IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

LETTERS PATENT APPEAL NO.272 OF 2012
IN
WRIT PETITION NO.9449 OF 2009

1. Wilfred Anthony Jose Pereira
of Mumbai, r/at Torrefiel, 127,
Carter Road, Bandra, Mumbai – 400050

2. Daphne May Teresa Pereira
r/at Torrefiel, 127, Carter Road,
Bandra, Mumbai – 400050 … Appellants

Vs

1. The State of Maharashtra
(Revenue and Forest Department)
having its office at Mantralaya
Mumbai-32

2. The Collector
Mumbai Suburban District,
having its office at New Admin. Building
10th floor, Government Colony
Bandra(E), Mumbai-51

3. The Additional Commissioner
Konkan Division, Mumbai

4. Dr.Celine Mary Philomena Aranjo
of Sydney, Australia,
r/at 52, Rose Bank Avenue, Kings Grove
N.S.W. 2208, Sydney, Australia

5. Melanie Fialho
of Mumbai, Indian Inhabitant
r/at Bandstand Building, A, 65
Kane Road, Bandra, Mumbai-50

6. Gemma Patricia Ann Brown
of Sydney, Australia, r/at 20,
Stretham Avenue, Picnic Point
N.S.W. 2213, Sydney, Australia

7. Percival Joseph Pereira
reisiding in Sydney Australia, having
his office at Mumbai, 227, St.Andrew's
Road, Bandra, Mumbai-50

8. Bernadette Fernandes
of Mumbai, Flat No.304, Asit Apartments
Kane Road, Bandra, Mumbai-50

9A. Mrs.Pratima Prakash Wagh
9B. Mr.Rajesh Prakash Wagh
9C. Mr.Kedar Prakash Wagh
all residign at 23/A, Kalpak Bungalow
Perry Cross Road, Bandra (W)
Mumbai-50

10. M/s.Vinaper Castle Co-operative Housing
Society Ltd.
Vinaper Castle, 37C, Pereira Road,
Bandra, Mumbai – 50

11. Nipun Ishwardas Thakkar
12. Vijaya Nipun Thakkar
13. Naman Nipun Thakkar
having their office at 12, CIEM Industrial
Estate, Ramchandra Lane Extension,
Malad (W), Mumbai-64 ... Respondents

WITH
LETTERS PATENT APPEAL NO.60 OF 2012
IN
WRIT PETITION NO.3909 OF 2012

Bernadette Fernandes
residing at Flat No.304, Asiot Apartments
Kane Road, Bandra (W), Mumbai-50 .... Appellants

vs.

1. The State of Maharashtra
Revenue and Foresh Department
Mantralaya, Mumbai-32

2. The Additional Commissioner
Konkan Division, Mumbai

3. The Collector
Mumbai Suburban District,
having its office at New Admin. Building
10th floor, Government Colony
Bandra(E), Mumbai-51

4. Wilfred Anthony Jose Pereira
of Mumbai, r/at Torrefiel, 127,
Carter Road, Bandra, Mumbai – 400050

5. Daphne May Teresa Pereira
r/at Torrefiel, 127, Carter Road,
Bandra, Mumbai – 400050

6. Dr.Celine Mary Philomena Aranjo
of Sydney, Australia,
r/at 52, Rose Bank Avenue, Kings Grove
N.S.W. 2208, Sydney, Australia

7. Melanie Fialho
of Mumbai, Indian Inhabitant
r/at Bandstand Building, A, 65
Kane Road, Bandra, Mumbai-50

8. Gemma Patricia Ann Brown
of Sydney, Australia, r/at 20,
Stretham Avenue, Picnic Point
N.S.W. 2213, Sydney, Australia

9. Percival Joseph Pereira
reisiding in Sydney Australia, having
his office at Mumbai, 227, St.Andrew's
Road, Bandra, Mumbai-50

10. Prakash Shankar Wagh
(since deceased through LRs:
10A. Mrs.Pratima Prakash Wagh
10B. Mr.Rajesh Prakash Wagh
10C. Mr.Kedar Prakash Wagh
all residign at 23/A, Kalpak Bungalow
Perry Cross Road, Bandra (W)
Mumbai-50

11. M/s.Vinaper Castle Coop. Housing Society Ltd.
Vinaper Castle, 37C, Pereira Road,
Bandra, Mumbai – 50 } … Respondents

WITH
CIVIL APPLICATION NO.451 OF 2012
IN
LETTERS PATENT APPEAL NO.272 OF 2012
IN
WRIT PETITION NO.9449 OF 2009

Wilfred Anthony Jose Pereira & anr.) … Applicants

vs.

The State of Maharashtra & Ors.) … Respondents

WITH
CIVIL APPLICATION NO.101 OF 2013
IN
LETTERS PATENT APPEAL NO.272 OF 2012
IN
WRIT PETITION NO.9449 OF 2009

Wilfred Anthony Jose Pereira & anr.) … Applicants

vs.

The State of Maharashtra & Ors.) … Respondents

Mr.S.U. Kamdar, Sr.Adv. with Mr.Naval Agarwal, Ms.Ferzana Behramkadin and Ms.Shivani Khanna i/b FZB & Associates for Appellant in LPA/272/2012 and for Applicant in CAL/451/2012 and CAL/101/2013

Mr.Sandeep Parikh with Mr.P.Chabuswar i/b S.Mahomedbhai & Co. for Appellant in LPA/60/2013 and for Resp. No.8 in Letters Patent Appeal/272/2012

Mr.Ravi Kadam, Spl. Counsel a/w Mr.Abhinandan B. Vagyani, Additional Government Pleader, for Respondent Nos.1, 2 & 3 in both Letters Patent Appeals.

Mr.D.S. Patil for Resp.Nos.4 to 7 in LPA/272/2012 and for Resp. Nos.6 to 9 in LPA/60/2013

Mr.S.G. Aney, Sr.Adv. with Mr.Sanjay Jain, Mr.Kalpesh Mehta & Vasim Shaikh i/b Pravin Mehta & Mithi & Co. for Resp. Nos.11 to 13 in LPA/272/2012

Mr.P.K. Dhakephlakar, Sr.Adv. with G.S. Godbole i/b Mr.Dushyant Purekar for Resp. No.10 in LPA/272/2012 and for Resp. No.11 in LPA/60/2013

Ms.Ferzana Behramkamdin & Ms.Shivani Khanna i/b FZB & Asso. For Resp. Nos.4 & 5 in LPA/60/2013

CORAM: **A.S. OKA &**
MRS.MRIDULA BHATKAR, JJ.

JUDGEMENT RESERVED ON: **30th JULY, 2013**

JUDGEMENT DELIVERED ON: **29th OCTOBER, 2013**

(Signed judgment pronounced by A.S. Oka, J. as per Rule 1(i) of Chapter XI of the Bombay High Court (Appellate Side) Rules, as Mrs.Mridula Bhatkar, J. is not available in Mumbai.)

JUDGMENT (PER A.S. OKA, J.):

1. Both these appeals can be disposed of by a common judgment. We must note here that though the submissions were concluded before this Bench on 30th July, 2013, which was a specially constituted Bench, written arguments were submitted to this Court by the Appellants in Letters Patent Appeal No.272 of 2012 on 5th August, 2013 and after compiling the written arguments, files were forwarded to us on 19th August, 2013.

2. Both the appeals take exception to the judgment and order dated 5th November, 2012 passed by the learned Single Judge in Writ Petition No.3909 of 2012 and Writ Petition No.9449 of 2009. Both the Petitions were dismissed.

3. The property in dispute is plot No.228 admeasuring 1858 sq.yards equivalent to 1551.80 sq.metres bearing Survey No.228, City Survey Nos.B/736, B/737, B/738, B/739 and B/743 (for short, 'the said land') situated at Bandra, Taluka Andheri in Mumbai Suburban District. On 17th December, 1906, the Secretary of State for India in Council executed Indenture of Lease (for short, "the original lease") in respect of the said land. The lessees under the said original lease were Mrs.E. J. Menesse and five others. The lease was initially for a period of 50 years from 1st January, 1901 with a covenant for renewal for a period of 21 years with same covenants including renewal.

4. Dr.Vincent Pereira, by a Deed of Assignment dated 14th May, 1934 acquired the said land together with buildings thereon from the lessees under the original lease. Dr.Vincent Pereira stepped into the shoes of the original lessees. On 15th January, 1975, there was a registered renewed lease deed executed in respect of the said land by and between the Hon'ble Governor of Maharashtra and Dr.Vincent Pereira who was the lessee under the said lease. The said lease

provided that the term thereof will be of 30 years commencing from 1st January, 1951. The lease also provided that except for the term of 30 years and the rent reserved, the lease was on same terms and conditions as incorporated in the original lease dated 17th December, 1906. It provided that all the terms and conditions of the original lease stand incorporated in the said lease deed dated 15th January, 1975. The said Dr.Vincent Pereira died on 2nd May, 1981.

5. Prior to his death, on 27th June, 1978, Dr.Vincent Pereira (for short, 'the original lessee') executed a development agreement. One Prakash Shankar Wagh and one Mandar Mohan Bhagwat were described therein as licensees, who were carrying on business in the name and style as M/s.Kalpak Builders and Contractors (for short, 'M/s.Kalpak'). Under the said agreement, M/s.Kalpak was allowed to enter the said land for demolition of the existing bungalow, out house and a garage and for constructing two multi-storied buildings on the sites marked as A and B on the plan annexed to the said agreement. The licence granted to M/s.Kalpak under the said agreement was to expire on 27th June, 1981. Simultaneously with the execution of the said agreement, the original lessee executed a General Power of Attorney dated 27th June, 1978 in favour of the said Prakash Wagh under which various powers were conferred on the said Mr.Prakash Wagh such as preparation and submission of the building plans for

sanction. M/s.Kalpak constructed a seven storied building which was named as Vinaper Castle. (for short, 'the said building'). M/s.Vinaper Castle Co-operative Housing Society Ltd. (for short, “the said society”) was formed by the flat purchasers of the flats in the said building. On 18th October, 1980, Occupation Certificate was granted in respect of second to seventh floors of the said building. It is stated that the plinth area of the said building is 191.20 sq.yards.

6. On 23rd August, 1986, the Additional Collector, Mumbai Suburban District issued a show-cause notice in the name of the original lessee alleging that he had transferred the said land to a co-operative housing society and a multi-storied building has been constructed thereon without prior permission. It is alleged that breach of sub-clause (g) of clause (2) of the lease deed dated 15th January, 1975 has been committed. The original lessee was called upon to show cause as to why the said land should not be resumed. There is no dispute that the reference in the said notice to sub-clause (g) of clause 2 is to the corresponding clause in the original lease.

7. A reply dated 28th January, 1987 was issued by one Malcolm Pereira to the said notice by pointing out that the original lessee had died. In the reply, the names of seven legal representatives were set out. It was denied that the said land was

transferred to a co-operative society. It was contended that notice was required to be issued to all the legal representatives of the original lessee and to the Court Receiver.

8. The Collector of Mumbai Suburban District informed the said Malcolm Pereira and Secretary of the said Society by a letter dated 30th December, 1991 that hearing was fixed on 8th June, 1992. On 11th July, 1992, an advocate representing the said society addressed a letter to the Collector contending that the society should be recognised as a lessee. It was stated therein that as the original lessee and his legal representatives have not paid the lease rent, the said society has paid the rent. It was contended that the members of the said society belonged to middle class and, therefore, by taking a sympathetic view, the society may be treated as a lessee. It was contended that the ex-lessee should be prosecuted for mis-appropriation and should be debarred from obtaining renewal of lease. The appellants in Letters Patent Appeal No.272 of 2012 addressed a letter dated 14th July, 1992 to the Additional Collector contending that the lease in favour of the original lessee was in perpetuity and the said society and its members were trespassers. It appears that the Collector also issued notice to the Court Receiver, who was appointed as a Receiver of the said land pending Testamentary Petition No.4 of 1982 to which legal representatives of

the deceased original lessee were parties. He was called upon to remain present at the time of the hearing. Another letter was addressed by the second appellant and the said Malcolm Pereira on 28th September, 1992 to the Collector stating that there was no violation of the lease conditions and the payments made by the society were on behalf of the original lessee. On 26th April, 1993, an order was passed by the Collector by which the said land was ordered to be resumed. It was directed that the said Society shall give an undertaking to clear the liabilities of the legal representatives of the original lessee and to accept terms and conditions of transfer of lease. It was directed that if such undertaking was not furnished within the stipulated time, the society will be treated as an encroacher on the said land. Being aggrieved by the said order, the said Malcolm Pereira preferred an appeal before the Divisional Commissioner. In the appeal, the said order was stayed. Even Mr.Percival Joseph Pereira and the Vinaper Castle Co-operative Society Limited preferred separate Appeals. In the meanwhile, a Suit was filed by the said Malcolm Pereira and the second appellant in the Letters Patent Appeal No.272 of 2012 for declaration that they were Occupants Class II in respect of the said land and that they have not committed any breach of the terms and conditions of the original lease. The challenge in the suit was also to the aforesaid order dated 26th April, 1993.

9. By an order dated 4th September, 1997, the Additional Commissioner proceeded to set aside the order dated 26th April, 1993 on the ground that the said order was passed without notice to all the legal representatives of the original lessee. Therefore, an order of remand was passed.

10. On 25th July, 2006, the Collector addressed a letter to Malcolm Pereira and other persons claiming to be the legal representatives of the original lessee and to the said society. They were informed about the order of the Additional Commissioner of setting aside the earlier order and of conducting a fresh enquiry. On 2nd May, 2007, Malcolm Pereira died. It is stated that he made a bequest of his share in the said land to the second appellant in Letters Patent Appeal No.272 of 2012. On 13th September, 2007, after hearing the parties, the Collector passed an order (1st impugned order) holding that the original lessee committed breaches of terms and conditions of the lease. The Collector held that the plea raised by the legal representatives of the original lessee that the original lessee was a Class II occupant cannot be accepted. The Collector held that in view of the breach committed by the original lessee, the said land was required to be resumed. The Collector was of the view that the said building was constructed on the said land 27 years back which

was occupied by the flat purchasers and for the fault of the original lessee and the builder, the flat purchasers should not be punished. The Collector directed that the said society should be put in the shoes of the original lessee on proper terms and conditions and, for that purpose, the matter should be referred to the State Government.

11. Being aggrieved by the order of the Collector, three separate appeals were preferred. The first one was preferred by Wilfred Anthony Jose Pereira. The second one was by the partners of M/s.Kalpak and the third one was Percival Joseph Pereira and four others claiming to be other legal representatives of the original lessee. The additional Commissioner, Konkan Division, by order dated 4th May, 2009, (2nd impugned order), dismissed the three appeals. He observed that there was a delay in resuming the land and, therefore, the flat purchasers should not be punished. Two Second Appeals were preferred before the State Government against the orders of the Collector and Additional Commissioner. The first one was by the appellants in the Letters Patent Appeal No.272 of 2012 and the second one was by M/s.Kalpak. The Hon'ble Minister of Revenue by his judgment and order dated 18th July, 2009 (3rd impugned order) dismissed the appeals by confirming the orders of the Collector and Additional Commissioner. He directed that a sum equivalent to 50% of the prevailing market value of the said land as

per the ready reckoner shall be recovered from the said society by way of unearned income and thereafter, a lease shall be executed in favour of the said society. He directed that the lease rent be recovered from the said society from the date of illegal transfer alongwith interest thereon. He directed that entry of the name of the said society shall be made in the revenue records as a lessee. He directed that the said society shall not be entitled to develop or redevelop the said land without prior permission of the Collector / State Government.

12. On 1st August, 2009, the Collector passed an order directing the said society to deposit a sum of ₹7,28,57,010/- being an amount equivalent to 50% of the unearned income, a sum of ₹7,42,500/- towards the arrears of lease rent and a sum of ₹22,27,500/- towards interest. It was directed that approval of the Collector would be required for the existing members and no one shall be admitted as a member without the permission of the Collector. After deposit of the sum of ₹50,00,000/-, the Additional Collector by letter dated 28th August, 2009 granted liberty to the said society to deposit the balance amount of ₹7,08,27,010/- in three equal installments of ₹2,36,09,003/- payable on 1st November, 2009, 1st February, 2010 and 1st May, 2010 respectively. It must be noted here that a writ petition being Writ Petition No.7476 of 2009 was filed by

M/s.Kalpak challenging the impugned orders of the Collector, Additional Commissioner and the State Government which came to be dismissed. The order of dismissal of the Writ Petition has been confirmed by the Apex Court. On 2nd November, 2009, Writ Petition No.9449 of 2009 was filed by the appellants in the Letters Patent Appeal No.272 of 2012 for challenging the orders. It must be noted that the Respondent Nos.6 to 9 in Letters Patent Appeal No.60 of 2013, who were claiming to be some of the Legal Representatives of the original lessee filed Writ Petition No.10350 of 2009 challenging the impugned orders. The said Writ Petition was withdrawn. The appellant in Letters Patent Appeal No.60 of 2013, who is also claiming to be a legal representative of the original lessee, filed Writ Petition No.3909 of 2012 challenging the impugned orders.

13. By the impugned judgment and order dated 5th November, 2012, the learned Single Judge dismissed both Writ Petition No.9449 of 2009 and Writ Petition No.3909 of 2012. Letters Patent Appeal No.272 of 2012 has been preferred by the petitioners in the Writ Petition No.9449 of 2009. Letters Patent Appeal No.60 of 2013 has been preferred by the petitioner in Writ Petition No.3909 of 2012. We must note here that extensive submissions have been made by the learned Senior Counsel appearing for the appellants in Letters Patent Appeal No.272 of 2012 and the said submissions have been

generally adopted by the Counsel for the appellants in Letters Patent Appeal No.60 of 2013.

SUBMISSIONS OF THE APPELLANTS

14. The learned Senior Counsel appearing for the appellants in Letters Patent Appeal No.272 of 2012 urged that show-cause notice dated 23rd October, 1986 was issued six years after the alleged breach and that the breach of only sub-clause (g) of clause 2 of the original lease has been alleged. He urged that subsequent show-cause notice dated 25th July, 2006 was issued at the behest of the said society nearly 20 years after the alleged breach. He submitted that on 15th July, 1991, a demand notice of lease rent was issued to the original lessee claiming rent at revised rate from 1st January, 1981 to 31st December, 1990. He urged that in view of this demand notice, the show-cause notice dated 20th October, 1986 on the basis of which impugned orders were passed, is deemed to have been waived. He urged that plea of waiver was raised in Appeal before the Additional Commissioner as well as before the learned Single Judge. He submitted that the plea of waiver has not been dealt with. The learned Senior Counsel urged that there was no breach of sub-clause (g) of clause 2 of the Indenture of Lease inasmuch as there was no transfer or assignment of the said land or any part thereof made by the original lessee. He urged that even the original Lease permitted

construction of buildings on the said land. He submitted that by agreement dated 27th June, 1978, only a licence was granted for M/s.Kalpak to enter the said land and to construct buildings and the licence was confined to a period of only three years. He relied upon the decision of the Apex Court in the case of **Suraj Lamp & Industries (P) Ltd. v. State of Haryana**, **(2012) 1 SCC 656** and urged that an agreement of sale falls short of a Deed of Conveyance or transfer and such agreement does not create any right in the immovable property. He relied upon a decision of this Court in the case of **BEST Workers' Union vs. State of Maharashtra,** (**2008) 5 ALL MR 848** and urged that an agreement of sale does not create any legal interest in the immovable property. He urged that the said decision also holds that in India, dual ownership is recognised in law and, therefore, transfer of a building on the said land and transfer a part of the said land are two different things. He relied upon various clauses in the development agreement executed in favour of M/s.Kalpak for contending that only upon completion of construction of two buildings on the said land with the permission of the Collector, a sub-lease was to be executed in favour of the societies of the flat purchasers. He urged that only after execution of such sub-lease that there could have been a transfer. Relying upon the sale agreements in respect of the flats in the said building, he submitted that the purchasers of the flats are disentitled to claim any interest in the said

land. He urged that the flat purchasers and the said society can claim only through M/s.Kalpak and that M/s.Kalpak had no right in respect of the said land. He urged that the regularisation of the alleged breach could have been by regularising the transaction between the original lessee and M/s.Kalpak and there was no question of regularising possession of the said society. He urged that the area of the land under the building is 1160 sq.yards but the Collector has purported to regularise the possession of the said society to the extent of the entire said land admeasuring 1664 sq.yards. He submitted that if at all any sympathy was required to be shown to the flat purchasers, only the possession of the land below the said building could have been regularised and there was no propriety in granting the entire said land to the society. He submitted that in any event, by allowing construction of a building, the original lessee did not commit any breach as the principle of duality of ownership has been recognised in India and the original Lease was only in respect of the said land. He pointed out that even under section 11 of the Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 (for short, "MOFA"), a conveyance has to be executed in terms of the development agreement.

15. He criticised the findings of the learned Single Judge by contending that though under the development agreement executed on 27th June, 1978, only a licence was granted to M/s.Kalpak, the learned Judge has committed an error by holding that in fact it was a transfer prohibited by sub-clause (g) of clause 2 of the Indenture of Lease. He placed reliance on various decisions of the Apex Court dealing with sections 91 and 92 of the Indian Evidence Act, 1872 and contended that no one has led evidence to establish an intention contrary to the written terms of the development agreement. He urged that challenge to the development agreement can be only in a Civil Court and in the absence of any such challenge, the document will have to be read as it is.

16. He relied upon a decision of the Apex Court in the case of **Puran Singh Sahni vs. Sundari Bhagwandas Kripalani & Ors. (1991) 2 SCC 180** by submitting that the intention of the parties should be discovered from the words used in the agreement. He submitted that by no stretch of imagination, the development agreement shows that the original lessee intended to transfer any part of the said land. He relied upon the observations made by the Apex Court in the case of **MP Housing Board vs. Progressive Writers and Publishers, (2009) 5 SCC 678**. He urged that the learned Single Judge has committed an error by holding that though

the development agreement is essentially a transaction of grant of licence, it is in the nature of a lease. He urged that the said finding is illegal. He urged that even going by the development agreement, the transfer was made in favour of the society of flat purchasers and that also after obtaining the permission of the Collector.

17. The learned Senior Counsel appearing for the appellants thereafter submitted that the impugned orders passed by the Collector, Additional Commissioner and the State Government are malafide. He urged that the Respondent Nos.11 to 13 in Letters Patent Appeal No.272 of 2012 are builders and the said orders have been passed at their instance, who would be enjoying the benefits of transfer of lease to the said society. He pointed out that on 18th October, 2009, the said society admitted the respondent Nos.11 to 13 as members by stating that the society proposes to construct three new flats on the balance vacant portion of the said land and the consideration of each flat was mentioned as ₹4 crores. On 26th October, 2009, possession of the said land was handed over by the City Survey Officer to Respondent No.10. On 28th October, 2009, the said society submitted a list of 16 members to the Collector for his approval which included the names of Respondent Nos.13 to 16. In the letter of allotment dated 16th November, 2009 issued by the said society to respondent Nos.11 to 13, it was stated that they would be

allotted one flat each admeasuring 172.72 sq.metres. The building was to be constructed within 12 months from the date of issue of allotment letters. The consideration of each flat was mentioned as ₹4 crores. He pointed out that out of 16 members notified to the Collector, 13 were the original members. He pointed out that the Respondent Nos.11 to 13 filed three separate disputes under section 91 of the Maharashtra Cooperative Societies Act, 1960 against the said society. The said three respondents contended that the said society was under an obligation to construct and give possession of flats admeasuring 172.74 sq.metres to each of them on 10th October, 2010. In the general body meeting of the said society, a resolution was passed providing that Respondent Nos.11 to 13 shall construct a new building. It was resolved to execute an assignment of lease / sub-lease / sub-division / surrender directly from the State Government in favour of Respondent Nos.11 to 13. It was resolved that the Respondent Nos.11 to 13 would be entitled to enjoy use, occupy and deal with and dispose of the property including open terrace, open space, car parking space, etc. The said society resolved to execute an irrevocable power of attorney in favour of respondent Nos.11 to 13. The learned Senior Counsel pointed out that an Indenture of Lease in terms of the impugned orders was executed between the Hon'ble Governor of Maharashtra and the said society on 19th October, 2010. Three days thereafter, on 22nd

October, 2010, consent terms were filed in the Cooperative Court between the said society and the Respondent Nos.11 to 13 in the pending disputes. Consent terms provided that the said society was unable to construct any building on the said land and, therefore, the said society had agreed to execute assignment of lease / sub-lease / sub-division in respect of the plot directly in favour of Respondent Nos.11 to 13 with the consent of the Collector. Respondent Nos.11 to 13 were permitted to construct a building by availing existing FSI / future FSI and TDR. They were authorised to construct buildings / bungalows / row-houses and were granted power to use, occupy or deal with, dispose of the same including open terrace, open spaces, car parking spaces, etc. The consent terms record that the said society agreed to execute an irrevocable power of attorney in favour of the respondent Nos.11 to 13. The consent terms record that the said society has received a sum of ₹3,04,47,000/- each from Respondent Nos.11 to 13 and the said respondents were liable to pay ₹1 crore each on completion of the building. The learned Senior Counsel pointed out that on 29th April, 2011 in the general body meeting of the said society, it was resolved that the consideration payable by Respondent Nos.11 to 13 will stand reduced from ₹4,47,00,000/- to ₹2,66,66,367/-. It was noted that the respondent Nos.11 to 13 had made excess payment of ₹37,80,333/- each. Out of

the said excess payment, a sum of ₹33,33,333/- would be treated as interest free refundable deposit and the balance amount of ₹4,47,000/- would be treated as an advance towards the maintainance payable to the said society. The said resolution notes that the amount received from the respondent Nos.11 to 13 was utilised by the said society for payment of unearned income, arrears of rent, interest and penalty on the arrears of the rent and on stamp duty payable on the Indenture of Lease executed on the basis of the impugned order. The learned Senior Counsel pointed out that in the year 2011, three more disputes were filed against respondent Nos.11 to 13 in which the consent terms were filed on 30th July, 2011 in terms of the general body resolution dated 29th April, 2011. The learned Senior Counsel relied upon several documents to show that in fact the Respondent Nos.11 to 13 have been appointed as developers by the said society, who are authorised to develop the remaining open portion of the said land and the said society has not only received consideration but the amount paid by the Respondent Nos.11 to 13 has been used for payment of unearned income. The learned Counsel, therefore, urged that the impugned judgment and order deserves to be quashed and set aside.

SUBMISSIONS ON BEHALF OF THE SAID SOCIETY

18. The learned Senior Counsel appearing for the said society also made detailed submissions. He urged that the three authorities exercising powers under the Maharashtra Land Revenue Code, 1966 and the learned Single Judge have concurrently held that the original lessee committed the breach of the terms and conditions of the original Lease and in fact, there was a transfer effected by the original lessee by entering into a transaction with M/s.Kalpak. He urged that in the Letters Patent Appeal, the said finding cannot be disturbed. He submitted that the submissions made by the learned Senior Counsel appearing for the appellants regarding malafides on the part of the three authorities were never canvassed at any stage of the proceedings and the said submissions were never canvassed before the learned Single Judge. He urged that the said submissions are sought to be canvassed for the first time in the Letters Patent Appeal and, therefore, the said submissions deserve rejection. He submitted that neither the said society nor Respondent Nos.11 to 13 have played any role in passing the impugned orders by the three authorities. He urged that the order of remand was passed on 4th September, 1996 and the proceedings after remand, commenced in 2006 as a result of a public notice published at the instance of the lessees of sale of the said land. He invited our attention to the fact

that the heirs of Mr.Percival Joseph Pereira published a public notice in a newspaper and tried to sell the said to one Sahana builders. He pointed out that it is the said public notice which resulted into commencement of the proceedings after the remand. He pointed out that on the basis of the said public notice that the Collector issued notices to the legal representatives of the original lessee on 25th July, 2006 and the said fact is mentioned in the first impugned notice. He pointed out that on 18th October, 2009, the said society admitted the Respondent Nos.11 to 13 as members of the said society. He urged that the submission that the said land can be divided and the possession of the said society can be regularised only in respect of the land below the said building was made for the first time before this Court in present Appeal. He urged that there was no submission made before the learned Single Judge that the said land could be sub-divided. The learned Senior Counsel invited our attention to the order passed by the State Government in second appeal which records that in case of several properties in the city and especially at Bandra, where the said land is situated, the Government has taken action of regularisation of the transfer effected by the lessees of the plots. He pointed out from the order of the second appellate authority that in case of 31 lessees, it was found that there was a breach committed of similar clause i.e., sub-clause (g) of clause (2) of the Leases and the State Government regularised the breaches by

accepting the 50% of the unearned income. He urged that there is a policy of the State Government to regularise the said breaches of the building plots which is reflected in the Government Resolution dated 21st November, 1957. He produced for perusal of the Court the said Government Resolution. He urged that the argument of the waiver of show-cause notice made by the appellants has no basis as there was never any voluntary or intentional relinquishment on the part of the State Government of its right to resume. He also refuted the argument made on the basis of concept of dual ownership. He urged that there was never any challenge to the grant of lease of the entire said land to the said society. He urged that it was never argued that only a portion of the said land could have been given to the said society. He urged that in Letters Patent Appeal, it is not open for this Court to find fault with the order of the learned Single Judge by holding that the learned Single Judge ought to have exercised powers under Article 226 of the Constitution of India and ought to have modified the order of allotment made in favour of the said society. He pointed out that the said society has paid a sum of more than ₹7 crores by way of unearned income. He stated that no interest in the said land has been created in favour of any of the Respondent Nos.11 to 13. He urged that the said land cannot be sub-divided especially when the said society has paid total amount of ₹7,58,27,010/- to the State Government. He urged that the said

society has taken the said money from the Respondent Nos.11 to 13 and the said society is not in a position to repay the amount. He urged that the Respondent Nos.11 to 13 are not going to make any profit out of the said land.

19. He relied upon various decisions in support of his submissions. As far as the plea of waiver by the State Government is concerned, he relied upon decisions of the apex Court in the case of **M/s.Shrikrishnadas Tikara vs State Government Of Madhya Pradesh, (1977) 2 SCC 741**; **Saroop Singh Gupta vs. Jagdish Singh & Ors., AIR 2006 SC 1734** and **Shantiprasad Devi v. Shankar Mahto, AIR 2005 SC 2905.** He urged that the word 'transfer' or 'assignment' used in the original Lease will have to be given a wider meaning. On this point, he relied on the decision of the Apex Court in the case of **Mangalore City Corporation vs. CIT, West Bengal, AIR 1978 SC 1272** and **Gopal Saran vs. Satyanarayanan, AIR 1989 SC 1141**. He urged that the order of placing the said society in the shoes of the original lessee is based on the policy decision of the State Government. He relied upon several decisions which lay down that policy decisions should not be interfered with in writ jurisdiction unless it is shown that the policy is inconsistent with the Constitution or that it is arbitrary. Relying upon the decision of the Apex Court in the case of **Madhya Pradesh Oil**

Extraction vs. State of Madhya Pradesh, (1997) 7 SCC 592, he urged that inviting tenders or public auction is not the only method by which distribution of State largesse can be made. Lastly, he relied upon the decision of the Apex Court in the case of **Wander Ltd. vs. Antox India P. Ltd., 1990 (Supp) SCC 727** and submitted that the appellate Court should not interfere with exercise of discretion by the Court of first instance and substitute it by its own. He urged that the scope of interference in this Appeal is considerably narrow.

SUBMISSIONS OF THE RESPONDENT NOS.11 TO 13 IN LETTERS PATENT APPEAL NO.272 OF 2012.

20. The learned Senior Counsel appearing for the Respondent Nos.11 to 13 urged that the learned Single Judge while passing the impugned order has exercised jurisdiction essentially under Article 227 of the Constitution of India and not under Article 226 of the Constitution of India. He, therefore, submitted that the Letters Patent Appeal was not maintainable. In support of the plea that the Letters Patent Appeal was not maintainable, he relied upon the law laid down in the case of **Advani Oerlikon vs. Machindre Govind, AIR 2011 Bom. 1984.** He urged that the scope of interference in Letters Patent Appeal was narrow. He urged that the appellate Court cannot interfere with the finding of fact recorded by the learned Single Judge.

Relying upon a decision of the Apex Court in the case of **T.K. Mohd. Abu Bakar vs. TSM Ahmed, AIR 2009 SC 2966,** he urged that when the authorities of the State Government and the learned Single Judge have considered the material on record thoroughly, this Court dealing with Letters Patent Appeal should be very slow in interfering with the findings recorded by the learned Single Judge.

21. He urged that the Letters Patent Appeal cannot be converted into a public interest litigation by allowing the appellant to argue the plea of malafides against the respondent Nos.11 to 13 though the said plea was never raised at any stage of the proceedings. He submitted that even if this Court is of the view of that the State Government could have adopted some other method for disposing of the vacant portion of the said land, in exercise of the appellate jurisdiction, this Court cannot interfere. Relying upon the decision of the Apex Court in the case of **Dwarkadas & Sons vs. Board of Trustees, Bombay Port Trust, AIR 1989 SC 1642,** he urged that this Court under the guise of preventing abuse of power, would be itself guilty of usurping the power which does not vest in it, if this Court interferes with the order of the Authorities by which the said society has been placed in the position of the original lessee. He urged that this Court cannot embark upon an attempt to frame policy – economic or otherwise. Lastly, relying upon the decision of the

Apex Court in the National Resource allocation Reference No.1 of 2012 **(2012 10 SCC 1)**, he urged that the auction is not the only method available for disposal of the government property.

SUBMISSIONS OF THE STATE GOVERNMENT

22. The learned Senior Counsel appearing for the State Government contended that the State Government has acted on the basis of the Government Resolution dated 21st November, 1957 which incorporates a policy of regularisation. He pointed out that the said policy has been applied to several properties in the city of Mumbai as reflected from the order of the State Government in appeal. He urged that the policy applies not only to regularisation of illegal sale or transfer but it applies to all categories of illegal transfers. He urged that the ultimate transferee was the society and, therefore, the possession of the society has been regularised by charging unearned income of ₹7,28,87,010/-. He pointed out that the said policy has been applied in case of 31 plots in the vicinity of the said land. He urged that the Collector has acted in terms of the mandate of the said policy. He submitted that the appellants never applied for sub-division of the said land. He urged that the policy decision of the State Government has to be decided on the principles of Wednesbury unreasonableness. He urged that in the event the sub-division is made or Respondent No.10 society is dispossessed of

the vacant land, the said society may take legal action against the State Government and that the State Government will be embroiled in litigation and will not be able to get any revenue. He submitted that the policy leaves no scope for discretion but to regularise such a transaction.

REJOINDER OF THE APPELLANTS

23. The learned Senior Counsel appearing for the appellants made submissions by way of reply by pointing out that that at all stages including before the appellate authority, a plea was specifically raised that the said land could be sub-divided. By pointing out the memorandum of writ petition, he submitted that the jurisdiction of this Court under Article 226 was specifically invoked by the appellants and that the learned Single judge has exercised the jurisdiction under Article 226 of the Constitution of India.

QUESTIONS FOR CONSIDERATION

24. We have given careful consideration to the submissions. The main questions which arise for our consideration are as under:

i) Whether these Letters Patent Appeals are maintainable?

ii) Whether the action of the State Government of resumption of the said land is legal and proper?

iii) Whether the action of the State Government of putting the said society in the shoes of the original lessee by granting leasehold rights to the said society in respect of the entire said land was legal?

CONSIDERATION OF THE FIRST QUESTION

25. For the consideration of the first question, we have perused the memorandum of the Writ Petition No.9449 of 2009. The first page of the memorandum of the petition shows that the jurisdiction of this Court under Articles 226 and 227 of the Constitution of India was invoked. Paragraph 1 of the petition, at three places, clearly records that the jurisdiction of this Court only under Article 226 of the Constitution of India was invoked. The first prayer in the said petition is for issue of a writ of Certiorari for quashing and setting aside the orders of the three authorities. The second prayer is for issue of a writ of Mandamus and the third prayer is also for issue of a writ of Mandamus. We have also perused memorandum of the Writ Petition No.3909 of 2012. The first page of the petition mentions that the jurisdiction of this Court under Articles 226 and 227 of the

Constitution of India has been invoked. The first paragraph of the petition clearly asserts that the jurisdiction of this Court under Article 226 of the Constitution of India has been invoked. Perusal of the prayers made in the petition show that the first prayer is for quashing and setting aside the orders of the authorities. Two further prayers are for issuing a writ of Mandamus. We have perused the impugned judgment and order. In paragraph 3 of the impugned judgment and order, the learned Single Judge has noted that the Writ Petition No.9449 of 2009 was filed for invoking the powers under Article 226 of the Constitution of India. The learned judge has quoted the prayers in the said petition. As stated earlier, the first prayer is for issuing a writ of Certiorari and the other prayer was for issuing a writ of Mandamus. The tenor of the entire impugned judgment and order shows that the learned Single Judge was exercising jurisdiction under Article 226 of the Constitution of India. In paragraph 63 of the impugned judgment, the learned Single Judge noted that his powers under Articles 226 and 227 of the Constitution of India were invoked. The learned Senior Counsel appearing for the respondent Nos.11 to 13 relied upon a decision of the Full Bench of this Court in the case of **M/s.Advani Oerlikon Ltd. vs. Machindra Govind Makasare & Ors. (supra).** We must note that that the orders impugned were passed by quasi judicial authorities under the Maharashtra Land Revenue Code, 1966. Considering the grounds urged in both the writ petitions,

there was a justification for invocation of Article 226 of the Constitution of India. Therefore, in view of what is held in paragraph 20 of the said decision of the Full Bench, the preliminary objection raised regarding the maintainability of the appeal deserves to be discarded.

CONSIDERATION OF SECOND QUESTION

26. We have perused the original Lease dated 17th December, 1906. The terms and conditions of this Lease will have to be taken into consideration as it is not in dispute that the original lessee was bound by the said terms and conditions. The first clause of the said Lease provides that the lease was in respect of the ground and premises with their upper terraces which was described as the said plot of land. Clauses (g) and (h) are relevant which read thus:

> "2 And the Lessee does hereby covenant with the Lessor that he, the Lessee, during the said term
>
> (a) ….
>
> (g) will not transfer or assign the said plot of land or any part thereof without the consent in writing of the Collector;
>
> (h) and will not at any time have buildings covering or projecting over more than an area of seven hundred and seventy three (773) square yards of the said plot of land, and will not erect any buildings other than those now existing and indicated by a red colour and the letters F, G, H, I on the site plan hereto annexed so s to cover or project over any land within a margin consisting of a strip

ten feet broad along and inside the perimeter of the said plot.".

(underline added)

27. Clause 4 of the Original Lease provides that in case of breach of the conditions contained therein other than the breach relating to payment of rent, costs or expenses, the Collector has a discretion either to impose additional conditions or put an end to the agreement resuming the land. The first part of clause 4 provides that in case of breach of terms and conditions, the lessor shall be entitled to cancel the agreement and resume the said land. Clause 6 provides for a renewal of the lease after expiry of the term of 50 yeas for a further period of 25 years with the same covenants and stipulations Thus, sub-clause (g) of clause 2 puts an embargo on transfer of assignment of the said land or any part thereof without the consent of the Collector. If breach of sub-clause (g) is committed, the Collector has a power to resume the land subject matter of lease.

28. The proceedings commenced on the basis of the show-cause notice dated 23rd October, 1986 addressed by the Collector to the original lessee. The allegation therein is that the said land has been transferred to a co-operative society and a multi-storied building has been constructed without the permission of the Collector. The specific allegation is as regards the breach of sub-clause (g). In this

context, we must note here that on 15th January, 1975, the Governor of Maharashtra executed a lease in favour of the original lessee which specifically provides that the lease will be governed by the terms of the original Lease.

29. Thus, the notice is based on transfer effected by the original lessee by an agreement dated 27th June, 1978 in which the partners of M/s.Kalpak have been described as licensees. It is true that clause 1 thereof provides that the licence was for a period of three years. It provides that the licence was granted to M/s.Kalpak for entering the said land for demolition of the bungalow, cottage and existing garage on the said land and for construction of two multi-storied buildings on sites marked as A and B on the plan annexed to the agreement. Clause 6 provides that the said structures were to be demolished by M/s.Kalpak at its own cost within a period of two years from the date of the agreement. It provides that M/s.Kalpak was to construct the building on the site marked A within three years and was to construct a second multi-storied building on the site marked B within the same time. It is provided that the flats in building on site marked B will contain flats admeasuring not less than 500 sq.ft. One of the material clauses is clause 7 which reads thus:

> "7. As and by way of compensation to the Lessee for the value of the bungalow known as "The Rocks" and the outhouse thereof and of the cottage known as the The Wig" and of the garage standing on the said land and premises, which are to be demolished, the Licencees will allot to the Lessee and/or the Lessee's nominee or nominees, without any payment whatsoever for the same being made to the Licencees, the following tenements and premises in the said new multi-storeyed building at the site marked 'A' on the plan 'A' hereto annexed to be erected and completed by the Licencee:
> (a) The terrace flat on the topmost floor of the building with a built-up area of not less than 1800 square feet and the open terrace appurtenant thereto.
> (b) A Dispensary-cum-Polyclinic on the first floor having a built-up area of not less than 1200 square feet.
> (c) Two closed garages on the ground floor, each 20 ft. by 10 ft."

30. Therefore, the original lessee was entitled to receive two very large premises in the newly constructed building and two enclosed garages admeasuring 200 sq.ft each without any payment whatsoever. Clause 8 provides that the original lessee was entitled to nominate a nominee who will become the owner of the said premises and will not be required to pay any cost to M/s.Kalpak. Thus, the consideration for agreement is a terrace flat on the topmost floor of the multi-storied building admeasuring not less than 1800 sq.ft with an open terrace appurtenant thereto and a dispensary cum clinic on the first floor having built up area of not less than 1200 sq.ft. Thus, the original lessee was to get an area of not less than 3000 sq.ft in a newly constructed building as well as two garages admeasuring 200 sq.ft each in a prime locality at Bandra near Bandstand Sea face.

31. Thus, under the agreement dated 27th June, 1998, which is described as an agreement creating licence, substantial consideration was received by the original lessee. The consideration was in the form of very valuable constructed premises as stated above.

32. Under the said agreement, M/s.Kalpak was authorised to demolish three structures on the said land and to erect two multi-storied buildings. The demolition was to be carried out by M/s.Kalpak at its own cost and even multi-storied buildings were to be constructed at its own cost. A general Power of Attorney was executed by the original lessee authorising a partner of M/s.Kalpak to do various acts, things and deeds. Under the said agreement, M/s.Kalpak was authorised to sell flats in the buildings to be erected by it. The agreement provides that the allottees or the owners of the flats in the buildings shall form a co-operative society or an association of owners or a limited company. The agreement incorporates a clause for executing a sub-lease of the said land together with buildings to such co-operative society or association or a limited company with the permission of the Collector. Clause 33 of the agreement provides that M/s.Kalpak shall be entitled to make the

said land freehold and if any amount in excess of ₹25,000/- was demanded by the Government for making the land freehold, the same was to be paid by M/s.Kalpak.

33. Though a clause in the said Agreement provides that no prospective purchaser or allottee of the flats shall be entitled to claim any interest in the said land, under the Agreement, there is a provision for executing a sub-lease in favour of incorporated body formed by the flat purchasers. In this context, it will be necessary to make a reference to the agreements of sale executed by M/s.Kalpak in favour of flat purchasers in relation to the flats in the said building. The agreement contains a recital that the co-operative society will be formed of the purchasers of the flats in the said building. Clause 4 records that the flat purchaser will have no claim save and except the claim over the flat agreed to be purchased. It specifically provides all the open spaces, unallotted parking spaces, lobbies, staircases, lifts, etc. will remain the property of M/s.Kalpak till the same are transferred to a co-operative society or an incorporated body of flat purchasers. Clause 5 refers to execution of conveyance in favour of the incorporated body formed by the flat purchasers. Thus, M/s.Kalpak claimed that the open spaces in the said land was its property and will remain to be its property. Paragraph 15 records that the flat purchaser has accepted the title of M/s.Kalpak in respect of

the said land. Clause 18 is regarding formation of the co-operative society or a limited company or an incorporated body by the purchasers of the flats.

34. In short, after considering the agreement between the original lessee and M/s.Kalpak and the agreements between M/s.Kalpak and the flat purchasers, the following factual aspects emerge:

a) Possession of the said land was parted with by the original lessee to M/s.Kalpak with full authority to demolish the existing structures and to erect two multi-storied buildings;

b) M/s.Kalpak paid substantial consideration to the original lessee in the form of large constructed premises in the buildings to be constructed;

(c) M/s.Kalpak had authority to sell the flats and tenaments in the buildings agreed to be constructed on the said land and accordingly, the flats were sold;

(d) M/s.Kalpak represented to the flat purchasers that the open spaces shall vest in it;

(e) A sub-lease or a conveyance or a document of transfer was to be executed in respect of the said land and building for the benefit of the society or the incorporated body formed by the flat purchasers.

35. All this was done by the original lessee without obtaining prior permission of the Collector or the State Government. It is not in dispute that out of the two buildings, one building (the said building) was constructed by M/s.Kalpak and except for the tenaments to be allotted to the original lessee, all the flats have been sold to the flat purchasers, who are members of the said society formed by the flat purchasers. It is in this context that the learned Single Judge appreciated the findings recorded by the three authorities that the original lessee transferred or assigned the said land in breach of sub-clause (g) of the clause 2 of the original Lease. In paragraph 10 of the impugned judgment, the learned Judge has referred to the Power of Attorney executed simultaneously with the agreement dated 27th June, 1978. Sub-clause (g) of clause 2 of the original lease clearly provides that for sale or transfer of the said land, prior written permission of the Collector was mandatory. The learned Single judge

in paragraph 49 of the impugned judgement has noted that this was not a case where original lessee appointed a builder for construction of his own house but this was a case where the original lessee authorised M/s.Kalpak to erect new building after demolition of the original structures and to sell the flats therein on ownership basis. In the same paragraph, the learned Single Judge noted that the consideration was in the form of valuable flats in the proposed building in the Bandstand area at Bandra. The learned Single Judge observed that the said plot was granted to the original lessee for constructing a house for his own accommodation. In paragraph 50 of the impugned judgment and order, the learned Single Judge noted that after effecting transfer by agreement dated 27th June, 1978, the said building was constructed and flats in the buildings were sold. The learned Single Judge in paragraph 52 noted another aspect that M/s.Kalpak was granted authority to convert the said land into a freehold land.

36. Therefore, the learned Single Judge rightly came to the conclusion that though the agreement dated 27th June, 1978 purports to grant a licence, it was, in substance, a transfer or assignment of the said land to a third party. As noted earlier, very comprehensive powers were conferred on M/s.Kalpak which could have been exercised only by a transferee of the said land. It will be necessary to

refer to the original Lease. It enables the original lessee to construct a building for himself. None of the clauses in original Lease permit buildings to be constructed for being occupied by any strangers. Sub-clause (g) of clause (2) provides that the original lessee shall not transfer or assign the said plot of land or any part thereof without the consent in writing of the Collector. A submission was sought to be made by the learned Senior Counsel appearing for the appellants based on the decisions of the Apex Court that the word "transfer" used in sub-clause (g) is a transfer contemplated by the Transfer of Property Act, 1882. It was sought to be contended that the transfer contemplated by sub-clause (g) of clause 2 has to be a transfer of all the interest of the original lessee in the said land. Reliance is placed by the appellants on the decision of the Apex Court in the case of **Suraj Lamp & Industries (P) Ltd. v. State of Haryana** (supra) and **Dattatray Shankar Mote & Ors. Vs. Anand Chantaman Datar & Ors., (1974) 2 SCC 799.** The learned Counsel also sought to place reliance on the decision of this Court on the case of **BEST Workers Union** *(supra)*. The said decision was relied upon by the appellants before the learned Single Judge. The learned Single Judge has rightly dealt with the said decision by coming to the conclusion that the same will not help the appellants. This aspect has been dealt with by the leaned Single Judge in paragraph 73 of his judgment. The learned Single judge observed that in the said decision, it was held

that the agreement for development dated 18th May, 2005 entered into by and between the BEST workers Union and Respondent No.7 therein cannot be said to be an agreement for lease but it is an agreement to create a lease in future. The learned Single Judge observed that the findings of the Division Bench were in the peculiar facts and circumstances emerging from the record of the said case.

37. The original Lease clearly provides for a power in the Government to resume the said land in the event breaches of the terms and conditions are committed by the original lessee. While interpreting the original Lease, the Court will have to ascertain what was prohibited by the same. As we have narrated earlier, the original lessee took substantial consideration from M/s.Kalpak. The original lessee allowed M/s.Kalpak to demolish the existing structures, to erect two multi-storied buildings and to sell the flats and premises therein to third parties on ownership basis. Except the constructed premises which were to be allotted to the original lessee under the agreement executed by M/s.Kalpak, nothing was retained by the original lessee. What remained to be done after the execution of Agreement was the execution of sub-lease or assignment to the society or incorporated body of flat purchasers.

38. Some argument was canvassed based on the concept of dual ownership which is recognised in India. Attempt of the appellants was to contend that if at all there is a transfer, the same is only of the building. Even this argument has been dealt with by the learned Single Judge and in our view, correctly. We must note here that the said argument is based on the contention that a flat purchaser does not get any interest in the land but he gets right to occupy the flat. The learned Single Judge in paragraph 66 of the judgment observed that the agreement between the original lessee and M/s.Kalpak was something more than a mere licence. The original lessee granted right to M/s.Kalpak to demolish the existing buildings and construct two multi-storied buildings. The learned Single Judge observed that possession of the said land was parted with by the original lessee to enable M/s.Kalpak to carry on construction of two buildings and there is nothing in the agreement to show that the original lessee retained any right in respect of the said land except the premises to be allotted by way of consideration.

39. At this stage, we must note that after the order of remand by the Additional Commissioner on 25th July, 2006, a fresh notice was served by the Collector to all concerned parties including the said society and M/s.Kalpak. In the said notice, there is specific assertion that on the said land, a multi-storied building has been constructed

and the same has been handed over to the said society. While calling the parties to attend the hearing on the basis of the order of remand, the Collector called upon the parties to produce the agreement between the original lessee and M/s.Kalpak. We have already referred to the original show-cause notice served by the Collector. It is true that in the order passed by the Collector after remand, apart from recording a finding that there was a clear breach of sub-clause (g), there is some reference to even breach of sub-clause (h). However, the show-cause notices of the year 1986 and 2006 clearly allege breach of sub-clause (g) of the Indenture of Lease. We must note here that one of the arguments made before the Collector and the Additional Commissioner was that the original lessee was an Occupant Class II and, therefore, had absolute right of transfer and assignment of the said land. However, the said argument had been negatived. In any event, the said argument is not pressed into service by the appellants in this appeal.

40. An argument is canvassed that the action of the State Government of issuing notice dated 15th July, 1991 demanding the revised rent in respect of the said property amounts to waiver of the show cause notice dated 23rd October, 1986. It must be noted here that when the rent was demanded, the show cause notice was not disposed of. It must be noted that the revised rent was demanded

from 1st January, 1981 on the basis of order/Memorandum dated 14th March, 1986 of revision of rent. The Law laid down by the Apex Court in the case of **M/s.Shrikrishnadas Tikara vs. State Government of Madhya Pradesh ([1977] 2 SCC 741)** is that doctrine of estoppel will not apply against the Government in exercise of sovereign powers. In any event, enhanced rent was demanded from the original leasee and not from M/s.Kalpak or the said society. As held by the Apex Court in the aforesaid decision, in this case there is an absence of voluntary and intentional abandonment by the Government. Hence, the said argument cannot be accepted.

41. All three authorities under the Maharashtra Land Revenue Code have recorded a finding of fact that there was a breach committed by the original lessee of sub-clause (g) of clause 2 of the Indenture of Lease. All the three authorities held that the said land was required to be resumed from the Legal Representatives of the original lessee. The concurrent findings recorded by the three authorities have been confirmed by the learned Single Judge. The original Lessee has done something which was clearly prohibited under the original Lease. We find no perversity in the view taken by the learned Single Judge and, therefore, the finding of the learned Single Judge on this aspect will have to be confirmed. Therefore, the order of resumption of the said land cannot be faulted with.

CONSIDERATION OF THE THIRD QUESTION

42. The last issue is as regards the allotment of the entire said land to the said society. In the first impugned order of the Collector dated 13th September, 2007, it is observed that for the illegal acts of the original lessee and M/s.Kalpak, the flat owners should not suffer. Thereafter, the Collector had observed thus:

> "It is no doubt that the breach of condition was committed during the life time of Dr.V.A. Pereira and it was required to resume the land at the proper time. In such cases the government has right to resume the suit land, but today by way of simple resumption the needy house seekers will be punished. The violation of terms and condition was made by late Dr.V.A. Pereira. In this circumstances, I feel that for the wrong acts of the builder and developer or lessee, the flat owners should not be punished.
>
> It is true that before purchasing the flats, the buyers should have verified the government lease rights and interest and then should have purchased the same. But the building is constructed 27 years ago and the physical possession can not be resumed back. Considering the human problem arising out of wrong, greedy acts of developers and lease-holders, I feel my predecessor had taken right approach in his order, dated 26/4/1993. Now there are only two alternatives, either the society, i.e. entire construction should be held as encroachment and it should be penalised and regularised under section – 51 of Maharashtra Land Revenue Code, 1966 or the society which is registered co operative housing society should put into position of original lessee on appropriate terms and conditions. Since the land is lease land second option is preferable. The society was

registered around twenty five years back, automatically it governs all rights in the plot, and M/s.Kalpak Builder's plea is not acceptable. But the society should bear all the charges, rents etc. of lease land, and for the lease the matter should be referred to the State Government. Considering all the above fact, I pass the following order:

ORDER-

The claim of the heirs of late Dr.V.A. Pereira for getting declared as Occupant Class-II in suit property is hereby denied.

The Co operative Housing society on this plot should be put into shoes of lessee on proper terms and conditions and for that purpose the matter is hereby referred to the Government.

..."

(underline added)

43. In the operative part, the Collector directed that the said society should be put in the shoes of the original lessee on proper terms and conditions and for that purpose, the matter should be referred to the State Government. Similar view was taken by the Additional Commissioner in appeal. The view taken by the State Government in the second appeal is slightly different. It will be necessary to make a reference to the reasoning recorded by the State Government. The paragraph 2 of the English Translation of said order reads thus:

2. .... Collector Mumbai Suburban also informed that total 48 plots at Village Bandra Mount Merry Road, were given to various persons only for residential purpose on lease from the year 1901 to 1906. Separate cases of the said 48 plots are going on. In the said 48 plot the period of lease at the beginning was 50 years (101 to

1950) and thereafter extended for 30 years (1951 to 1980). Thereafter as per the government resolution dated 5.10.1990 when the process of renewal of lease agreement started some of the lessor at Village Bandra Mount Merry Road challenged the said government resolution in Bombay High Court and during the hearing in the Court on the said resolution as per the order dated 5.10.1999 as revised lease rent can not be charged it has been directed to withdraw the said resolution and to decide revised policy. Accordingly the said decision is withdrawn. As per the order of Court government has still not decided revised policy for renewal of lease. It is noticed that out of the said 48 cases in 31 cases lessor have violated the condition No.2(G) and 2(H) of the agreement. Out of the same in 16 cases condition No.2(G) is violated and in 12 cases 2(G) and 2(H) violated. Disciplinary action is being initiated against them about the same. As also in 6 cases government granted re-development permission subject to condition of depositing unearned income amount. In view of the condition No.2(G) of the said lease agreement for transferring lease government had issued directions give memorandum No.LND-2261/77861-1 dated 15.11.1963. Accordingly, nearly in 16 cases by payment of premium amount the lease rights has been transferred in the name of the co-operative housing society standing on the said plot. As well as in the present case also M/s.Vinapar Cassel co-operative Housing society by their letter dated 4.9.1991 requested for transferring the lease rights in the name of their society."

(underlined supplied)

44. Thereafter, the second appellate authority i.e., the State Government proceeded to observe thus:

"2. …. As there was violation terms and conditions of the agreements in approximately 48 plots allotted on lease at Village Bandra, Mount Merry Road, earlier Collector vide his letter dated 20.4.2007 had submitted proposal to the government for regularizing violation of conditions in such cases, government accepted the proposal that in the case of those plots where prima facie there is violation of condition, instead of delegating the

> powers of regularizing the violation of conditions to Collector, Mumbai Suburban in such cases collector should be directed to submit independent and clear proposal case wise a to what violation of condition has been done by concerned plot holder in such matter and what penal action should be initiated in this regard and thereafter decision should be taken in such cases independently matter wise and appropriate directions has been issued to Collector Mumbai Suburban on 22.6.2001.
>
> The factual position in the present matter is as aforesaid and various appeals filed before additional commissioner, konkan division has been decided by his order dated 4.5.2009 and the order dated 13.09.2007 of the Collector Mumbai Suburban that Co-operative housing society on the said plot should be declared lessor on appropriate terms / conditions and for that purpose case should be sent to government for decision has been confirmed.
>
> (underlined added)

45. Thus, the State Government has recorded that cases of breach of terms and conditions of lease for regularisation shall not be dealt with by the Collector, Mumbai Suburban District. It is stated that the Collector shall submit a detailed proposal in such cases and thereafter the decision will be taken by the State Government. Thus, the said order makes it very clear that the Collector had no authority to direct that the said society should be put in the shoes of the original lessee. That is the reason why the State Government while deciding the appeal, imposed different conditions, which read thus:

> 1. The order dated 13.9.2007 of Collector Mumbai Suburban and order dated 4.5.2009 of Additional Commissioner, Konkan Division are confirmed.

2. By recovering 50% amount of the prevailing market value (valuation as per ready reckoner) of the land for illegal transfer/sell of the plot bearing No.228 out of CTS No.B 736 to B 739 and B-743 situated at Village Bandra Mount Merry Tal. Andheri which given on lease and their transaction should be regularized and appropriate lease agreement should be executed with presently existing society. As well as the amount of rent from the date of such illegal transfer till this date should be recovered alongwith simple interest thereon.

3. After initiating action as aforesaid by recovering the transfer amount as per the policy of the government dated 25.5.2007 of allotting land to the co-operative housing society permission be granted for tenement transfer. As well as entry be taken in the name of the society holding the said land as lessor and the provisions of Government Resolution dated 25.5.2007 should be made applicable to the said co-operative housing society.

4. For the said lessor society it shall be necessary to obtain prior permission of Collector/government for doing development/re-development of the said land"

(underlined added).

46. We must record here that both the learned Senior Counsel appearing for the State Government as well as the learned Senior Counsel appearing for the society attempted to justify the impugned orders by relying upon only the Government Resolution dated 21st November, 1957. Perusal of the written submissions filed by the State Government shows that reliance is placed only on the policy incorporated in Government Resolution dated 21st November, 1957. Thus, the stand of the State Government is that the action of regularisation has been take only on the basis of the said policy. It will be necessary to make a reference of Government Resolution

dated 21st November, 1957. Paragraph 1 of the said Government Resolution reads thus:

> "Government has, had under consideration the following points:
> 1) Whether permission for sale of non-agricultural plot held on new tenure should be granted and if so, subject to what terms and conditions;
> 2) Whether permission for conversion of the tenure of non-agricultural plot from new tenure into old tenure should be granted and if so, subject to what terms and conditions;
> 3) Whether unauthorised sales of the non-agricultural plots held on new tenure should be regularized and if so, subject to what terms and conditions and
> 4) Whether time limit for the construction of a building on non-agricultural plot should be extended and if so, subject to what terms and conditions, and how the breach if any, of that condition should be dealt with."
>
> (underlined added)

47. The decision of the Government is recorded on point (3) reads thus:

> "Point (3):- The Collector should sanction regularisation of the unauthorised sale of new tenure plots, by sharing 62½ % to 75% of the difference between the sale proceeds and the original price paid by the grantee plus the value of the improvements made in the plot by the grantee. The Collector should fix the percentage difference between 62½% to 75% having regard to the circumstances and facts of individual cases. The conditions subject to which the plot was originally granted, shall remain intact on regularisation of such unauthorised sales.
>
> (underlined supplied)

48. The real issue is whether the said Government Resolution was still in force after the enactment of the Maharashtra Land Revenue Code, 1966. Assuming that it was applicable, the same

applies only to unauthorised sales. Secondly, answer to point No.3 records that unauthorised sales shall be regularised. In the present case, the breach alleged is on the basis of development agreement by and between the original lessee and M/s.Kalpak. The findings of all the authorities is that there is an unauthorised transfer of the said land by the original lessee to M/s.Kalpak. There is no finding recorded by any authority that there is a sale of the said land to the said society. Therefore, on the basis of the said Government Resolution dated 21st November, 1957 an order could not have been passed by the Collector and the State Government of placing the said society in the shoes of the original lessee. Moreover, it must be noted that none of the three authorities under the said Code in the impugned order have held that for placing the said society in the shoes of the original lessee, the power under Government Resolution dated 21st November, 1957 has been exercised. The said argument appears to have been made for the first time in the Letters Patent Appeal.

49. There is another aspect which goes to the root of matter. The said Code (the Maharashtra Land Revenue Code, 1966) was brought into force on 15th August, 1967. The said Code is brought on the statute book with a view to unify and amend the law relating to land and the land revenue in the State of Maharashtra. There is no

dispute between the parties that in view of the provisions of the Government of India Act, 1935 and the Constitution of India, the said land vested in the State Government. The said Code contains provisions for grant of leases. Section 38 confers power on the Collector to a lease under a grant or a contract in any unalienated unoccupied land to any person subject to rules made by the State Government in this behalf. In the present case, under the orders of the Collector and the State Government, a lease has been granted to the said society. This is not a case where unauthorised sale was regularised. In exercise of powers under section 38, the Maharashtra Land Revenue (Disposal of the Government Lands) Rules, 1971 (for short, "Land Disposal Rules") have been brought into force which govern the grant of Government land. Rules 26 and 27 of the said Rules provide for grant of building sites. Sub-rule (1) of Rule 26 provides for disposal of the building sites by public auction to the highest bidder unless for reasons to be recorded in writing, the Collector holds that in any particular case, there is a good reason for granting the lands without auction. In the present case, none of the three authorities recorded any such reasons.

50. There is another important aspect of the matter. By the impugned orders, the land was resumed. Therefore, on resumption, the said land ought to have been treated as any other land vesting in

the State Government which ought to have been dealt with as per the Land Disposal Rules. Even assuming that the Government Resolution dated 21st November, 1957 was invoked for grant of lease to the said society, on enactment of the said Code and the Land Disposal Rules, the said land could not have been disposed of on the basis of the said Government Resolution as the disposal of the lands vesting in the State will be governed by the Land Disposal Rules brought on the statute book in the year 1971. After the Land Disposal Rules were brought into force in the year 1971, the disposal of a land vesting in the State cannot be made contrary to the Land Disposal Rules by relying upon earlier Government Resolution. The Government Resolution dated 21st November, 1957 was not at all applicable in view of the enactment of the Land Disposal Rules in exercise of power under section 38 of the said Code.

51. In the first impugned order passed by the Collector, he has recorded that there was an option open of regularising the unauthorised occupation of the said society in accordance with section 51 of the said Code. Section 51 deals with regularisation of encroachments on the government land. Section 63 grants power to the Collector to summarily evict any person unauthorisedly occupying any land vesting in the State Government. The Collector has referred to section 51 obviously because he was conscious of the fact that the

possession of the society of the building and the land below the building was unauthorised. Section 51 of the said Code reads thus:

> "51. **Regularisation of encroachments.** - Nothing in Section 50 shall prevent the Collector, if the person making the encroachment so desires, to charge the said person a sum not exceeding five times the value of the land so encroached upon and to fix an assessment not exceeding five times the ordinary annual land revenue thereon and to grant the land to the encroacher on such terms and conditions as the Collector may impose subject to rules made in this behalf; and then to cause the said land to be entered in land records in the name of the said person:
>
> Provided that, no land shall be granted as aforesaid unless the Collector gives public notice of his intention so to do in such manner as he considers fit, and considers any objections or suggestions which may be received by him before granting the land as aforesaid. The expenses incurred in giving such public notice shall be paid by the person making the encroachment; and on his failure to do so on demand within a reasonable time, shall be recovered from him as an arrear of land revenue."

52. Section 51 provides that an encroachment on a government land can be regularised by granting the same to the encroacher on the terms and conditions as provided therein. The proviso to section 51 specifically lays down that no land should be granted as provided in section 51 unless the Collector gives notice of his intention to do so and considers the objections or suggestions received before passing an order of grant of land. All the three authorities have concurrently held that possession of the land was

unauthorisedly parted with by the original lessee and the possession of the said society is illegal. Going by the provisions of the said Code, either a grant could have been made to the society by following the Land Disposal Rules or illegal possession of the society could have been regularised under section 51 of the said Code. Section 51 mandates that before granting the land by regularisation, a public notice has to be published. Rule 26 of the Land Disposal Rules applicable to building sites contains a provision for inviting offers by way of auction unless for reasons recorded the requirement of auction is dispensed with. Looking at the matter from any angle, the action of directing that the society shall be directly placed in the shoes of the original lessee in respect of the entire said land is completely illegal and contrary to the said Code and Rules framed therein.

53. At this stage, it will be necessary to make a reference to the impugned order passed by the State Government. It notes that from years 1901 to 1906, 48 plots at Bandra, Mount Mary Road, were given on lease for residential purposes. In 31 cases, the lessees were found to have committed breach of sub-clauses (g) and (h) of clause 2 of the Indenture of Lease. It merely notes that in 16 such cases, possession of the cooperative societies have been regularised by granting leases. We must note here that merely because in 16

cases, unauthorised possession of the societies was regularised, there cannot be any justification for regularising the possession of the said society in the present case by granting the entire said land to the society.

54. There is one more aspect which needs consideration. Under the agreement executed by the original lessee in favour of M/s.Kalpak, authority was granted to construct two buildings out of which only one building has been constructed. The learned Counsel appearing for the said society has tendered a chart which shows that total FSI available in respect of the said land is 1533.50 sq.metres. The said building has been constructed on a portion admeasuring 793.60 sq.metres by consuming FSI of 969.43 sq. metres. The open portion of the said land is 740 sq.metres for which FSI of 564.07 sq.metres is still available. Thus, admittedly, only a portion of the said land has been constructed upon. Going by the chart produced by the said society, even after the construction of the said building, substantial vacant land admeasuring 740 sq.metres out of the said land is available on which FSI of 567.07 sq.metres can be consumed. We must note here that the said land is situated in one of the most prime localities in the city at Bandra near the Bandra Bandstand. Even in the year 1997, when the first impugned order was passed, the property was very valuable.

55. Anxiety was expressed by the Collector, Additional Commissioner as well as the State Government about the problems which may be faced by the flat purchasers of the flats in the said building. The authorities were right to an extent when they felt that effort should be made to regularise the possession of the flats purchasers. However, the authorities could have considered the case of regularisation of the said building, the land below the building and at highest, the land appurtenant to the building which was required to be kept open as marginal space as per the Rules. The effect of the impugned orders is that even a very large open portion of the land on which a very large FSI of 6103 sq.feet (i.e., 567 sq.metres) is available has also been granted to the society on lease. Perusal of the impugned orders of the three authorities show that there is absolutely no application of mind as to why the said society should be granted bonanza by grant of additional open land having a large and valuable FSI having market value of crores. Though it is true that allegations of malafides canvassed by the appellants in these appeals were not canvassed before the learned Single Judge, the most significant fact is that after initiation of proceedings of forfeiture, the said society enrolled three members by taking consideration of ₹4 crores each from them and an amount of non-earned income of more than ₹7 crores payable by the said society has been paid by the said three members. Moreover, under the consent terms filed in the co-

operative Court, the said three members have been allowed to construct on the open portion of the said land.

56. We must note here that from the agreements for sale executed by M/s.Kalpak in favour of the flat purchasers, it is very clear that the flat purchasers are put to notice that the original lessee was granted the said land on lease on various terms and conditions. The flat purchasers cannot plead ignorance about the said terms and conditions. While showing sympathy to the flat purchasers, all the three authorities have completely ignored that very valuable open portion of the land having large FSI available in the prime locality near Bandra Bandstand was granted to the said society whose members were fully aware of the relevant clauses in the original Lease. There are no reasons whatsoever assigned by all the three authorities as to why the entire said land including the open portion with the benefit of large FSI should be allotted to the said society.

57. At this stage, it will be necessary to make a reference to the decision of the Apex Court in the case of **Akhil Bharatiya Upbhokta Congress v. State of Madhya Pradhesh, (2011) 5 SCC 29.** In paragraphs 65 and 66, the Apex Court has held thus:

> "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 or 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 another 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."

(underline added)

58. Reliance has been placed by the learned Senior Counsel appearing for the society as well as the learned Senior Counsel appearing for Respondent Nos.11 to 13 on the recent judgment of the Apex Court in Special Reference No.1 of 2012 **(2012 (10) SCC 1).**

The Apex Court held that public auction may not be always the best way of distribution of natural resources and disposal to highest bidder may not necessarily be the only way to subserve the common good. We must note here that the Land Disposal Rules in certain cases contemplate public auction. At this stage, it will be necessary to make reference to a decision of this Court in the case of **K.Raheja Corporation Private Limited and Anr. vs. State of Goa & Ors., 2010 Vol.112 (10) Bom.L.R. 4729**. In paragraph 84 of the said decision, this Court considered various decisions of the Apex Court and in particular, the decisions of the Apex Court in the case of **Ram & Shyam Co. v. State of Haryana (1985) 3 SCC 26** and **Kasturi Lal Lakshmi Reddy v. State of J & K, (1980) 4 SCC 1.** The relevant part of paragraph 84 reads thus:

> "84 ...
>
> In the very well known decision of the Apex Court in the case of Ram & Shyam Co. v. State of Haryana laid down that:
>
> > **12.** Let us put into focus the clearly demarcated approach that distinguishes the use and disposal of private property and socialist property. Owner of private property may deal with it in any manner he likes without causing injury to any one else. But the socialist or if that word is jarring to some, the community or further the public property has to be dealt with for public purpose and in public interest. The marked difference lies in this that while the owner of private property may have a number of considerations which may permit him to dispose of his property for a song. On the other hand, disposal of public property

partakes the character of a trust in that in its disposal there should be nothing hanky panky and that it must be done at the best price so that larger revenue coming into the coffers of the State administration would serve public purpose viz. the welfare State may be able to expand its beneficent activities by the availability of larger funds. This is subject to one important limitation that socialist property may be disposed at a price lower than the market price or even for a token price to achieve some defined constitutionally recognised public purpose, one such being to achieve the goals set out in Part IV of the Constitution. But where disposal is for augmentation of revenue and nothing else, the State is under an obligation to secure the best market price available in a market economy. An owner of private property need not auction it nor is he bound to dispose it of at a current market price. Factors such as personal attachment, or affinity, kinship, empathy, religious sentiment or limiting the choice to whom he may be willing to sell, may permit him to sell the property at a song and without demur. A welfare State as the owner of the public property has no such freedom while disposing of the public property. A welfare State exists for the largest good of the largest number more so when it proclaims to be a socialist State dedicated to eradication of poverty. All its attempt must be to obtain the best available price while disposing of its property because the greater the revenue, the welfare activities will get a fillip and shot in the arm. Financial constraint may weaken the tempo of activities. Such an approach serves the larger public purpose of expanding welfare activities primarily for which the Constitution envisages the setting up of a welfare State**.** In this connection we may profitably refer to *Ramana Dayaram Shetty* v. *International Airport Authority of India [MANU/SC/0048/1979]* in which Bhagwati, J. speaking for the Court observed: (SCC p. 506, para 12)

> It must, therefore, be taken to be the law that where the Government is dealing with the public, whether by way of giving jobs or entering into contracts or issuing quotas or licences or granting other forms of largesse, the Government cannot act arbitrarily at its sweet will and, like a private individual, deal with any person it pleases, but its action must be in conformity with standard or norms which is not arbitrary, irrational or irrelevant. The power or discretion of the Government in the matter of grant of largesse including award of jobs, contracts, quotas, licences etc. must be confined and structured by rational, relevant and non-discriminatory standard or norm and if the Government departs from such standard or norm in any particular case or cases, the action of the Government would be liable to be struck down, unless it can be shown by the Government that the departure was not arbitrary, but was based on some valid principle which in itself was not irrational, unreasonable or discriminatory
>
> At another place it was observed that the Government must act in public interest, it cannot act arbitrarily or without reason and if it does so, its action would be liable to be invalidated. It was further observed that the object of holding the auction is generally to raise the highest revenue. The Government is entitled to reject the highest bid if it thought that the price offered was inadequate. But after rejecting the offer, it is obligatory upon the Government to act fairly and at any rate it cannot act arbitrarily.
>
> (Emphasis added)

Another landmark decision of the Apex Court which is material on this aspect is in the case of Kasturi Lal Lakshmi Reddy v. State of J & K MANU/SC/0079/1980 : (1980) 4 SCC 1. In paragraph 11, the Apex Court held thus:

> 11. So far as the first limitation is concerned, it flows directly from the thesis that, unlike a private individual, the State cannot act as it pleases in the matter of giving largess. Though

ordinarily a private individual would be guided by economic considerations of self-gain in any action taken by him, it is always open to him under the law to act contrary to his self-interest or to oblige another in entering into a contract or dealing with his property. But the Government is not free to act as it likes in granting largess such as awarding a contract or selling or leasing out its property. Whatever be its activity, the Government is still the Government and is, subject to restraints inherent in its position in a democratic society. The constitutional power conferred on the Government cannot be exercised by it arbitrarily or capriciously or in an unprincipled manner; it has to be exercised for the public good. Every activity of the Government has a public element in it and it must therefore, be informed with reason and guided by public interest. Every action taken by the Government must be in public interest; the Government cannot act arbitrarily and without reason and if it does, its action would be liable to be invalidated. If the Government awards a contract or leases out or otherwise deals with its property or grants any other largess, it would be liable to be tested for its validity on the touchstone of reasonableness and public interest and if it fails to satisfy either test, it would be unconstitutional and invalid.

In paragraphs 14 and 15 of its judgment, the Apex Court proceeded to observe thus:

14. Where any governmental action fails to satisfy the test of reasonableness and public interest discussed above and is found to be wanting in the quality of reasonableness or lacking in the element of public interest, it would be liable to be struck down as invalid. It must follow as a necessary corollary from this proposition that the Government cannot act in a manner which would benefit a private party at the cost of the State; such an action would be both unreasonable and contrary to public interest. The Government, therefore, cannot, for example, give a contract or sell or lease out its property for a consideration less than the highest that can be

obtained for it, unless of course there are other considerations which render it reasonable and in public interest to do so. Such considerations may be that some directive principle is sought to be advanced or implemented or that the contract or the property is given not with a view to earning revenue but for the purpose of carrying out a welfare scheme for the benefit of a particular group or section of people deserving it or that the person who has offered a higher consideration is not otherwise fit to be given the contract or the property. We have referred to these considerations only illustratively, for there may be an infinite variety of considerations which may have to be taken into account by the Government in formulating its policies and it is on a total evaluation of various considerations which have weighed with the Government in taking a particular action, that the court would have to decide whether the action of the Government is reasonable and in public interest. But one basic principle which must guide the court in arriving at its determination on this question is that there is always a presumption that the governmental action is reasonable and in public interest and it is for the party challenging its validity to show that it is wanting in reasonableness or is not informed with public interest. This burden is a heavy one and it has to be discharged to the satisfaction of the court by proper and adequate material. The court cannot lightly assume that the action taken by the Government is unreasonable or without public interest because, as we said above, there are a large number of policy considerations which must necessarily weigh with the Government in taking action and therefore the court would not strike down governmental action as invalid on this ground, unless it is clearly satisfied that the action is unreasonable or not in public interest. But where it is so satisfied, it would be the plainest duty of the court under the Constitution to invalidate the governmental action. This is one of the most important functions of the court and also one of the most essential for preservation of the rule of law**.** It is imperative in a democracy governed by the rule of law that governmental action must be kept within the limits of the law and if there is any transgression, the court must be ready to condemn it. It is a matter of historical

experience that there is a tendency in every Government to assume more and more powers and since it is not an uncommon phenomenon in some countries that the legislative check is getting diluted, it is left to the court as the only other reviewing authority under the Constitution to be increasingly vigilant to ensure observance with the rule of law and in this task, the court must not flinch or falter. It may be pointed out that this ground of invalidity, namely, that the governmental action is unreasonable or lacking in the quality of public interest, is different from that of mala fides though it may, in a given case, furnish evidence of mala fides.

15. The second limitation on the discretion of the Government in grant of largess is in regard to the persons to whom such largess may be granted. It is now well settled as a result of the decision of this Court in *Ramana D. Shetty* v. *International Airport Authority of India* that the Government is not free, like an ordinary individual, in selecting the recipients for its largess and it cannot choose to deal with any person it pleases in its absolute and unfettered discretion. The law is now well-established that the Government need not deal with anyone, but if it does so, it must do so fairly without discrimination and without unfair procedure. Where the Government is dealing with the public whether by way of giving jobs or entering into contracts or granting other forms of largess, the Government cannot act arbitrarily at its sweet will and, like a private individual, deal with any person it pleases, but its action must be in conformity with some standard or norm which is not arbitrary, irrational or irrelevant. The governmental action must not be arbitrary or capricious, but must be based on some principle which meets the test of reason and relevance. This rule was enunciated by the court as a rule of administrative law and it was also validated by the court as an emanation flowing directly from the doctrine of equality embodied in Article 14."

(Emphasis added)

In view of the law laid down by the Apex Court, the GIDC cannot arbitrarily allot lands vested in it and the alienations made by the GIDC must stand the test of reasonableness. The allotment of the public properties

> vested in the GIDC can be made only in a fair and transparent manner and that also in public interest. Therefore, the action of allotment of large tracts of lands to the companies will have to be tested on the touchstone of reasonableness."

59. Therefore, the action of the State Government of allotment of the entire said land to the said society will have to be tested on the touchstone of reasonableness contemplated by Article 14 of the Constitution of India. The land could have to been allotted only in a fair and transparent manner. The anxiety of the State to protect the flat purchasers can be appreciated but we fail to understand as to how even the large vacant portion of the said land with extensive and very valuable FSI was allotted to the said society without any application of mind. It is not the case of the State Government that the said land could not have been sub-divided. The State Government could have always adopted a fair and transparent procedure permissible under the said Code and the Land Disposal Rules for allotment of vacant portion of the said land. The flat purchasers who are indirectly parties to the illegality inasmuch as they purchased the flats with the knowledge of the terms and conditions of original lease have been granted the said additional benefit of a prime open plot of land with large FSI. Fortunately, as of today, no development has been carried out thereon. As far as the allotment of the open plot of land is concerned, the State should have

made an attempt to obtain best possible revenue. The action of the Government has to be in public interest. We fail to see how public interest is subserved by allotting such a valuable open plot of land to the said society without following any transparent and fair procedure. As we have held earlier, the State Government was bound by the provisions of the said Code and the Land Disposal Rules while considering the case of the said society. The State Government cannot rely upon the Government Resolution of 1954 which cannot operate after coming into force of the said Code and Land Disposal Rules.

60. An argument is made that in Letters Patent Appeal, this Court should not interfere with the action of the allotment of the entire said land to the said society and if such interference is made, this Court will be treating the Letters Patent Appeal as a Public Interest Litigation. It was also argued that the contentions which are raised by the appellants were neither raised before the authorities or before the learned Single Judge. It was submitted that the only argument canvassed before the authorities under the said Code was that the original lessee was a class II occupant.

61. It is necessary to make reference to the prayers made in the Writ Petitions before the learned Single Judge. We must note

here that on 28th August, 2009, a lease agreement was executed by Respondent No.1 State Government in favour of the said society. In the Writ Petition, the challenge is not only to the impugned orders of three authorities but also to the lease deed executed in favour of Respondent No.10-Society. In fact, in prayer clauses (c2) and (e1) added by way of amendment, there is challenge to all subsequent orders passed by which amounts payable by the said society by way of 50% of the unearned income, arrears of lease rent and interest were fixed and installments were granted to the said society to pay the amounts. We have already pointed out that the petition filed before the learned Single judge was a petition under Article 226 of the Constitution of India. The challenge in the petition was specifically to the grant of the said land to the said society and there was a challenge to the execution of lease. The learned Single Judge was dealing with a case of property vesting with the State. The learned Single Judge was also dealing with the challenge to the order of allotment of the entire said land to the said society by way of a lease. Therefore, the learned Single Judge ought to have taken into consideration the illegality committed by the State by grant of entire said land to the society. Therefore, in this Letters Patent Appeal, legality and validity of the orders allotting the entire said land to the said society can be gone into. This being an intra-court appeal, this Court can pass all orders which could have been passed by the

learned Single Judge. As held by the Apex Court in the case of **Baddula Lakshmaiah vs. Shri Anjaneya Swami Temple ([1996] 3 SCC 52),** Letters Patent Appeal is an intra Court Appeal whereunder the Letters Patent Bench, sitting as a Court of Correction, corrects its own orders in exercise of the same jurisdiction as vested in the Single Bench.

62. In the impugned order passed by the State Government in the second appeal, there is a reference to application dated 4th September, 1991 made by the society for transfer of lease in the name of the said society. In the impugned order dated 13th September, 2007 passed by the Collector, he has observed that there were two options before him. The first one was that the entire construction should be treated as encroachment and should be regularised under section 51 of the said Code. The second one was that said society should be placed in position of the original lessee. The decision to place the said society in the shoes of the original lessee in respect of the entire said land is completely contrary to the provisions of the said Code and the Land Disposal Rules. Both the options ought to have been considered in the light of the fact that substantial portion of the open land alongwith FSI thereon was available. The State Government ought to have considered the request for regularisation of the possession of the said society over

the land below the building and the land appurtenant thereto which was required to be maintained as marginal open space. In the alternative, the State Government could have also considered the option of grant of lease to the said society in respect of the land below the said building and the land appurtenant thereto in accordance with the law. There is a complete non application of mind as regards grant of open land in respect of which substantial FSI was available. Therefore, that part of the impugned orders will have to be set aside. The grant of open land to the said said society by no stretch of imagination subserves public interest.

63. The learned Senior Counsel appearing for the said Society pointed out that very large amount by way of unearned income, arrears of lease rent and interest has been paid by the said society by taking money from the respondent Nos.11 to 13.

64. If the open portion of the plot together with right to utilise FSI is transferred by the State Government by adopting best possible method to ensure that the State Government earns maximum revenue, it cannot be disputed that the State Government will get the revenue which will be much larger than the unearned income, arrears of lease rent and interest amount received from the said society. Therefore, the State Government will have to refund all the amounts

received from the respondent No.10 so that the said amounts can be returned by Respondent No.10 to the Respondent Nos.11 to 13.

65. The State Government or the Collector, as the case may be, will have to grant benefit to the members of the said society by protecting the possession of the said society over the said building, the land below the building and the land appurtenant to the building which is required to be kept open as per the relevant Development Control Regulations. We propose to permit the Respondent No.10 to make a fresh application in that behalf and to enable the State Government to decide the said application, we propose to direct the parties to maintain status quo as of today for a reasonable time.

66. Hence, we pass the following order:

i) The impugned order dated 13th September, 2007 passed by the Collector of the Mumbai Suburban District, the impugned order dated 4th May, 2009 passed by the Additional Commissioner, Konkan Division and the impugned order dated 18th July, 2009 passed by the State Government are set aside to the extent to which a direction was issued to grant a lease in respect of the entire said land to M/s.Vinaper Castle Co-operative Housing Society Ltd. However, we make it clear that the said impugned

orders to the extent to which they hold that the original lessee committed a breach of the terms and conditions of the original Lease are confirmed and, therefore, the direction to resume the said land is upheld;

ii) All consequential orders passed by the Collector and the State Government on the basis of the impugned orders by which the lease was granted to the said society are also quashed and set aside;

iii) All amounts paid by the said society to the State Government on the basis of the impugned orders shall be refunded by the State Government to the said society within a period of six months from today;

iv) We make it clear that the lease granted by the State Government in respect of the entire said land to the said society is illegal and the said society shall not be entitled to claim any benefit thereunder;

v) It will be open for the said society to apply to the State Government either for regularisation of its occupancy in respect of the land below the said building and the land appurtenant to the said building or for grant of the land below the said building and the land appurtenant to the

said building. Such application shall be made within a period of two months from today;

vi) The State Government shall decide the said application on its own merits but in the light of observations made by this Court in paragraph 65 of this judgment and order within a period of six months from today;

vii) To enable the said society to take appropriate steps, we direct that for a period of six months from today, status quo as of today in respect of possession of the said land and the building thereon shall be maintained by all concerned parties;

viii) We make it clear that no additional construction shall be carried out on the said land for a period of six months from today. However, this order will not prevent the said society from carrying out necessary repairs to the said building after obtaining permission of the competent authority;

67. To the aforesaid extent, the impugned judgment and order passed by the learned Single Judge stands modified.

68. Letters Patent Appeals are partly allowed on the above terms with the aforesaid modification.

69. There shall be no order as to costs.

70. Pending civil applications stand disposed of.

(MRS.MRIDULA BHATKAR, J.) **(A.S. OKA, J.)**