bidding was certainly an indisputable means, by which maximization of revenue returns is assured (in this behalf other observations recorded by me in paragraph 3 above may also be kept in mind). In the aforesaid view of the matter, all that needs to be stated is, that if the State arrives at the conclusion, in a given situation, that maximum revenue would be earned by auction of the natural resource in question, then that alone would be the process which it would have to adopt, in the situations contemplated in the foregoing two paragraphs.

13. One is compelled to take judicial notice of the fact, that allotment of natural resources is an issue of extensive debate in the country, so much so, that the issue of allocation of such resources had recently resulted in a washout of two sessions of Parliament. The current debate on allotment of material resources has been prompted by a report submitted by the

Comptroller and Auditor General, asserting extensive loss in revenue based on inappropriate allocations. The report it is alleged, points out that private and public sector companies had made windfall gains because the process of competitive bidding had not been adopted. The country witnessed a similar political spat a little while earlier, based on the allocation of the 2G spectrum. On that occasion the controversy was brought to this Court by way of a public interest litigation, the judgment whereof is reported as *Centre for Public Interest Litigation Vs. Union of India, (2012) 3 SCC 1*. Extensive revenue loss, in the course of allocation of the 2G spectrum was duly noticed. On each occasion when the issue of allocation of natural resources, results in an alleged loss of revenue, it is portrayed as a loss to the nation. The issue then becomes a subject matter of considerable debate at all levels of the Indian polity. Loss of one, essentially entails a gain to the other. On each such occasion loss to the nation, translates into the identification of private players as the beneficiaries. If one were to accept the allegations appearing in the media, on account of defects in the disposal mechanism, private parties have been beneficiaries to the tune of lakhs of crores of Indian Rupees, just for that reason. In the current debate, rival political parties have made allegations against those responsible, which have been repudiated with counter allegations. This Court is not, and should never be seen to be, a part of that debate. But it does seem, that the Presidential reference is aimed at invoking this Court's advisory jurisdiction to iron out the creases, so that legal and constitutional parameters are correctly understood. This

would avoid such controversies in future. It is therefore, that an opinion is also being rendered by me, on the fourth question, namely, "What is the permissible scope for interference by courts with policy making by the Government including methods for disposal of natural resources?" On this the advice tendered in the "main opinion" inter alia expresses, "We may, however, hasten to add that the Court can test the legality and constitutionality of these methods. When questioned, the Courts are entitled to analyse the legal validity of different means of distribution and give a constitutional answer as to which methods are ultra vires and intra vires the provisions of the Constitution. Nevertheless, it cannot and will not compare which policy is fairer than the other, but, if a policy or law is patently unfair to the extent that it falls fouls of the fairness requirement of Article 14 of the Constitution, the Court would not hesitate in striking it down.", (refer to paragraph 146 of the "main opinion"). While fully endorsing the above conclusion, I wish to further elucidate the proposition.

Before adverting to anything else, it is essential to refer to Article 39 (b) of the Constitution of India.

> "**39. Certain principles of policy to be followed by the State –** The State shall in particular, direct its policy towards securing -
>
> **(b)** that the ownership and control of the material resources of the community are so distributed as best to subserve the common good**;**
>
> (emphasis is mine)

The mandate contained in the Article extracted above envisages, that all material resources ought to be distributed in a manner which would “best subserve the common good”. It is therefore apparent, that governmental policy for distribution of such resources should be devised by keeping in mind the “common good” of the community i.e., the citizens of this country. It has been expressed in the “main opinion”, that matters of policy fall within the realm of the legislature or the executive, and cannot be interfered with, unless the policy is in violation of statutory law, or is ultra vires the provision(s) of the Constitution of India. It is not within the scope of judicial review for a Court to suggest an alternative policy, which in the wisdom of the Court could be better suited in the circumstances of a case. Thus far the position is clearly unambiguous.

The legality and constitutionality of policy is one matter, and the manner of its implementation quite another. Even at the implementation stage a forthright and legitimate policy, may take the shape of an illegitimate stratagem (which has been illustrated at a later juncture hereinafter). Since the Presidential reference is not based on any concrete fact situation, it would be appropriate to hypothetically create one. This would enable those responsible for decision making, to be able to appreciate the options available to them, without the fear of trespassing beyond the limitations of legality and constitutionality. This would also ensure that a truly meaningful opinion has been rendered. The illustration, that has been chosen is imaginary, and therefore, should not be taken as a

reference to any similar real life situation(s)/circumstance(s). The focus in the instant consideration is limited to allocation of natural resources for private commercial exploitation, i.e., where a private player will be the beneficiary of such allocation, and will exploit the natural resource to make personal profits therefrom.

The illustration chosen will be used to express an opinion on matters which are governed by statutory provisions, as also, those which are based on governmental policy. This is so because in so far as the present controversy is concerned, the parameters for distribution of natural resources must be examined under these two heads separately.

Coal is a natural resource. It shall constitute the illustrative natural resource for the present consideration. Let us assume a governmental decision to allocate coal lots for private commercial exploitation. First, the legislative policy angle. Reference may be made to the Mines and Minerals (Development and Regulation) Act, 1957 (hereinafter referred to as, the MMDR Act). The enactment deals exclusively with natural resources. Section 11A of the MMDR Act has been chosen as the illustrative provision, to demonstrate how a forthright legitimate legislative policy, may take the shape of an illegitimate stratagem. The choice of Section 11A aforesaid is on account of the fact that it was added to the MMDR Act only on 13.2.2012, and as such, there may not have been, as of now, any actual allocation of coal lots based thereon. Section 11A of the MMDR Act, is being placed hereunder :

"**11A. Procedure in respect of coal or lignite –** The Central Government may, for the purpose of granting reconnaissance permit, prospecting licence or mining lease in respect of an area containing coal or lignite, select, through auction by competitive bidding on such terms and conditions as may be prescribed, a company engaged in, -

(i) production of iron and steel;
(ii) generation of power;
(iii) washing of coal obtained from a mine; or
(iv) such other end use as the Central Government may, by notification in the Official Gazette, specify,

and the State Government shall grant such reconnaissance permit, prospecting licence or mining lease in respect of coal or lignite to such company as selected through auction by competitive bidding under this section:

Provided that the auction by competitive bidding shall not be applicable to an area containing coal or lignite,-

(a) where such area is considered for allocation to a Government company or corporation for mining or such other specified end use;
(b) where such area is considered for allocation to a company or corporation that has been awarded a power project on the basis of competitive bids for tariff (including Ultra Mega Power Projects)."

Explanation – For the purposes of this section "company" means a company as defined in section 3 of the Companies Act, 1956 and includes a foreign company within the meaning of section 591 of that Act.

(emphasis is mine)

For the grant of a mining lease in respect of an area containing coal, the provision leaves no room for any doubt, that selection would be made through auction by competitive bidding. No process other than auction, can therefore be adopted for the grant of a coal mining lease.

Section 11A of the MMDR Act also defines the zone of eligibility, for participation in such competitive bidding. To be eligible, the contender must be engaged in the production of iron and steel, or generation of

power, or washing of coal obtained from a mine, or an activity notified by the Central Government. Only those satisfying the legislatively prescribed zone of eligibility, are permitted to compete for a coal mining lease. For the sake of fairness, and to avoid arbitrariness, the provision contemplates, that the highest bidder amongst those who participate in the process of competitive bidding, would succeed in obtaining the concerned coal mining lease. The legislative policy limiting the zone of consideration could be subject matter of judicial review. It could be assailed, in case of violation of a legal or constitutional provision. As expressed in the "main opinion" the facts of each individual case, will be the deciding factor for such determination. In the absence of any such challenge, the legislative policy would be binding and enforceable. In such an eventuality, those who do not fall within the zone of consideration, would be precluded from the process of competitive bidding for a mining lease over an area having coal deposits. In the process of auction through competitive bidding, if the objective is to best subserve the common good (as in Article 39(b) of the Constitution of India) the legislative policy would be fully legitimate. If however, the expressed legislative policy has no nexus to any legitimate objective, or it transgresses the mandate of distribution of material resources to "best subserve the common good", it may well be unfair, unreasonable or discriminatory.

For an effective analysis, Section 11A of the MMDR Act needs a further closer examination. Section 11A aforesaid, as an exception to the

legislative policy referred to in the foregoing paragraph, also provides for the grant of a mining lease for coal to a private player, without following the auction route. The provision contemplates the grant of a mining lease for coal, without any reciprocal monetary or other consideration from the lessee. The proviso in section 11A of the MMDR Act, excludes the auction route where the beneficiary is engaged in power generation. Such exclusion, is contemplated only when the power generating concern, was awarded the power project, on the basis of "competitive bids for tariff". It is important to highlight, that there is no express assurance in section 11A aforesaid, that every entrepreneur who sets up a power project, having succeeded on the basis of competitive bidding, would be allotted a coal mining lease. But if such an allotment is actually made, it is apparent, that such entrepreneur would get the coal lot, without having to participate in an auction, free of cost. The legislative policy incorporated in Section 11A of the MMDR Act, if intended to best subserve the common good, may well be valid, even in a situation where the material resource is being granted free of cost. What appears to be free of cost in the proviso in Section 11A of the MMDR Act, is in actuality consideration enmeshed in providing electricity at a low tariff. The aforesaid proviso may be accepted as fair, and may not violate the mandate contained in Article 14 of the Constitution of India, or even the directive principles contained in Article 39(b) of the Constitution of India.

Hypothetically, assume a competitive bidding process for tariff, amongst private players interested in a power generation project. The private party which agrees to supply electricity at the lowest tariff would succeed in such an auction. The important question is, if the private party who succeeds in the award of the project, is granted a mining lease in respect of an area containing coal, free of cost, would such a grant satisfy the test of being fair, reasonable, equitable and impartial. The answer to the instant query would depend on the facts of each individual case. Therefore, the answer could be in the affirmative, as well as, in the negative. Both aspects of the matter are being explained in the succeeding paragraph.

Going back to the hypothetical illustration based on Section 11A of the MMDR Act. One would add some further facts so as to be able to effectively project the legal point of view. If the bidding process to determine the lowest tariff has been held, and the said bidding process has taken place without the knowledge, that a coal mining lease would be allotted to the successful bidder, yet the successful bidder is awarded a coal mining lease. Would such a grant be valid? In the aforesaid fact situation, the answer to the question posed, may well be in the negative. This is so because, the competitive bidding for tariff was not based on the knowledge of gains, that would come to the vying contenders, on account of grant of a coal mining lease. Such a grant of a coal mining lease would therefore have no nexus to the "competitive bid for tariff". Grant of a

mining lease for coal in this situation would therefore be a windfall, without any nexus to the object sought to be achieved. In the bidding process, the parties concerned had no occasion to bring down the electricity tariff, on the basis of gains likely to accrue to them, from the coal mining lease. In this case, a material resource would be deemed to have been granted without a reciprocal consideration i.e., free of cost. Such an allotment may not be fair and may certainly be described as arbitrary, and violative of the Article 14 of the Constitution of India. Such an allotment having no nexus to the objective of subserving the common good, would fall foul even of the directive principle contained in Article 39(b) of the Constitution of India. Therefore, a forthright and legitimate policy, on account of defective implementation, may become unacceptable in law.

In a slightly changed factual scenario, the conclusion may well be different. If before the holding the process of auction, for the award of a power project (based on competitive bids for tariff), it is made known to the contenders, that the successful bidder would be entitled to a mining lease over an area containing coal, those competing for the power project would necessarily incorporate the profit they were likely to make from such mining lease. While projecting the tariff at which they would supply electricity, they would be in a position to offset such profits from their costs. This would result in an in an opportunity to the contenders to lower the tariff to a level lower than would have been possible without the said lease. In such a situation the gains from the coal mining lease, would be

enmeshed in the competitive bidding for tariff. Therefore, it would not be just to assume in the instant sequence of facts, that the coal lot has been granted free of cost. One must read into the said grant, a reciprocal consideration to provide electricity at a lower tariff. In the instant factual scenario, the allotment of the mining lease would be deemed to be aimed at "subserving the common good" in terms of Article 39(b) of the Constitution of India. Therefore even the allotment of such a mining lease, which appears to result in the allocation of a natural resource free of cost, may well satisfy the test of fairness and reasonableness contemplated in Article 14 of the Constitution of India. Moreso, because a fair playing field having been made available to all those competing for the power project, by making them aware of the grant of a coal mining lease, well before the bidding process. The question of favouritism therefore would not arise. Would such a grant of a natural resource, free of cost, be valid? The answer to the query, in the instant fact situation, may well be in the affirmative.

The policy of allocation of natural resources for public good can be defined by the legislature, as has been discussed in the foregoing paragraphs. Likewise, policy for allocation of natural resources may also be determined by the executive. The parameters for determining the legality and constitutionality of the two are exactly the same. In the aforesaid view of the matter, there can be no doubt about the conclusion recorded in the "main opinion" that auction which is just one of the several

price recovery mechanisms, cannot be held to be the only constitutionally recognized method for alienation of natural resources. That should not be understood to mean, that it can never be a valid method for disposal of natural resources (refer to paragraphs 10 to 12 of my instant opinion).

I would therefore conclude by stating that no part of the natural resource can be dissipated as a matter of largess, charity, donation or endowment, for private exploitation. Each bit of natural resource expended must bring back a reciprocal consideration. The consideration may be in the nature of earning revenue or may be to "best subserve the common good". It may well be the amalgam of the two. There cannot be a dissipation of material resources free of cost or at a consideration lower than their actual worth. One set of citizens cannot prosper at the cost of another set of citizens, for that would not be fair or reasonable.

…….J.

(JAGDISH SINGH KHEHAR)

NEW DELHI;
SEPTEMBER 27, 2012.