

(1998) 05 DEL CK 0100

In the Delhi High Court

Case No : Civil Writ No"s. 1233/72, 217, 218, 219, 396, 527, 576 and 716/73, 473 and 1191/74, 502/75, 102/81, 157/ 83, 857/84, 1839/87 and 2790 of 1991

Ansal and Saigal Properties (P) Ltd. and Others

APPELLANT

Vs

L. and D.O. and Others

RESPONDENT

Date of Decision : 01-05-1998

Acts Referred:

Constitution of India, 1950 — Article 226

Delhi Development Act, 1957 — Section 14

Citation : (1998) 3 CLT 92 : (1998) 74 DLT 152

Hon'ble Judges : R.C. Lahoti, J; Lokeshwar Prasad, J

Bench : Division Bench

Final Decision : Partly Allowed

Judgement

Lokeshwar Prasad, J.—Since the above mentioned writ petitions, filed under Article 226 of the Constitution, raise common questions for consideration, the same, with the consent of the learned Counsel for the parties, have been heard together and are being disposed of by this common order. In all the writ petitions, plots of land, situated in the vicinity of Connaught Place & India Gate, were auctioned and in respect of those plots of lands, so disposed of by auction, a separate perpetual lease deed, with identical terms, in respect of each such plot, was executed in favor of the auction purchasers by the then Secretary of State for India in Council through the then Commissioner, Delhi. Thereafter by several subsequent acts and assignments in law, the perpetual lease hold rights in respect of the above said plots of land have been transferred in favor of the petitioners in the present writ petitions. Thus, it is not in dispute that each of the petitioners in the present writ petitions is the recognised lessee in respect of the plot in question so purchased by him. Initially, in terms of the lease deeds, on the plots in question, a single storeyed residential house was constructed. The present dispute in these writ petitions relates to an era when the construction of multi-storeyed buildings had just commenced in the city of Delhi. One of the

major issues requiring consideration is regarding the terms on which the respondents can permit the change of user of residential premises to a multi-storeyed commercial premises. Practically, in most of the writ petitions, the petitioners, after obtaining the sanction of the building plans from the local authority, like the New Delhi Municipal Committee, have already constructed multi storeyed buildings consisting of flats. In some of the cases, the flats, so constructed in the multi-storeyed structures, have too been disposed of and thus have changed hands. The Land & Development Officer (hereinafter referred to as "the L & DO"), on behalf of the lessor, in some of the cases has taken action by issuing a show cause notice to the concerned lessee for determining the lease and exercising right of re-entry on the ground that the lessee has violated the terms of the lease by constructing a multi-storeyed building thereby changing the user of the land without obtaining prior permission of the Lesser in terms of the lease.

2. Practically, in all the petitions, the petitioners have disputed the validity of the notices of re-entry and have sought for consequential directions to the respondents such as restraining them from taking possession of the building or in any way interfering with the possession and enjoyment of the petitioners over the leased land and the building standing thereon.

3. However, as the record of proceedings before the Court shows, during the course of hearing, the emphasis shifted on settlement by revision of the terms of the leases on which the petitioners were holding the pieces of land. It was not disputed during the course of hearing by either party that the respondents were not serious about exercising their right of re-entry pursuant to the notices issued in that regard so long as petitioners were agreeable to suitable revision of the terms and conditions of the leases so as to benefit the Lesser also or in other words so long as the lessees were reasonably prepared, to part with a fraction of the benefits, earned by them, by constructing multi-storeyed flats/complexes, to the lessor. To highlight this factual statement, we may specifically refer to some of the orders passed by the Court, through different Benches, seized of the hearing, from time to time.

4. In CWP 217/73 on 24.9.1982, the Division Bench passed me following order:

"This order will cover not only mis case but also other similar cases which are listed together or are shown on today's and yesterday's Board. During the course of hearing of this case and some other matters it has been brought to our notice that a policy decision was taken by the Central Government in the Ministry of Works and Housing and conveyed to the Land & Development Officer that re-entry notices or notices with regard to breach of conditions of lease could be withdrawn in appropriate cases on terms which may be given to individual owners by the Land & Development Officer. In consequence of this policy decision damages under the head "charges" were also worked out in some cases. Therefore, it appears that the Government was not really faying to enforce meticulously the clause regarding re-entry or forfeiture of lease. It was however,

keen that breaches should either be removed or regularised but the owners/lessees will have to conform to certain conditions and also, in some cases, pay charges for regularisation. This policy has also been a matter of comments and observation in some of the matters which have earlier come before us. In this view of the matter we direct that the petitioners, where asked, should give inspection and provide facility for inspection to the officers and officials of the respondents on appointed date and time. For this purpose respondents will ask for inspection from the petitioners. After the inspections have been done, the Land & Development Officer/DDA should examine the feasibility of offering terms and conditions to the petitioners for regularisation and withdrawal, as may be necessary, in each case. These terms be offered, where feasible, within four weeks of inspection. The inspection themselves should be completed within four weeks from today. Where the DDA/Land & Development Officer, for any reason, is not able to offer terms, in those cases the reasons Therefore should be specifically brought to our notice. All these matters be listed for further orders and directions on December 13, 1982".

5. The respondents made offers to the petitioners and the petitioners made representations there against--each setting out its own view point as to the proposed terms and conditions of the leases. On 7.2.1983, the Court took a note of these exchanges of proposals/counter proposals and said :

"Representations regarding those terms or counter proposals should be given by the parties concerned within 12 weeks from today. Parties are also at liberty to make personal representations or representations through their representatives to the respondents and have the matter sorted out with the department early, if possible.

The department on receiving counter proposals or representations should consider them in each case and decide within eight weeks of the receipt of each of those representations/counter proposals. Final decision of the department should be placed before us for further orders".

6. On 7.11.1983, it was brought to the notice of the Court that a personal hearing was required so as to resolve the issue. The Court said :

"This matter and other similar matters are all on board today for directions. We are told that after giving inspection of the premises the petitioners made representations but they have not yet been given personal hearing".

7. On 13.1.1987 while adjourning the hearing, the Court noted the statement of Counsel for the respondents that he would obtain instructions from the Government as to whether it was possible for it to have the question of damages, payable by the petitioners for regularisation adjudicated by an Arbitrator acceptable by both the parties.

8. So also on 14.9.1988 the Court adjourned the hearing enabling respondents to carry out inspection of the premises and consider the case for regularisation of

the breaches, if any, and offer terms and conditions for regularisation to the petitioners.

9. In some of the cases, the petitioners moved specific applications seeking amendment in the writ petitions so as to lay a challenge on the proposals/orders made by the respondents during the pendency of the petitions. On 17.7.1995, the Court said, *inter alias* :

"CW 1233/73 & other 43 connected matters

It is a bunch of 44 matters fixed for hearing today. However, Mr. Singhvi, learned Senior Counsel appearing for some of the petitioners points out that in some of the petitions, the petitioners have moved applications for amendment in the respective writ petitions and as such those matters cannot be treated as ripe for hearing so long as the prayer for amendment is not disposed of.

Both the learned Counsel have joined in submitting that during the pendency of these petitions, the respondents have revised their policy and offered the terms contained therein to the petitioners. The policy is acceptable to some of the petitioners, while some others are yet to make up their minds. If they agree on the terms of the new policy, then the entire controversy may be resolved out of the Court and may be that only a little part of it, ancillary one, would be left out to be settled in the Court. Making that joint statement both of them jointly prayed for giving at least six weeks time to have a mutual discussion and to arrive at a settlement, if possible.

In view of the joint prayer made by learned Counsel for the parties, it is directed that all the petitioners who have moved applications for amendment shall deliver copies thereof to the Counsel for the respondents within three days. Reply to the applications for amendment may be filed within two weeks thereafter".

10. It is thus clear that the legality or otherwise of the notices of re-entry is an issue which has relegated into the background and the real issues which are to be decided and on which all the learned Counsel for the parties have addressed the Court centre around the terms and conditions to be incorporated in the fresh offer upon which the Lesser would consider the regularisation of the breaches, withdrawal of the notice of re-entry and grant of ex-post facto sanction for the construction of multi-storeyed complex on the demised premises, as will be noticed shortly hereinafter.

11. The first such offer dated the 29th September, 1983 was given by the L & DO in compliance with the orders/directions of this Court dated the 7th February, 1983. Thereafter the Government of India, Ministry of Urban Development (Land Division) revised their policy on 11.1.1995. In pursuance of the orders/directions of this Court dated the 17th July, 1995 and on the basis of revised policy dated 11.1.1995, the Government of India, Ministry of Urban Affairs and Employment, Land & Development Office, Nirman Bhawan, New Delhi vide their Communication No. L & DO/LI-9134(6)/95/396 dated the 19th October, 1995

have given a revised offer. In terms of the offer of 1995, made by the L & DO, on behalf of the lessor, each lessee, for the condensation/regularization of the breaches of the terms of the lease was required to pay to the L & DO amount on account of additional premium to be paid in lump sum; 5% charges on additional premium; revised Ground Rent; overhead charges; existing Ground Rent; interest on existing Ground Rent; additional Ground Rent; interest on additional Ground Rent; damage charges; Penalty; charges for withdrawal of re-entry; and cost of supplementary lease deed.

12. Besides making payment in the manner stated above, each lessee, in terms of the above said offer was also required to furnish two undertakings on a stamp paper, undertaking to execute a supplementary lease deed and a tripartite agreement.

13. The petitioners are opposing the above terms, offered by the L & DO, on the ground that the same are highly discriminatory, exorbitant, unreasonable, harsh, illegal and even contrary to the guidelines and the policy issued by the respondents themselves from time to time. The contention of the petitioners in all the writ petitions, in brief, is that there is no justification in asking for payment of additional premium as the same is against the terms and conditions of the lease deed. According to them there is no provision in the lease deed, empowering the Lesser or any one acting on his behalf, to demand such an exorbitant, unreasonable, harsh and illegal term (payment of additional premium in lump sum) for the change of user. They also dispute the "crucial date" for calculation of conversion charges/ additional premium. The petitioners are also assailing the condition of the execution of a supplementary lease deed and tripartite agreement on the ground that the same completely changes the terms and conditions of the existing lease deed which is not permissible either in law or in equity. The above offer, made by the L & DO, is also being assailed by the petitioners on the ground of hostile discrimination.

14. Though the amendment applications, filed in some of the petitions, have not been formally allowed but the Counsel for both the parties agreed during the course of hearing that they would be addressing the Court on the issues sought to be raised in the applications for amendment and the Court may adjudicate upon such pleas also. Even in such of the petitions in which formal applications for amendment have not been filed, in view of the petitioners therein having been delivered with offers in writing by the respondents on the same lines as has been done to other petitioners, they have also been heard on those issues which in substance are common in all the petitions. We would, Therefore, deal with all such issues during the course of this judgment, a course which has been agreed upon to be followed by all the learned Counsel for all the parties.

15. We have heard the learned Counsel for the parties at length and have also carefully gone through the documents/material on record, including the written submissions, filed by the learned Counsel for the parties. In the light of the challenges laid and the contentions advanced at the Bar we formulate the

following " questions which arise for decision in the present writ petitions:

(1) Whether the terms, now being offered by the L & DO, in pursuance of the orders/directions of the Court dated the 17th July, 1995, vide letter No. L & DO/L1-9/134(6)95/396 dated the 19th October, 1995 for regularisation of breaches, withdrawal of re-entry and for according/granting ex-post facto sanction for the construction of multi storeyed commercial buildings on the demised premises in terms of Clauses 2(5) and 2(6) of the leases are exorbitant, unreasonable, harsh, illegal and contrary to the guidelines and the policy issued by the respondents?

(2) What is the scope of judicial review? Whether the terms offered by the Government of India, Ministry of Urban Affairs and Employment, Land & Development Office, Nirman Bhawan, New Delhi vide Communication No. L & DO/L1-9/134(6)/95/396 dated the 19th October, 1995 for condoning the breaches of the terms and conditions of the leases are not open to judicial review?

(3) Whether the petitioners have been subjected to hostile discrimination by the respondents while giving the offer of 1995 as compared to other lessees?

Question-1

16. As already stated, for the first time, on behalf of the lessor, the L&DO gave terms and conditions for regularising the breaches temporarily, to withdraw the notice of re-entry and to grant ex-post facto sanction for the construction of multi storeyed commercial buildings on the demised premises in terms of the Clauses 2(5) and 2(6) of the leases vide letter dated 24.9.1983. The terms and conditions contained in the above said offer were not acceptable to the petitioners and, Therefore, no further action could be taken in that direction. However, during the pendency of these writ petitions, the Lesser revised its policy on 11.1.1995 and on the basis of the revised policy and also in pursuance of the orders/directions of this Court dated the 17th July, 1995, offered new terms to the lessees vide letter dated 19.10.1995. In the above said offer, made vide letter dated 19.10.1995, it was stated that the Lesser would consider the question of regularising the breaches temporarily, to withdraw the notice of re-entry and to grant ex-post facto sanction for construction of multi storeyed commercial buildings on the demised premises in terms of Clauses 2(5) and 2(6) of the leases provided the lessees (petitioners) were willing to comply with the following terms and conditions in advance:

(A) (i) Payment of additional premium;

(ii) Payment of 5% p.a. charges on additional premium;

(B) (i) Payment of revised ground rent;

(ii) Payment of overhead charges;

(C) (i) Payment of existing ground rent;

(ii) Payment of interest on existing ground rent;

- (D) (i) Payment of additional ground rent;
- (ii) Payment of interest on additional ground rent;
- (E) Payment of damage charges;
- (F) Penalty;
- (G) Charges for withdrawal of re-entry;
- (H) Cost of supplementary lease;
- (I) Withdrawal of writ petitions pending in this Court;
- (J) Furnishing an undertaking on a non-judicial stamp paper of Rs. 2/- agreeing to pay revised ground rent of the original ground rent in terms of Clause (4) of the original lease;
- (K) Furnishing an undertaking on a non-judicial stamp paper of Rs. 2/- agreeing to execute a supplementary lease deed which will provide for, apart from the above and in addition to the existing covenants of the lease to the extent the same are not modified or superseded by these terms, the following :
 - (a) restricting the sale, transfer, mortgage assignment of the building, blocks, flats or any part thereof without the prior permission of the Lesser and payment of unearned increase in any of such events;
 - (b) revision of revised ground rent after every span of 10 years. The ground rent so revised however will not exceed 25% of the ground rent prevailing at the time of such revision; and
 - (c) keeping a running strip of land measuring 5291.55 sq. ft. in front and rear of the demised premises free from all encumbrances, structure, construction and surrendering the same to the Lesser or his authorised Agent as and when called upon to do so.

17. Along with the supplementary lease deed the lessee, in terms of the above said offer, was also required to execute a tripartite agreement so as to facilitate the transfer of the flat/flats on lease hold rights on prorata basis and the formation of a co-operative society of the flat owners for smooth running of common amenities.

18. After hearing the learned Counsel for the parties and also after taking into consideration the documents/material on record we feel that the petitioners are not seriously opposing the claim of the payment of existing ground rent together with interest mentioned at "C" above; payment of additional ground rent and interest claimed thereon mentioned at "D" above; damages for excess coverage mentioned at "E" above; cost of preparation of lease deed mentioned at "H" above and the condition for the withdrawal of the writ petitions, pending in this Court mentioned at "I" above which according to us also, in the given facts and circumstances cannot be said to be unreasonable or harsh. After excluding the

above terms/conditions we shall examine the remaining conditions in the order in which they appear in the above said offer.

Payment of Additional Premium

19. The contention of the learned Counsel for the petitioners, in so far as the above aspect is concerned, broadly speaking is, that in the instant case the rights and obligations of the parties flow from the perpetual lease deeds, executed between the parties in respect of the plots in question and in the absence of any provision in the lease deeds for levy/recovery of additional premium/conversion charges, no additional premium/conversion charge, for the change of the user of the land/plots) in question, is livable/recoverable from the petitioners either by the Lesser or by the L&DO on his behalf. It was also submitted by some of the learned Counsel for the petitioners that the leases are Government grants within the meaning of Government Grants Act, 1995 1895 and in terms of the provisions of Section 3 thereof the grant of property by the Government par takes the nature of law as the above provisions over-rule even legal provisions which are contrary to the tenor of the document. It was further submitted by them that it is contrary to the provisions of law and the terms of the perpetual lease deeds to demand charges for the change of the user of the plots in question while granting written consent for the change of user in terms of the conditions of the leases because that would amount to changing the very basis of the character of the perpetual leases. The learned Counsel for the petitioners, in support of their above contention, have placed reliance on a decision of the Supreme Court in the case of Express Newspapers Pvt. Ltd. and Others Vs. Union of India (UOI) and Others, . It was also submitted by some of the learned Counsel for the petitioners that in view of the fact that the petitioners had obtained sanction of building plans for the construction on the plots in question from the concerned local authority (NDMC), no separate sanction was required from the Lesser or from the L & DO on his behalf.

20. The learned Counsel for the respondents, on the other hand, submitted that in all these cases the plots of Nazul Lands were given on lease hold rights to the petitioners not for commercial purposes or for the purpose of erecting multi storeyed buildings thereon and since the petitioners have unilaterally converted the land use without even an application for conversion by raising multi storeyed flats thereon, they are liable to pay conversion charges/additional premium. It was also contended by him that the sanction of the plans by the NDMC or by any other authority has no bearing on the lease deeds because in terms of the conditions of the lease deeds it was obligatory on the part of the petitioners to have obtained "previous consent in writing" of the lessor. He referred to Clauses 2(5) and 2(6) of the lease deeds in question and submitted that in terms of the above clauses there is a specific prohibition providing that the lessee will not without the previous consent in writing of the Chief Commissioner of Delhi or duly authorised officer erect or suffer to be erected on any part of the demised premises, any building other than and except the buildings erected thereon at

the date of the execution of the deed. The learned Counsel for the respondents has placed reliance on decisions in cases *Union of India & Ors. v. Dev Raj Gupta & Ors.*, 42(1990) DLT 566 and *Smt. Dayawanti Punj v. NDMC*, AIR 1982 Delhi 532.

21. As already stated, it is not in dispute that in all these cases a perpetual lease deed has been executed by the then Secretary of State for India in Council through the Chief Commissioner of Delhi in favor of the auction purchasers in whose shoes the present petitioners have ultimately stepped into. It is also not in doubt that the petitioners cannot have better claims or rights than what were being enjoyed/available to their predecessors-in-interest. The case of the petitioners, in so far as the above aspect is concerned, mainly hinges upon the true meaning intent and scope of Clause 2, Sub-clauses (5) (6) & (11) and Clause 3, of the lease deeds which read as under:

"(5) The lessee will not without the previous consent in writing of the Chief Commissioner of Delhi or duly authorised officer as aforesaid erect or suffer to be erected on any part of the said demised premises any buildings other than and except the buildings erected thereon at the date of these presents".

"(6) The lessee will not without such consent as aforesaid carry on or permit to be carried on the said premises any trade or business whatsoever or use the same or permit the same to be used for any purpose other than that of a residence or door suffer to be done thereon any act or thing what so ever which in the opinion of the Chief Commissioner of Delhi may be an annoyance or disturbance to the Secretary of State or his tenants in the New Capital of Delhi".

"(11) The lessee will upon every assignment, transfer or sub-lease of the said premises hereby demised or any part thereof and within one calendar month thereafter deliver a copy of the deed of assignment, transfer or sub-lease to the Lesser or the Chief Commissioner of Delhi, and all such assignees, transferees and sub-lessees shall be bound by all the covenants and conditions herein contained and be answerable in all respects therefore. Provided always that the lessee shall not assign, transfer or sub-lease a part only of the said premises hereby demised without the previous approval in writing of the Chief Commissioner of Delhi".

"3. If the yearly rent hereby reserved or any part thereof shall at any time be in arrear and unpaid for one calendar month next after any of the said days where on the same shall have become due, whether the same shall have been demanded or not or if there shall have been in the opinion of the Lesser or the Chief Commissioner of Delhi whose decision shall be final, any breach by the lessee or by any person claiming through or under him of any of the covenants or conditions hereinbefore contained and on his part to be observed or performed then and in any such case it shall be lawful for the Lesser or any person or persons duly authorised by him notwithstanding the waiver of any previous cause or right of re-entry upon any part of the premises hereby demised or of the

buildings thereon in the name of the whole to re-enter and thereupon this demise and everything herein contained shall cease and determine and the lessee shall not be entitled to any compensation whatsoever nor to the return of any premium paid by him".

22. On a combined reading of Sub-clauses (5) and (6) of Clause 2 of the lease deeds it is apparent that the lessee cannot erect or suffer to be erected on any part of the demised premises, any building other than and except the building erected thereon at the time of the execution of the lease deed without the previous consent in writing of the Chief Commissioner of Delhi or duly authorised officer and the demised premises cannot be used for purposes other than that of a residence without such consent. The question of questions, Therefore, is as to whether while giving such a consent/ permission/sanction, in terms of the above said provisions of the lease deed, the Lesser or a duly authorised officer on his behalf, can ask the lessee to pay any conversion charge/additional premium for the change of user of the plot in question from residential to multi storeyed commercial. The above question came up for consideration before this Court in case Kamala Bakshi and Others Vs. Union of India and Another, and it was held that after coming into force of the statutory Master Plan, the terms of the lease deed regarding user automatically stood modified from contractual "residential" purposes to statutory "commercial" purposes in view of Section 14 of the Delhi Development Act, 1957 which prohibited the use of any land or building for purposes other than that contemplated by the Master Plan or the Zonal Plan. It was further held in the above said case that the fact that the lease related to Government land was immaterial as the Act was binding on the Government in the absence of any provision either expressly or by necessary implication exempting the State and in view of the statutory conversion of the term of the lease regarding the user of the land, there was no question of the lessee seeking any permission of the Lesser Government for the conversion of the land from residential to commercial and that there was also no question of payment of any conversion charges by the lessee to the Lesser Government and in the case of statutory conversion there was no scope for insisting upon receipt of conversion charges under a contract by the lessor. Agreeing with the above view taken in the case of Smt. Kamla Bakshi (supra), a Division Bench of this Court in case Dev Raj Gupta and Others Vs. Union of India and Others, held that the terms of the contract must yield to statutory provisions enacted subsequently. The Division Bench in the above said case of Dev Raj Gupta has observed that when the law provides that the building or property will be only for commercial purpose, there can be no agreement between the parties which would require the building to be used for residential purpose as such an agreement would be contrary to law and that the lease had been granted by the Government and the Government had enacted the Delhi Development Act, 1957 and the Master Plan according to which the use of the land has been changed from residential to commercial purpose. The Division Bench in the above said case further held that for the aforesaid reasons "misuse charges" on account of the property being

used for commercial purpose, instead of residential purpose cannot be charged by the respondents (lessor) Against the above decision of the Division Bench of this Court in Dev Raj Gupta's case, Union of India and others filed an appeal in the Supreme Court and the Supreme Court in the above said appeal entitled Union of India and Others v. Dev Raj Gupta and Ors, 42(1990) DLT 566 held :

"The High Court is further not right in holding that there was an automatic or a statutory conversion of the user of the land because in the Master Plan the land in question fell in the area reserved for commercial use. The High Court failed to appreciate that the change of user of the land permitted by the Plan was only enabling in nature. If lifted the restriction which was otherwise there for using the land for commercial purpose. The land has to be used as per the agreement between the contracting parties, and no change of the user can be made contrary to the agreement even if the plan permits such user. The plan helps the parties to change the use, if the parties mutually agree to do so. It does not permit the occupant to change the user unilaterally. It is not, Therefore, correct to say that no permission of the landlord was needed to change the user of the land".

23. In view of the above decision of the Apex Court, the findings of the learned Single Judge of this Court in Smt. Kamla Bakshi's case (supra) to the effect that with the coming into force of the Master Plan there is an automatic change of user and no permission and no payment of conversion charges is required, stand over ruled.

24. In case Daya Wanti Punj and Others Vs. New Delhi Municipal Committee and Others, which related to 9, Tolstoy Marg, a similarly situated plot, given on lease vide lease deed dated the 19th March, 1991, executed between the Secretary of State for India in Council, the Lesser and the lessee, one of the questions for consideration before the Division Bench of this Court was that on what terms the Lesser should give his consent to the conversion of user of his land from "residential" to "commercial". In that case the Lesser did not give any terms. During the hearing of the petition the Court directed the Lesser to quote his terms to the petitioners on which he (lessor) would allow his land to be used for the erection of a multi storeyed commercial building. In compliance with the orders of the Court the terms were given by the Lesser vide letter dated 16.3.1982 which amongst others included the following items:

1. Additional Premium in lump sum Rs. 26,79,029.00
2. Interest @ 6% p.a. on the amount of Additional Premium from 11.1.1971 (i.e. date of receipt of application dated 30.12.1970 in the office) to 3.10.1971 Rs. 1,17,143.30
3. Interest @ 8% p.a. on additional premium from 4.10.1971 to 28.8.1975 Rs. 8,36,150.65
4. Interest @ 10% p.a. on additional premium from 29.8.1975 to

14.1.1982 and thereafter from 15.1.1982 to the date of payment @ Rs. 22,325.55 p.a. Rs. 17,09,440.70 (to be calculated and added.)

25. This Court, in the above mentioned case of Smt. Dayawanti Punj, while not agreeing with the land value of Rs. 1,500/- per sq. yard, being adopted, as basis for the purpose of calculating the rates for conversion, held:

"We see no justification for adopting the basis of the land value of Rs. 1,500/- per sq. yard which is the basis of the Government's demand. Our conclusion is that 1970 is "that point of time", to use an expression of the Government policy dated 21st June, 1979, on the basis of which market value of the land should be ascertained for the purposes of giving permission for permanent change of purpose".

26. Thus, the Division Bench of this Court in Smt. Dayawanti's case (supra) though did not agree with the basis of the land value for calculating the demand of additional premium but it cannot be denied that it gave its stamp of approval on the lessors right and the liability of the lessee to pay conversion charges (additional premium) for the change of the user of the plot from residential to commercial.

27. Besides the legal aspect, as explained above from a perusal of the record it is apparent that the petitioners themselves had never disputed their liability to pay the commercialisation charges/conversion charges for the change in the user of the plot and in the initial stages had themselves requested the L & DO to intimate them the necessary commercialisation charges to be paid by them for the change in use of the land from "residential" to "commercial". One such communication from Sh. Sushil Ansal of Ansal and Saigal Properties Pvt. Ltd., addressed to the L & DO dated the 28th September, 1970 relating to Plot No. 49, Curzon Road [(CWP 1233/ 72)--M/s. Ansal & Saigal Properties (P) Ltd. and Anr. v. L & DO and Ors. reads as under:

"xxx"

We want a certificate in the form enclosed from your end certifying that commercial building can be permitted to be constructed on this plot and necessary commercialization-charges shall have to be paid by us for change in use of this plot.

"xxx"

28. To the above mentioned communication the L & DO gave a reply vide letter dated 3.10.1970 stating therein :

"With reference to your letter No. 19 CR/SK/I/430/70 dated 28/30.9.1970, on the above subject, I am to confirm that the multi-storeyed commercial building can be constructed on the plot under reference. The conversion charges for the change of use from residential to commercial shall have to be paid by you which shall be intimated to you in due course of time".

29. The sanction of the building plans by the New Delhi Municipal Committee (NDMC) also has no bearing in so far as the above aspect is concerned because the sanction letter issued by the NDMC clearly stated that "plans under the terms of the lease deed may please be got approved by the Land & Development Officer separately" and none of the petitioners ever disputed the above contention of the authorities of the NDMC.

30. Some of the learned Counsel for the petitioners, during the arguments, submitted that the leases; like the present ones, are contracts and grants under the Government Grants Act which are binding in nature on both the parties i.e. the lessors and the lessees and the terms of the leases cannot be changed by the Lesser unilaterally to the disadvantage of the lessees. In our opinion, in the facts and circumstances of the present cases, the above submission of the learned Counsel for the petitioners is devoid of substance because of the fact that the leases in question, as initially granted by the Lesser in favor of the lessees were purely for residential purposes. The petitioners have unilaterally changed the user of the land from residential to commercial by constructing multi storeyed flats thereon. The above contention of the learned Counsel for the petitioners decidedly would have had some substance had the user of the land not been changed unilaterally by the petitioners from "residential" to "commercial" and would have been allowed to continue as it was at the time of the execution of the leases in question. Here the boot is on the other leg. The moment the petitioners unilaterally changed the user of the land, the above ground, as taken by some of the learned Counsel for the petitioners, can no longer be available to them. As a matter of fact it was open for the Lesser to have taken further action for the breach of the conditions of the leases in terms of the lease which the Lesser has taken and for which there can be no legitimate grievance to the petitioners.

31. In our opinion, the decision of the Supreme Court in case Express News Papers (supra) in no way helps the cause of the petitioners in so far as the above aspect is concerned because in the above said case the Supreme Court mainly clarified the overlapping powers under different enactments. In the above said case, the building constructed after permission/sanction from the Delhi Development Authority was tried to be demolished under the provisions of the Delhi Municipal Corporation Act. The overriding powers of Delhi Development Act have been recognised and it has been held that the Municipal Corporation of Delhi had no power to issue a demolition notice once permission was accorded to by the Delhi Development Authority in accordance with the provisions of the Master Plan.

32. In view of the position explained above it is apparent that while granting permission for the change of user of the land (plot) in question from residential to commercial, the lessor/L & DO is fully justified in demanding additional premium/ conversion charges. However, there can be no denial of this fact that such a demand on account of additional premium or conversion charges has not to be arbitrary, exorbitant but must be based on some reasonable criteria.

33. For arriving at the conclusion as to whether the demand being made on account of additional premium/conversion charges is reasonable or not we have to examine as to what ought to be the basis for such a demand. For answering the above question we have to revert back to the decision of this Court in the above mentioned case of Smt. Dayawanti Punj. In the above mentioned case the lessor/ L&DO on account of conversion charges had raised a demand of additional premium of Rs. 26,79,029/-, calculated @ Rs. 1,500/- per sq. yard. The petitioners in mat case of Smt. Dayawanti Punj disputed that above calculation given by the L&DO and their stand was that they were not liable to pay such a high rate of Rs. 1,500/- per sq. yard and that they were entitled to permission at the market value of the land prevalent in 1963 when they made the first application on 19.3.1963 when the rate of the land in that area was only Rs. 300/- per sq. yard. Thus, the question which is important and has lot of significance for deciding the above factor is what is the right point of time which should be considered as the basis for grant of permission because undoubtedly time factor is of utmost importance in deciding the above issue. This very question came up for consideration before the Supreme Court in case Union of India and Ors. v. Dev Raj Gupta and Ors., 42(199) DLT566 and the Supreme Court in the above said case had held that the additional premium has to be calculated on the basis of the rates which were prevalent on the date the application for the change of user was made. In this connection another aspect requiring consideration is as to what constitutes an application for permission to convert the user of the land. This aspect too stands decided by the Supreme Court in the above said case of Dev Raj Gupta wherein their Lordships of the Supreme Court have observed that it is not necessary that such an application has to be in a prescribed form and in the absence of a prescribed form the least that is expected in an application for the aforesaid purpose "is a request by all the lessees to permit the change of the user of the find showing readiness and willingness to abide by the terms and conditions for such conversion of the user".

34. Some of the petitioners in the present batch are those who till date have not applied for conversion (change of user) and in terms of the above decision of the Supreme Court if they are made to apply for change of user to the L&DO today they would have to pay the conversion charges/ additional premium on the basis of the rates of land which are prevalent today which may be too harsh and may not be in consonance with the principles of equity, fair play and natural justice because these petitioners, though not formally applied, but changed the user of the land from "residential" to "commercial" Along with other petitioners who have submitted an application requesting for change of user and expressing readiness and willingness to abide by the terms and conditions for such conversion of the user. The learned Counsel for the respondents, during the course of arguments, submitted that Realizing this difficulty the Government of India, Ministry of Urban Development (Lands Division) vide their letter No. J-20011 /2 /90-LD dated the 11th January, 1995, while issuing guidelines/ instructions for the levy of conversion charges have dealt with the above aspect

and have clarified that for calculating the conversion charges/additional premium the "crucial date" shall be as follows:

(a) The date of receipt of application (complete in all respects) for conversion accompanied by the requisite documents and the earnest money, where applicable, will be the crucial date for determining the land rates applicable for calculation of conversion charges;

(b) In cases where no application for conversion has been made or where such application is made after sanction of the building plan, date of sanction of such plan by the local body will be the crucial date; and

(c) In cases where application has neither been made nor construction executed in accordance with the originally sanctioned plan but is executed as per the revalidated plan, the date of revalidation of such plan will be the crucial date.

35. The above policy of the Government of India in so far as the same relates to "crucial date" in our opinion appears to be just and reasonable and no fault can be found with the same because the same takes care of the petitioners who have already submitted applications and also of those petitioners who have not submitted any application requesting for permission for the change in the user of the land till date.

36. The above policy, formulated by the Government of India, also contains clarification with regard to the applications to be submitted by the lessees for conversion and the said clarification reads as under:

"Applications/requests can be signed either by lessee himself or by an authorised person holding general power of attorney of the lessee for this purpose. When there are more than one lessees/GPA holders, the application can be signed by any of the lessees/GPA holders. However, in such cases before communication of the terms, a no objection certificate on non-judicial stamp paper of appropriate value for granting permission for development should be obtained by the lessee from the co-lessee/GPA holders who have not signed the original application".

"Considering the fact that in some cases unregistered GPAs were furnished & registration of GPA is not compulsory, production of registered GPA will not be insisted upon in old cases".

37. In our opinion, in view of the decision of the Supreme Court in Deo Raj Gupta "s case (supra) the above said clarification was also necessary and as a matter of fact the Government of India, as a result of the above said clarification, have given a concession to the lessees to the effect that the applications/requests need not necessarily be signed by all the lessees and can be signed either by lessee himself or by an authorised person holding General Power of Attorney of the lessee and that the General Power of Attorney may be a registered documents or may not be a registered document.

38. As a result of above discussion, in our opinion, while granting permission, for

the change of the user, the Lesser or the duly authorised agent of the Lesser such as L&DO, is fully justified in demanding additional premium/conversion charges and the additional premium/conversation charges, for the conversion of the user of the land will be determined with reference to the land rates [as notified by the Government (Ministry of Urban Development) from time to time] applicable on the "crucial date" as per the FAR assigned to the plot prevailing on the crucial date. In case where the land rates are linked to the prescribed FAR, the same will be increased or reduced, as the case may be, proportionately with reference to the actual FAR applicable on the plot as on the crucial date but in cases where the land rates have been prescribed as per existing FAR, while calculating additional premium/ conversion charges the land rates need not be proportionately/increased or reduced.

Payment of 5% p.a. Charge on Additional Premium:

39. It was submitted by the learned Counsel for the respondents that the above payment, demanded by the lessor, is really in the nature of a charge for unilateral conversion of user limited to the period when the unilateral conversion was effected till the crucial date. In our opinion, when the additional premium is being demanded on behalf of the Lesser for the unilateral conversion of the land from residential to multi-storeyed commercial and the basis for calculating the additional premium is the land rates prevailing on the "crucial date" keeping in view the FAR achieved by the petitioners, there appears to be no justification in the above demand of the respondents which in the given facts and circumstances, already explained, cannot be sustained.

Payment of Revised Ground Rent:

40. The petitioners assail the demand of the revised ground rent on the ground that in terms of the leases the same is not tenable. Their contention is that the ground rent payable by them can be revised only in terms of the lease and not otherwise. According to them any revision in the rates of the ground rent contrary to the terms of the lease is not sustainable in the eyes of law. The learned Counsel for the petitioners, while making the above submission, referred to the contents of the Clause 4 of the leases, dealing with the enhancement of ground rent and submitted that enhancement/revision in the ground rent, if any, during the currency of the lease, has to be in terms of and in conformity with the provision of the lease. The learned Counsel for the respondents, on the other hand, submitted that in view of the unilateral conversion of the land use from residential to Commercial-multi-storyed Group Housing, the respondents are entitled to revise the ground rent also.

41. In our opinion, the objection taken by the petitioners to the proposed revision of ground rent in terms of policy dated 11.1.1995 appears to be without substance. There can be no denial of this fact that any revision in rates of the ground rent has to be in accordance with the terms of the lease. However, the terms of the lease cannot be interpreted in isolation. The leases in question are for

residential purpose and in terms of the lease the land without the permission of the Lesser cannot be used for any purpose or trade other than residential. Had the user of the land not been changed, the above contention, as advanced by the learned Counsel for the petitioners, decidedly would have had substance. In the present cases the petitioners have unilaterally changed the user of the land from residential to commercial and as per settled practice whenever any property is re-developed or extensively exploited by changing the user thereof, as in the present cases, revision in the rates of ground rent is fully justified. The proposed revision in the rates of ground rent is based on the change of user and premium including additional premium to be charged from the lessees and if the proposed revised ground rent is viewed in above context, it cannot be said to be harsh or exorbitant or unreasonable.

Payment of Over Head Charges:

42. Respondents have claimed payment on account of overhead charges. No satisfactory basis for the above said demand has been given in the policy of the Lesser dated the 11th January, 1995. Even the Counsel for the respondents, during the arguments, could not satisfy us about the justification of the above demand and, Therefore, in our opinion the same cannot be sustained.

Penalty:

43. The respondents claimed payment on account of "penalty" also. The above charges, claimed by the respondents, in the nature of penalty, is regarding "excess coverage" beyond the sanctioned plans. In our opinion, in case there is excess coverage beyond the sanctioned plan, in that event no fault can be found with the above said demand of the respondents which the respondents can claim in accordance with their policy for levying such charge/penalty on such excess coverage. However, such a charge/penalty has to be with reference to the date of the alleged construction resulting in excess coverage.

Charges for Withdrawal of Re-entry:

44. The respondents have claimed charges for withdrawal of re-entry @ Rs. 3,000/- per annum. It is stated that in cases where re-entry orders have been made by the Lesser for the violation of the lease terms, such re-entry orders will be revoked only after the recovery of revocation charges, calculated at Rs. 100/- per day subject to a maximum of Rs. 3,000/- per annum from the date of re-entry to the date of revocation thereof. As already stated, the Lesser so far has not effected the right of re-entry in any of the cases. In some of the cases the L&DO in his capacity as duly authorised officer, on behalf of the Lesser has issued notice(s) asking the petitioners to show cause or expressing the intention of the Lesser to effect the right of re-entry for the alleged violation of the conditions of the lease. In the absence of any order for effecting the right of re-entry or any re-entry having been effected, there appears to be hardly any justification for the above said demand. Moreover, the respondents failed to produce any document/material for our perusal justifying the above demand. In view of the above

discussion, there appears to be no justification in the above demand of the respondents which too in our opinion cannot be sustained.

Execution of Supplementary Lease Deed:

45. In terms of the offer, the lessee is required to furnish an undertaking on a non-judicial stamp paper of Rs. 2/-agreeing to execute a supplementary lease deed .It was submitted by the learned Counsel for he petitioners that the salient terms of the supplementary lease deed, proposed to be executed, seek to bring about fundamental and sweeping charges in the perpetual lease deed already in existence and the same, Therefore, cannot be permitted on this ground alone. It was also submitted by them that the terms of the proposed supplementary lease deed are contrary to the provisions of the Government Grants Act and the lessees, in existence, which do not envisage or stipulate that prior to giving permission for change of user, such drastic and sweeping changes can be brought about in the lessees. It was also submitted by them that even in the "Blue-Book", issued by the L&DO, containing the policy regarding change of user, there is no mention about the execution of such a supplementary lease deed.

The learned Counsel for the respondents, on the other hand, submitted that the proposed supplementary lease deed is intended to provide for-

- (i) Revision of ground rent after every ten years;
- (ii) Payment of unearned increases; and
- (iii) Restriction on transfer i.e. requiring permission of the Lesser to every transfer or a part of the demised premises.

The main objection of the petitioners, in so far as the execution of the supplementary lease deed is concerned, is also to the above mentioned three conditions. We will, Therefore, examine each one of them so as to satisfy ourselves as to whether the terms and conditions sought to be introduced in the supplementary lease deed by the respondents are reasonable.

46. The first condition sought to be introduced in the supplementary lease deed relates to the revision of the ground rent after every ten years. It was submitted by the learned Counsel for the petitioners that any revision in the ground rent has to be in accordance with the terms and conditions of the lease and any revision contrary to the terms and conditions of the lease would not be justifiable. In terms of the provisions contained in Clause 4 of the lease, ground rent can be revised after every thirty years but it may be double or more. Under the new terms it cannot be more than 25% of the ground rent and thus even over a period of thirty yeas it is not likely to exceed the figure which may be arrived at in terms of the existing lease. In view of the position explained above, the petitioners, as a matter of fact, are not being put to any disadvantageous position as a consequence of the introduction of the above clause. In any case, the annual increase, if calculated on the basis of the new terms, works out to only 2.5% which is really nothing considering the rate of inflation and escalation

in property prices in the metropolis of Delhi. Moreover, as per the existing arrangement, the ground rent is to be revised every after thirty years. For any change in the above terms, the execution of a supplementary lease deed containing this additional clause is absolutely essential. Thus, view from all angles it cannot be sated that the above condition, sought to be introduced in the supplementary lease deed, is in reality unreasonable or harsh.

47. The second condition, sought to be introduced as a consequence of the execution of the proposed supplementary lease deed, is with regard to the payment of "unearned increase". It was submitted by the learned Counsel for the petitioners that in the lease deeds, in existence, there is no such clause authorising the Lesser to charge any amount on account of "unearned increase". It was submitted by them that in the absence of any such clause in the original lease deed no such clause can now be added providing for payment of unearned increase in the event of transfer of the demised plot or any portion thereof. The plots in question were leased out long back for residential purpose. At that time the concept of multi storeyed flats/ Group Housing was unknown. The petitioners have changed the user of the land in question from residential to commercial - multi storeyed building/flats/Group Housing and they now seek to transfer the property in favor of several other persons in contravention of the provisions of Clause 2(11) of the lease deeds. The petitioners are not the original lessees and it cannot be disputed that they are earning or likely to earn huge profits on such transfers. We fail to understand why a part of this should not be made over to the Exchequer. This is all the more necessary because in the first place as a result of this activity of the petitioners (construction of multi storeyed flats) there is bound to be an over all increase in the obligations of the State such as arrangements for conservancy, sanitation, public transport etc. on which the Exchequer is bound to incur a lot of additional expenditure. Secondly, this would act as a check on the lessee to prohibit him from making unconscionable profits to the detriment of public interest. In such like transactions relating to transfer of property in the Union-territory of Delhi, payment of unearned increase is the norm rather than an exceptions. The petitioners have not made out any case for exceptional treatment. On the contrary they want to be treated at par with lessee of 6, Tilak Marg, New Delhi who too was required to pay unearned increase. Thus in our opinion the above condition too, in view of the above discussion, cannot be stated to be unreasonable or harsh.

48. The third condition, sought to be introduced, as a result of the execution of the supplementary lease deed, is regarding restriction on transfer i.e. requiring the permission of the Lesser to every transfer or a part of the demised premises. The above restriction again too emanates from the Clause 2(11) of the lease deed. If a clause in the principal lease deed prohibits the transfer of a part of the demised premises it stands to reason that the supplementary lease deed also incorporates that clause. Moreover, the petitioners, as a matter of act should not have any serious objection to the above requirement because as already staled the propriety rights in respect of the property in question vest in the lessor. The

petitioners are only lessees and the Lesser in whom the propriety right vests in all fairness has every right to impose such a condition so as to enable him to know in advance as to with whom he is required to deal with in respect of the property leased out by him.

49. In view of the position explained above, no fault can be found with the above condition of the offer made by the respondents to the petitioners. The same cannot be stated to be harsh or unreasonable. In our opinion, in the changed circumstances, in which the petitioners have landed themselves by unilaterally converting the user of the land from residential to commercial - multi storeyed flats, it has become necessary that a supplementary lease deed on the lines indicated in the offer of the respondents, is executed between the parties.

Execution of a Tripartite Agreement:

50. The new terms based on the guidelines/policy dated the 11th January, 1995, also speak of the execution of a tripartite agreement so as to facilitate the transfer of flat/flats or lease hold rights on prorata basis on the formation of a co operative society of the flat owners, for smooth functioning of common amenities and proper maintenance of common places. The proposed tripartite agreement is supposed to be between three parties i.e. the lessor, the lessee and the co-operative society of flat owners/flat owners as the case may be. Third party i.e. the co operative society of the flat owners/flat owners who are supposed to be a party to the above said tripartite agreement, are not before us and as such we do not think it proper and expedient to pass any orders which may bind a party which is not before us. Even otherwise the dispute in the present petitions is regarding the conversion of the land use from residential to commercial - multi storeyed flats and presently the parties are concerned with the regularisation of the change of the land use. Once the same is regularised the subsequent events which have taken place or may take place after the regularisation of the change of user can be taken care of by separate agreement(s) that may be entered into between the Lesser and the person(s) occupying such flats on such terms and conditions as may be settled between them. Thus, we leave this question of the execution of a tripartite agreement open, to be settled by the parties later on amongst themselves.

51. The learned Counsel for the petitioners, during the course of their arguments, referred to a number of decisions. We think it proper and appropriate to consider as to how far the decisions relied upon by the learned Counsel for the petitioners, help the cause of the petitioners, in the present writ petitions. The first decision referred to by the learned Counsel for the petitioners is in case *St. Aubyn (L.M.) & Ors. v. Attorney General*, 1951 (2) All. E.R. 473. We have gone through the above decision which deals with fiscal matters and as such has no relevance in so far as controversy in the present petitions is concerned. The petitioners relied on paras 11 & 12 in case *Raja Rajinder Chand Vs. Sukhi*, , for the interpretation of the word "grant". There is no dispute about this proposition, which does not really arise in these cases. Para 12 of the above decision inter-

alia deals with a "Sanad" which is not applicable to the facts of the present case. Decision in case Shanker Prasad Goenka and Another Vs. The State of Madhya Pradesh, , relied upon by the petitioners, lays down the proposition (which is not disputed) that the Lesser is not entitled to refuse sanction or consent for wholly extraneous reasons and the grounds for refusal should have a rational connection with the property actually leased or the character of the proposed transfer the assignee or the sub-lessee and that the Lesser cannot withhold the sanction for obtaining some other collateral advantage or for imposing on the intended assignor or transfer or any greater burden than that had been imposed by the lease and that the sanction cannot be withheld arbitrarily or vexatiously. As already explained, all the terms now being offered by the respondents cannot be said to be arbitrary or unreasonable. Para 33 of the judgment in Satwant Singh Sawhney Vs. D. Ramarathnam, Assistant Passport Officer, Government of India, New Delhi and Others, was relied upon by the petitioners to contend that every executive action, if it is to operate to the prejudice of any person must be supported by some legislative authority. This is wholly inapplicable to the present cases because the proposed action is being taken by the Lesser under the lease. Decision in case Municipal Corporation of Delhi Vs. Kishan Das and Another, relied upon, deals only with the interpretation of Section 14 of the Delhi Development Act, 1957 and not the proviso. In fact, it is only Devraj Gupta's case (supra) which deals with the effect of the Master Plan as such. The decision in case The State of U.P. Vs. Zahoor Ahmad and Another, as a matter of fact is in favor of the respondents inasmuch as the finding in para 16 of the judgment is that the Government has unfettered discretion to impose any condition, limitation or restriction in its grant and the rights or privileges and the obligations of the grantee would be regulated according to the terms of the grant notwithstanding any provisions of any statutory or common law. Decision in Motilal Padampat Sugar Mills Co. Ltd. Vs. State of Uttar Pradesh and Others, , was relied upon for purposes of promissory estoppel. The same, in our opinion, does not help the cause of the petitioners as no promise was given to the petitioners. Decision in case Daya Wanti Punj and Others Vs. New Delhi Municipal Committee and Others, , was cited on the question of crucial date. We have already dealt with the aspect of the case with regard to crucial date. Decision in case Edward Keventers (Successors) P. Ltd. v. Union Of India Etc., AIR 1983 Delhi 376, was relied upon to contend that if a Government grant is for valuable consideration, then it is to be construed in favor of the grantee. In the present petitions neither there is any dispute on the above proposition laid down by this Court nor does the above question arise. Moreover, the observations of this Court in para 22 & 23 are in favor of the respondents. Damages @ 100 times the ground rent were held to be not excessive or unreasonable. The learned Counsel for the petitioners also mentioned decision in case Life Insurance Corporation of India Vs. Escorts Ltd. and Others, . In our opinion, the above decision also in no way helps the cause of the petitioners. In the above said case the Supreme Court noticed the difference between "permission" and "previous permission" whereas in the present writ petitions the expression used in the lease deeds is "prior

written consent". The decision in case *Shalimar Tar Products Ltd. Vs. H.C. Sharma and Others*, , relied upon by the petitioners, also in no way helps the case of the petitioners; rather the same supports the case of the respondents. The learned Counsel for the petitioners relied on *Mahabir Auto v. Indian Oil Corporation*, JT 1990 (1) (SC) 363 ; *Central Inland Water Transport Corporation Ltd. v. Brojonath Ganguly*, AIR 1986 SC 1572 and *Kumari Shrilekha Vidyarthi and Others Vs. State of U.P. and Others*, , to show that Article 14 of the Constitution cannot be totally excluded when the State enters into the realm of contract There is no dispute about the above proposition. However, in the facts and circumstances of the present petitions the same does not in any way help the case of the petitioner in view of our having already tested the action of the respondent on the touchstone of Article 14 of the Constitution. Decision in cases *Ahmedabad Urban Development Authority Vs. Sharadkumar Jayantikumar Pasawalla and others*, and *J.K. Synthetics Limited and Birla Cement Works and another Vs. Commercial Taxes Officer, State of Rajasthan and another*, deal with fiscal matters and thus in no way advance the cause of the petitioners. The case *Pt. Chet Ram Vashist (Dead) by Lrs. Vs. Municipal Corporation of Delhi*, , deals with the interpretation of Section 313 of the DMC Act concerning layout plans and in our opinion has no relevance to the facts and circumstances of the present writ petitions. Thus, in our opinion, the cases relied upon by the learned Counsel for the petitioners, during the course of their arguments before us, in no way help the cause of the petitioners in so far as the present writ petitions and the controversies involved therein are concerned.

Question-2:

The learned Counsel for the respondents submitted forcefully that the terms, being offered by the Government of India, Ministry of Urban Affairs & Employment, Land & Development Office, Nirman Bhawan, New Delhi vide Communication No. L & DO/LI-9/134(6)/95/396 dated the 19th October, 1995 for condoning the violation /breaches of the conditions of the lease, are not amenable to scrutiny by this Court as if it were a Court of Appeal.

52. Before dealing with the above aspect we would first examine the power and scope of judicial review or judicial control and then would revert back to the - facts of the case at hand.

53. While examining the scope of judicial review we have to see as to what the law expects from such a functionary and how has such a functionary to exercise the discretionary powers vested in it.

54. De Smith states in *Judicial Review of Administrative Action*-

"Discretionary powers must be exercised for the purposes for which they were granted; relevant considerations must be taken into account and irrelevant considerations disregarded; they must be exercised in good faith and not arbitrarily or capriciously. If the repository of the power fails to comply with these requirements it acts *ultra vires*".

In Mahesh Chandra Vs. Regional Manager, U.P. Financial Corporation and others, , their Lordships have held :

"Every wide power, the exercises of which has far-reaching repercussion, has inherent limitation on it. It should be exercised to effectuate the purpose of the Act. In legislations enacted for general benefit and common good the responsibility is far graver. It demands purposeful approach. The exercise of discretion should be objective, test of reasonableness is more strict. The public functionaries should be duty conscious rather than power charged. Its actions and decisions which touch the common man have to be tested on the touch stone of fairness and justice. That which is not fair and just is unreasonable. And what is unreasonable is arbitrary. An arbitrary act in is ultra vires. It does not become bona fide and in good faith merely because no personal gain or benefit to the person exercising discretion should be established. An action is mala fide if it is contrary to the purpose for which it was authorised to be exercised. Dishonesty in discharge of duty vitiates the action without any thing more. An action is bad even without proof of motive or dishonesty, if the authority is found to have acted contrary to reason".

55. In Tata Cellular Vs. Union of India, , their Lordships of the Supreme Court, while discussing the scope of judicial review, have held :

"The judicial power of review is exercised to rein in any unbridled executive functioning. The restraint has two contemporary manifestations. One is the ambit of judicial intervention; the other covers the scope of the Court's ability to quash an administrative decision on its merits. These restraints bear the hallmarks of judicial control over administrative action.

Judicial review is concerned with reviewing not the merits of the decision in support of which the application for judicial review is made, but the decision-making process itself. It is thus different from an appeal. When hearing an appeal, the Court is concerned with the merits of the decision under appeal. Since the power of judicial review is not an appeal from the decision, the Court cannot substitute its own decision. Apart from the fact that the Court is hardly equipped to do so, it would not be desirably either. Where the selection or rejection is arbitrary, certainly the Court would interfere. It is not the function of a Judge to act as a super board, or with the zeal of a pedantic schoolmaster substituting its judgment for that of the administrator".

56. In H. B. Gandhi v. Gopi Nath and Sons their Lordships have held:

"Judicial review is not directed against the decision but is confined to the decision-making process. Judicial review cannot extend to the examination of the correctness or reasonableness of a decision as a matter of fact. The purpose of judicial review is to ensure that the individual receives fair treatment and not to ensure that the authority after according fair treatment reaches, on a matter which it is authorised by law to decide, a conclusion which is correct in the eyes of the Court. Judicial review is not an appeal from a decision but a review of the

manner in which the decision is made. It will be erroneous to think that the Court sits in judgment not only on (he correctness of the decision making process but also on the correctness of the decision itself".

57. In *Fertiliser Corporation Kamgar Union v. Union of India*, AIR 1981 SC 344, their Lordships of the Supreme Court have held that judicial interference with the administration cannot be meticulous in our Montesquien system of separation of powers. The Court cannot usurp or abdicate, and the para meters of judicial review must be clearly defined and never exceeded. It was held in the above said case that if the Directorate of a Government company has acted fairly, even if it has faltered in its wisdom, the Court cannot, as a super auditor, take the Board of Directors to task. The function of the Court is limited to testing whether the administrative action has been fair and free from the taint of unreasonableness and has substantially complied with the norms of procedure set for it by the rules of public administration.

58. In yet another case *M/s. Shri Sitaram Sugar Co. Ltd. and another Vs. Union of India and others*, , the Supreme Court has held that the Court in exercise of judicial review, is not concerned with the correctness of the findings of fact on the basis of which the orders are made so long as those findings are reasonably supported by evidence. Their Lordships of the Supreme Court in the above said case have further held that judicial function in respect of such matters is exhausted when there is found to be a rational basis for the conclusions reached by the concerned authority.

59. Without multiplying the authorities suffice it to refer to *S. Ramachandra Raju Vs. State of Orissa*, , and *State of Uttar Pradesh and Others Vs. Maharaja Dharmander Prasad Singh and Others*,

60. Still we would like to take a note of two more decisions before reverting to the case at hand.

61. In *Ex. Naik Sardar Singh v. Union of India & Ors.*, AIR 1992 SC 417, the following statement of law made by Lord Diplock in *Civil Service Unions v. Minister for Civil Services*, 1984 3 All. ER. 935, was cited with approval :

"Judicial review has I think developed to a stage today when, without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground I would call "illegality", the second "irrationality" and the third "procedural impropriety"."

62. In the context of observance of principles of natural justice, the distinction between administrative orders and orders passed in exercise of quasi-judicial power is obliterating fast. Even an administrative order entailing adverse civil consequences has to comply with rules of natural justice. In *Shri D.K. Yadav v. M/s. J.M.A. Industries Ltd.*, 1993(3) Sca 391, their Lordships of the Supreme Court have held:

"The cardinal point that has to be borne in mind, in every case, is whether the person concerned should have a reasonable opportunity of presenting his case and the authority should act fairly, justly, reasonably and impartially. It is not so much to act and judicially but is to act fairly, namely, the procedure adopted must be just, fair and reasonable in the particular circumstances of the case. In other words application of the principles of natural justice that no man should be condemned unheard intends to prevent the authority to act arbitrarily affecting the rights of the concerned person.

It is a fundamental rule of law that no decision must be taken which will affect her an opportunity of putting forward his/her case. An order involving civil consequences must be made consistently with the rules of natural justice".

63. It, Therefore, follows that we would not interfere with the terms being offered by the Government of India vide their communication dated the 19th October, 1995 for condoning the violation/breaches of the conditions of the leases even if convinced of the possibility of a different conclusion being arrived at on the same material or because a different decision would have been a better one. All that is permissible is to see whether the decision taken by the respondents and communicated to the petitioners vide communication dated 19th October, 1995 for condoning the violation/breaches and the conditions of the lease is vitiated by irrationality, illegality, and/or procedural impropriety.

64. The power to condone the breaches of the terms and conditions of the lease undoubtedly is a discretionary power vested in the Lesser or to be exercised by an officer duly authorised by the Lesser in this behalf. The power though administrative in nature is coupled with a duty to act fairly in public interest and the same has to be exercised consistently with the principles of fair play, equity and natural justice. The same is open to judicial review only on the grounds of illegality, irrationality and procedural impropriety.

65. If we apply the above criterion to the case at hand we notice that in the exercise of such a power, as already explained, there is no illegality or irrationality or procedural impropriety. The power has been exercised by an officer (L&DO) duly authorised by the Lesser in this behalf consistently with the principles of natural justice in a fair manner and in public interest and the terms, now being offered by the respondents for condoning the breaches, based on their policy dated the 11th January, 1995, excepting the clauses, held by us as unreasonable, cannot be said to be unreasonable, harsh, illegal or improper.

Question-3 .-

66. The learned Counsel for the petitioners submitted that the petitioners in the present writ petitions have been subjected to hostile discrimination inasmuch as they have not been given the same treatment which has been meted out by the respondents to the lessee of 6, Tilak Marg and Ms. Sita Nanda, whose cases were identical with the cases of the petitioners. On the other hand the learned Counsel for the respondents submitted that there has been no discrimination at all and

equals have been treated alike. He further submitted that unequals cannot be treated as equals and the petitioners cannot claim parity with the cases of the lessee of 6, Tilak Marg and that of Ms. Sita Nanda.

67. Article 14 of the Constitution enjoins the State not to deny to any person equality before the law or equal protection of the laws. The two expressions "equality before the law" and "equal protection of laws" do not mean the same thing even if (here may be much in common. The phrase "equality before the law" contains the declaration of equality of civil rights of all the persons within the territories of India. It is a basic principle of republicanism. The phrase "equal protection of laws" is adopted by the framers of the Constitution from the fourteenth amendment to the U.S. Constitution. The right conferred by Article 14 postulates in clear cutters that all persons similarly circumstanced shall be treated alike both in privileges conferred and liabilities imposed. In other words Article 14 ensures equality amongst equals and its main aim and object is to protect persons similarly placed against discriminatory treatment. Conversely if persons dissimilarly situate are treated equally it would also result in discrimination.

68. The Supreme Court in case Gauri Shanker and others Vs. Union of India and others, has held that equals should not be treated unlike and un likes should not be treated alike. Their Lordships of the Supreme Court in the above said case have further observed that in giving effect to the above said salutary principle, a mathematical precision is not envisaged and there should be no fanatical or "doctrinaire" or wooden approach to the matter. A practical or realistic approach should be adopted.

69. Their Lordships of the Supreme Court in case The The State of West Bengal Vs. Anwar Ali Sarkar, and in case Budhan Choudhry and Others Vs. The State of Bihar, , have held that superficial un equality may not necessarily amount to denial of equal protection of laws unless there is shown to be present in it an element of intentional and purposeful discrimination.

70. In the case relating to 6, Tilak Marg, the lease of the property has been executed on 22.4.1963 which inter-alia provides a restriction of the lessee to the effect that before any assignment of transfer of the premises or any part thereof, written approval of the Lesser is required and the Lesser is entitled to charge 50% unearned increase and also has the pre-emptive right to purchase the property. Thus the petitioners can have no grievance on the above count in so far as the plot situated at 6, Tilak Marg is concerned. Moreover, the petitioners, in our opinion, cannot claim equality of treatment viz-a-viz the lessee of 6, Tilak Marg because in the case of 6, Tilak Marg there was no unilateral conversion of land use by that lessee unlike the present petitioners. The lessee of 6, Tilak Marg did not contravene any of the terms of the lease deed unlike the petitioners. Thus the contention of the learned Counsel for the petitioners that they deserve to be treated on the same footing on which the lessee of 6, Tilak Marg was treated, in our opinion, is without any substance because there is no parity

between the two and as already stated only equals can be treated alike and not the unequals.

71. Coming to the case of Ms. Sita Nanda, we notice that the plot of Ms. Sita Nanda is situated on Prithvi Raj Road where the permissible FAR is 75. Though said Ms. Sita Nanda has been charged additional premium on the basis of permissible FAR yet the FAR achieved by Ms. Sita Nanda in the Group Housing Scheme is less than the permissible FAR. In the case of petitioners residential premises already existed on the plots in question and the maximum FAR which they could achieve under the NDMC Building Bye-Laws was about 92. After the coming into force of the Master Plan, if permission for conversion was given, the petitioners could have achieved FAR of 400 for commercial and 175 for Group Housing. Under the Master Plan of 1990 the maximum permissible FAR has been brought down to 150. As against the above maximum permissible FAR the petitioners who have unilaterally converted the land use from residential to commercial have achieved about 400 FAR for commercial purposes and 175 FAR for residential purposes. Thus Ms. Sita Nanda did not get any benefit in terms of the FAR in converting the land use from residential to Group Housing whereas the case of petitioners is entirely different because as a result of change of user of the land from residential to commercial or multi-storeyed Group Housing Flats they stand to gain substantially in FAR. In the presence of the above facts there can be no parity between the petitioners and the case of the plot of Ms. Sita Nanda situated on Prithvi Raj Road.

For the above stated reasons we are not time lined to accept the contention of the learned Counsel for the petitioners that the petitioners have been subjected to hostile discrimination by the respondents.

Conclusion:

For the foregoing reasons the writ petitions are partly allowed and the same are disposed of with the following directions :

(i) that the impugned notice(s) and/or demand/bills raised by the Lesser for condoning the breaches of the terms and conditions of the leases are hereby quashed and that no further action be taken by the respondents in pursuance thereof;

(ii) that the respondents, consistently with the observations made hereinabove, shall within six weeks from the date of this order, give fresh terms and conditions for the condensation of the breaches of the terms and conditions of the lease to the concerned lessees (petitioners) irrespective of the fact whether any notice of determining the lease and/or for exercising the right of re-entry has been already given or not. The petitioners, within thirty days from the date of the receipt of such fresh terms from the respondents, shall complete the formalities, as stated above, and shall also deposit the amount in terms of the fresh offer. In case the petitioners fail to complete the formalities and deposit the amount within the above said period of thirty days, the respondents would be at liberty to take

further act in against the defaulting petitioner(s) in terms of the provisions of the lease. In the facts and circumstances of the case the parties are left to bear their own costs.