

(2005) 03 AHC CK 0206

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 48270 of 2004

Krishna Kumar Jaiswal

APPELLANT

Vs

State of Uttar Pradesh and Nisar Ahmad

RESPONDENT

Date of Decision : 09-03-2005

Acts Referred:

Mines and Minerals (Development and Regulation) Act, 1957 — Section 15, 17A
Uttar Pradesh Minor Minerals Concession Rules, 1963 — Rule 12(1), 12(2), 19(2),
23, 23(1)

Citation : AIR 2005 All 205 : (2005) 98 RD 679 : (2005) 1 RD 679

Hon'ble Judges : Ashok Bhushan, J

Bench : Single Bench

Advocate : S.K. Srivastava and Akhilesh Kalra, for the Appellant; S.P. Singh and S.C., for the Respondent

Final Decision : Allowed

Judgement

Ashok Bhushan, J.—Heard Sri Akhilesh Kalra, learned counsel for the petitioner and Sri S. P. Singh appearing for the respondent no. 4 and the learned standing counsel. Affidavits have been exchanged between the parties and with the consent of the parties the writ petition is being finally decided.

2. By this writ petition the petitioner has prayed for quashing the order dated 1.11.2004 passed by the State of Uttar Pradesh dismissing the revision filed by the petitioner challenging the mining lease dated 21.6.2004 granted in favour of respondent No. 4. It has been further prayed that the order dated 21.6.2004 and the lease deed executed in pursuance thereof be quashed.

3. Brief facts of the case as emerge from the pleadings of the parties are:_____

An application was made by the respondent No. 4 dated 18.10.2001 before the District Magistrate, Siddharth Nagar for grant of lease under the U.P. Minor Minerals (Concession) Rules, 1963 over plots No. 375, 386, 390, 400. 410,

377Ka, 377Kha, 385, 388, 395, 399, 401, 409, 412 and 414 area 6.00 acres situate in village Bargadwa, district Siddharth Nagar. Petitioner in his application has stated that the area in which lease has been applied is bhumidhari plots and the owners of the bhumidhari land have given consent in writing in favour of respondent No. 4. No orders for grant of lease was issued by the District Magistrate on the said application. The respondent No. 4 filed writ petition No. 31172 of 2003 Nisar Ahmed v. State of Uttar Pradesh and Ors. which was disposed of by the Division Bench of this Court vide its order dated 23.7.2003. The District Officer Siddharth Nagar was directed to consider and decide the application filed by the petitioner giving a reasoned order and after affording opportunity of hearing to all concerned. After the order of this Court dated 23.7.2003 the District Magistrate sanctioned the mining lease of ordinary sand for a period of three years with effect from 21.6.2004 to 20.6.2007 In pursuance of the order dated 21.6.2004 the lease deed was also executed on 21.6.2004 in favour of the respondent No. 4. In pursuance of the advertisement dated 24.2.2003 issued by the District Magistrate for auction of the lease, the petitioner being the highest bidder was granted the mining lease of sand bearing area of Tahsil Naugarh and Shauratgarh district Siddharth Nagar. After the approval of the State Government the lease was executed in favour of the petitioner on 17.6.2003. After the petitioner coming to know that the respondent No. 4 has started mining operation in the adjacent area of the petitioner's lease area, a revision was filed by the petitioner under Rule 78 of the U.P. Minor Minerals (Concession) Rules, 1963. The respondent No. 4 was issued notice in the revision who appeared and filed his objection and reply. The State Government after hearing both the parties dismissed the revision vide its order dated 1.11.2004.

4. The case of the petitioner in the writ petition is that the grant of lease in favour of the respondent No. 4 dated 21.6.2004 is illegal and contrary to the provisions of the U.P. Minor Minerals (Concession) Rules, 1963. It is stated that the Full Bench of this Court vide its judgment dated 27.3.2001 in writ petition of Ram Chandra's case held Rule 9A and Rule 53 A of U.P. Minor Minerals (Concession) Rules, 1963 (hereinafter referred "1963 Rules") as ultra vires. SLP was fled by the State Government of Uttar Pradesh challenging the Full Bench decision of this Court dated 27.3.2001. After the judgment dated 27.3.2001 the State Government issued a Radiogram dated 30.3.2001 directing all the District Magistrates not to grant any mineral concession. The Government order dated 13.6.2001 was issued directing grant of certain categories of mineral concession. In the SLP filed by the State of Uttar Pradesh in the apex Court an interim order was passed by the apex Court on 10.9.2001 directing the parties to maintain status quo. After passing of the status quo order applications were filed before the apex Court for permitting grant of lease in respect of "Nizi Bhumi" (land under private ownership) but the said application was rejected on 5.10.2001. By an order dated 7.11.2001 of the State Government information to all concerned were issued with regard to order of the apex Court dated 5.10.2001. In the apex

Court the State of Uttar Pradesh filed an affidavit that the State would grant mining lease by way of public auction. The apex Court vide its order dated 9.9.2002 dismissed the appeal. After dismissal of the appeal on 9.9.2002 the State Government issued a Government order dated 2.11.2002 providing that all mining areas henceforth be leased out by way of auction under Chapter IV of 1963 Rules. The Government order dated 2.11.2002 provided that new mining areas also shall be settled by public auction under Chapter IV. A Government order dated 25.5.1995 was earlier issued providing that with regard to newly discovered area lease may be granted on the principle of "first come first serve". The State Government issued subsequent Government order dated 27.8.2002 which discontinued the earlier policy as issued by the Government order dated 25.5.1995 with regard to newly discovered areas. It is stated that the application of the respondent No. 4 could not have been entertained on 28.10.2001. No lease could have been granted in view of the status quo order passed by the apex Court on 10.9.2001. Further the entire mining area of the State having been notified for auction lease under Chapter IV by the Government order dated 2.11.2002, the application under Chapter II given by the respondent No. 4 could not have been considered. The judgment of this Court dated 23.7.2003 passed in writ petition No. 31172 of 2003 filed by the respondent No. 4 only directed for consideration of the application of the respondent No. 4. The Division Bench never directed that the mining lease be granted to respondent No. 4. The District Magistrate without considering the entitlement of the respondent No. 4 to get the mining lease under Chapter II has illegally granted the mining lease to the respondent No. 4 on 21.6.2004. Another Government order dated 28.2.2004 was issued whereby declaration under Sub-rule (1) of Rule 23 of 1963 Rules was withdrawn and it was provided that the mining lease would be granted under Chapter II and Chapter VI of the 1963 Rules. The Government order however, further directed that the necessary amendment under Rule 9A and Rule 53 A are shortly to be made and the lease be granted after the said amendment of the Rules. It is stated by the petitioner that the amendment under Rules 9A and 53 A were made by 26th Amendment Rules 2004 dated 22.6.2004 and before the said amendment of Rules the lease has been granted to respondent No. 4 contrary to the Government order dated 28.2.2004. It has further been submitted that the State Government without considering all the submissions and grounds taken by the petitioner has rejected the revision. The revisional court has upheld the grant by the District Magistrate holding it to be in pursuance of the direction issued by the Division Bench of this Court on 23.7.2003 in writ petition filed by the respondent No. 4.

5. A counter affidavit and the supplementary counter affidavit has been filed by the respondent No. 4 stating that the grant in favour of the respondent No. 4 was fully justified. It is stated in the counter affidavit that the status quo order of the apex Court dated 10.9.2001 was with regard to leases under Rule 9A. The lease granted in favour of the respondent No. 4 has nothing to do with Rule 9A hence status quo order dated 10.9.2001 of the apex Court was not applicable

with regard to respondent No. 4. After the Full Bench judgment of this Court dated 27.3.2001 the State Government had issued radiogram stopping the grant of lease but subsequently by Government order dated 13.6.2001 the lease of land of private owners was made permissible. It is stated that in view of the Government order dated 25.9.1995 the grant of mining lease was permissible to newly searched area on the principle of "first come first serve". The Government order dated 27.8.2002 is not applicable on the grant of lease in favour of the respondent No. 4. The Government order dated 2.11.2002 was applicable only in respect of the Government land declared by the District Magistrate. The said Government order has no applicability with regard to "Nizi Bhumi" (land under private ownership). The petitioner has no locus standi to challenge the lease granted in favour of the respondent No. 4.

6. Learned counsel for the petitioner Sri Akhilesh Kalra in support of the writ petition raised following submissions :-

1. In view of the order passed by the apex Court dated 10.9.2001 in the SLP filed against the Full Bench judgment of this Court in Ram Chandra's case and subsequent order dated 5.10.2001 by which application seeking permission to grant lease in "Nizi Bhumi" (land under private ownership) had been rejected by the apex Court, the respondent No. 4 could neither file an application for lease nor could have been granted mining lease.

2. The apex Court dismissed the appeal on 9.9.2002 filed by the State Government on the stand taken by the State Government that henceforth lease shall be granted by auction lease under Chapter IV. A Government order dated 2.11.2002 was issued by the State Government declaring all the mining area in the State to be settled by way of public auction under Chapter IV. After declaration of entire mining area in the State under Chapter IV, no lease application for grant of lease under Chapter II could be entertained or survive.

3. That by Government order dated 27.8.2002 the earlier policy of giving mining lease with regard to newly discovered area on the basis of "first come first serve" was withdrawn. In view of the Government order dated 27.8.2002 even the newly discovered area was required to be noticed and the grant of lease in favour of the respondent No. 4 is clearly violative of Government order dated 27.8.2002.

4. That the lease has been granted to respondent No. 4 under Chapter II by order dated 21.6.2004 without there being any notice as provided under Rule 72 of the Rules hence the grant is illegal.

5. That by the Government order dated 28.2.2004 the State Government directed for grant of lease under Chapter II after amendment of Rules 9A and 53 A which amendments were made vide notification dated 22.6.2004 hence before the said date of amendment lease could not have been granted to respondent No. 4.

7. Sri S.P. Singh learned counsel appearing for the respondent No. 4 refuting the

submissions of the counsel for the petitioner justified the grant of lease in favour of the respondent No. 4. At the very outset it has been submitted that the petitioner has no locus standi to challenge the grant of lease in favour of the respondent No. 4. It is contended that the petitioner has already been granted mining lease and the petitioner wanted to monopolies the entire mining area. Sri Singh further submitted that the order of status quo passed by the apex Court on 10.9.2001 is not applicable with regard to lease granted to respondent No. 4 since the said order was applicable with regard to lease which were claimed according to preference under Rule 9A of the Rules. Sri Singh submitted that the apex Court itself has clarified the scope of status quo order. Reference has been made to the judgment of the apex Court dated 5.12.2003 in Civil Appeal No. 9581 of 2003, Abhimanyu Prasad and Ors. v. State of Uttar Pradesh and Ors. It is submitted that in Government order dated 13.6.2001 paragraph 6 it has been provided that there is no restriction for grant of mining lease in "Nizi Bhumi" (land under private ownership). By 25th amendment Rules dated 12.4.2002 Rule 9A has been substituted which provides preference with regard to category "B" land. The Government order dated 2.11.2002 notifying the mining area under Chapter IV is in respect of mining Mineral under river bed only. The Government order does not apply with regard to mining lease in "Nizi Bhumi" (land under private ownership). The Division Bench of this Court in its judgment dated 23.7.2003 in writ petition No. 31172 of 2003 has rightly directed the district officer to consider the mining application of the petitioner which was rightly allowed after obtaining the report from mines Inspector. The Government order dated 25.5.1995 provided for grant of mining lease to a discoverer of land on principle "first come first serve". Rule 72 is not applicable with regard to grant of lease under the Government orders dated 25.5.1995. The Government order dated 25.5.1995 and 13.6.2001 are still in existence and the lease in favour of the respondent No. 4 has rightly been granted on the basis of the said Government orders. The Government order dated 28.2.2004 is also not applicable with regard to grant of lease of "Nizi Bhumi" (land under private ownership) newly discovered areas. The Division Bench of this Court in the writ petition No. 27945 of 1997 Jagmohan Dutt Sharma v. State of Uttar Pradesh and Ors. dated 11.12.1997 has upheld the grant of lease on the basis of the Government order dated 25.5.1995.

8. I have considered the submissions raised by the learned counsel for the parties and have perused the record.

9. The U.P. Minor Minerals (Concession) Rules, 1963 have been framed in exercise of power u/s 15 of the Mines and Minerals (Regulation and Development) Act, 1957. Section 15 of the Central Act empowers the State Government to make rules for regulating the grant of mining lease with regard to minor minerals. Present is a case of mining lease of sand which is a minor mineral. Under Chapter II of the 1963 Rules mining leases are to be granted on an application for grant of lease submitted in form MM-1. Rule 9 provides for preferential rights of certain persons. Rule 9A as inserted under the Rules

provided for preferential right of certain persons in respect of sand. Chapter IV deals with the auction lease. Rule 23 provides that the State Government may by general or special order declare the area or areas which may be leased out by auction or by tender or by auction-cum-tender. Rule 24 further provides for withdrawal of area from auction or a part thereof by the State Government. Chapter VI deals with mining permit. It is not disputed by the parties that the State of Uttar Pradesh from time to time by the Government orders have laid down mining policy of the State. By general orders the State has also been making declaration under Rule 23 for grant of lease by auction/tender land also withdrawing areas earlier notified under Rule 23. The Government orders have also been issued from time to time regulating the grant of mining lease in accordance with the provisions of 1963 Rules. In the present case the application for grant of mining lease with regard to plots in question was made by the respondent No. 4 on 18th October, 2001 (as mentioned in the order dated 18.6.2004) of Officer-in-charge Mines Annexure-1 to the Supplementary counter affidavit and the District Magistrate has approved the said grant by its order dated 11.6.2004/21.6.2004. For purposes of this case it is relevant to note the relevant mining policy of the State during the said period and the Government orders issued by the State Government from time to time covering the subject and also the relevant rules as existing from time to time.

10. Rule 9A was inserted for the first time in the 1963 Rules providing for preferential right of certain persons in respect of sand by 20th amendment Rules vide notification dated 27.8.1994. Vide Government order dated 16.3.1999 auction/auction-cum-tender process was made applicable for grant of mining lease in entire State of Uttar Pradesh. The Government order was challenged in this Court by writ petition No. 23884 of 1999 (Uma Stone Crushing Co. v. State of Uttar Pradesh and Ors.) which was partly allowed on 28.10.1999. A Division Bench of this Court however, upheld the Government order dated 16.3.1999 partly. SLP was filed before the apex Court against the aforesaid Division Bench judgment (Civil Appeal No. 5738 of 2002). In the Civil Appeal No. 5738 of 2002 an affidavit was filed by the State of Uttar Pradesh that after the amendment made to Rule 9A lease will be granted only on public auction and there will be no preference granted in such auction. The apex Court modified the judgment of the Division Bench in Uma Stone Crushing Co. v. State of Uttar Pradesh and Ors. to that effect that the preference will not be applied to the auction made under Chapter IV. The appeal was disposed of. Copy of the judgment of the apex Court dated 9.9.2002 has been filed as Annexure -1 to the counter affidavit.

11. During pendency of the said appeal before the apex Court Rules 9A and 53A were struck down by the Full Bench of this Court by its judgment dated 27.3.2001 against which judgment the State of U.P. also filed special leave petition. The State Government in the meantime vide Government order dated 30.9.2000 declared policy of grant of lease under Chapter II. After passing of the order of status quo on 10.9.2001 the State Government issued Government order dated 2.11.2002 notifying the entire mining area of the State under

Chapter IV. The Government order dated 2.11.2002 continued till issuance of the Government order dated 28.2.2004 by which again the entire area of the State was withdrawn from Rule 23 and Chapters II and IV again become applicable. The Government order dated 28.2.2004, however, provided the amendment under Rule 9A and 53A are in process and lease be granted after the said amendment. As contemplated under Government order dated 28.2.2004 Rules 1963 were amended by the U.P. Minor Minerals (Concession) Rules 26th Amendment Rules, 2004 dated 22.6.2004 by which Rule 9A was omitted. In view of the amendment made by 26th Amendment Rules read with Government order dated 28.2.2004 the lease could have been granted under Chapter II.

12. Before proceeding to consider the submissions of the counsel for the petitioner it is necessary to consider the objections raised by the counsel for the respondent No. 4 regarding locus of the petitioner to challenge the grant of lease in favour of respondent No. 4. The petitioner admittedly has taken mining lease with regard to two Tahsils of district Siddharth Nagar on the basis of the auction held in April, 2003 he being the highest bidder. The lease area granted in favour of the respondent No. 4 is near the mining area of the petitioner. The petitioner's case is that the grant in favour of the respondent No. 4 has been made without notice and without making the area available to all due to which rights have been adversely affected. The petitioner claimed to be engaged in the excavation of minor minerals. The petitioner's further case is that without auctioning the aforesaid area the lease could not have been granted in favour of the respondent No. 4. The grant in favour of the respondent No. 4 has also been challenged on the ground that the petitioner is depositing higher amount of royalty/dead rent in comparison to respondent No. 4.

13. There is no dispute that the petitioner is also engaged in excavation of sand and on the basis of auction lease petitioner is carrying on mining operation. The petitioner's case as noticed above is that the lease could not have been granted in favour of the respondent No. 4 without settling it in an auction. One of the prayers in the writ petition made by the petitioner is also a writ of mandamus directing the respondents to settle the area afresh after notice. When grant in favour of the respondent No. 4 is claimed to be illegal contrary to U.P. Minor Minerals (Concession) Rules, 1963 the challenge can be laid by any person who feel aggrieved from the said auction. Petitioner who wants the area to be settled afresh has every right to challenge the grant in favour of the respondent No. 4. The submission of the learned counsel for the respondents that the petitioner has no locus standi cannot be accepted. The submission of the respondents that the petitioner want to monopolies the entire mining area can also not be accepted since the prayer of the petitioner in this writ petition is to direct for settlement afresh after notice. When a settlement is made after notice every one desirous of mining lease can participate and there is no question of any monopoly by the petitioner. In any view of the matter, the petitioner has sufficient locus to challenge the grant. The revisional authority has also rejected the preliminary objection raised by the respondents regarding locus of the petitioner to file

revision. Thus preliminary objection of the respondent's counsel cannot be accepted.

14. The first submission of the counsel for the petitioner is based on the interim order of status quo passed by the apex Court dated 10.9.2001. The status quo order was passed in the SLP filed by the State of Uttar Pradesh against the Full Bench judgment of this Court. The SLP in which the status quo order was continuing was subsequently disposed of on 9.9.2002. In the present case the lease has been granted in favour of the respondent No. 4 on 21.6.2004, on which date admittedly the order of status quo was not operating. In view of the fact that the lease has been granted in favour of respondent No. 4 on 21.6.2004 by which time the status quo order was not continuing, it is not necessary to examine the above contention of the counsel for the petitioner any further.

15. The second submission of counsel for the petitioner is that after the order of the apex Court dated 9.9.2002 the State Government issued a Government order dated 2.11.2002 notifying the entire mining area under Rule 23 for grant of mining lease by auction. A copy of the Government order has been filed as Annexure-9 to the writ petition. The Government order dated 2.11.2002 declares the entire vacant areas under Rule 23 for grant of auction lease. The submission of counsel for the petitioner is that in view of the declaration by the Government order dated 2.11.2002 no lease application could have been entertained or granted under Chapter II. The submission of the learned counsel for the respondent No. 4 is that the Government order dated 2.11.2002 is not applicable with regard to grant of lease in "Nizi Bhumi" (private owned land or area newly discovered). Learned counsel for the respondents has submitted that the Government order dated 2.11.2002 is with regard to only those land which vest in the State and is not applicable with regard to privately owned land. For appreciating the said submission the Government order dated 2.11.2002 has to be looked into in its entirety. The said Government order dated 2.11.2002 is on the subject; grant of mining lease in State of Uttar Pradesh all vacant area having Baloo, Maurang and Bajari under Chapter IV of U.P. Minor Minerals (Concession) Rules, 1963. The Government order dated 2.11.2002 has been issued thus for entire area of the State. No exception is granted in the Government order excluding private lands. All minor minerals situated in the State of U.P. vest in the State whether lie in the land owned by the State or a private person. The State is a owner of the minerals though lying in a private land. A person who may be owner of a particular land, cannot claim ownership of minerals, found in the sub soil, or surface of the land. The apex Court in Bhagwan Das v. State of Uttar Pradesh and Ors. : U.J. (S.C.) 1976 Page 418 had occasion to consider the rights of a private owner with regard to sand and gravel deposited by the receding waters of the river. After considering the provisions of the U.P. Zamindari Abolition & Land Reforms Act, 1961 and the U.P. Minor Minerals (Concession) Rules, 1963, the apex Court laid down that the State is owner of all the minerals, may it lie on the surface of land of private owner. Following was laid down in paragraph 10:-

"10. Evidently, the appellant finds it difficult to reconcile himself with the position that what nature and good fortune have bounteously left on his lands should be permitted to be taken away by the Government which has not a vestige of title to the lands. The answer to this difficulty is two-fold. In the first place the deposits, by a definition contained in a competent legislation, are "minor minerals" and it is of no relevance that the Act of 1957 and the Rules of 1963 bring within their compass even those deposits which are left behind by the feuvial action of rivers. If that is the policy and the intendment of law, it is unprofitable to explore whether the statute could not have been more generous or less grudging to riparian owners. Secondly, and that bears on equity, prior to the point of time when the flood water of the river carried the sand and gravel to private lands, the title thereto was vested in the State Government. The rivers, the river beds and the sand, bajris and building stones lying in the river water are of State ownership. Nature carries those deposits to lands abutting on rivers and what the Act and the Rules provide for is to enable the Government to reclaim what it lost without any fault of its own. Halsbury's Laws of England (3rd Ed., Vol. 39, p. 559, paragraph 775) says that "The soil of the seashore, and of the bed of estuaries and arms of the sea and of tidal rivers, so far as the tide ebbs and flows, in prima facie vested of common right in the Crown, unless it has passed to a subject by grant or possessory title." Paragraph 768 (P.556) says that the Crown is also "entitled to the mines and minerals under the soil of sea" within certain limits. The sand and gravel deposited by the receding waters of the river are truly a part of the soil of the river bed and therefore, belong to the State. The fluvial action of the river carries them to riparian lands but such shifting cannot erase the title of the rightful owner."

16. Further the Government order dated 2.11.2002 paragraph 4 sub paragraph (5) itself refers to all new areas which are laying vacant. The mining policy which was issued by the Government order dated 2.11.2002 was with regard to the sand bearing area of entire State and it cannot be said that the said Government order did not regulate the minerals which are situate in the land owned by a private person. No other mining policy of the State with regard to land under the private ownership has been brought on record. Further, the State having taken stand before the apex Court that it will settle mining lease under Chapter IV by public auction only, State while framing policy for settlement of mining right could not have taken a different stand with regard to land under the ownership of private person. Thus the Government order dated 2.11.2002 is fully applicable with regard to all the areas in the State including land in private ownership. Paragraph 4 sub paragraph (5) issued direction for new area or the vacant area for settlement of mining right according to Chapter IV.

17. The next submission of the counsel for the petitioner is based on the Government order dated 27.8.2002 copy of which has been filed as Annexure-11 to the writ petition. Earlier the Government order dated 25.5.1995 was issued by the State Government (Annexure-10 to the writ petition) which provided that those areas which are new and have been applied by the applicants after

searching the said area, for those areas, there being no provision for issuing proclamation, the said area be granted on the basis of "first come first serve". The Government order dated 13.6.2001, which was issued after the Full Bench judgment of this Court dated 27.3.2001 in Ram Chandra's case also continues the said policy. The Government order dated 27.8.2002 Annexure-11 to the writ petition makes specific reference of the earlier Government order dated 25.5.1995 and 13.6.2001 and the said Government order dated 27.8.2002 specifically directs that the State after reconsideration has taken the view that new areas be not granted on the basis of newly discovered area (Khoji areas). The said Government order further provides that for maintaining the transparency in grant of area with regard to new areas, the new areas be notified and applications be invited which is in the public interest. The Government order dated 27.8.2002 thus clearly makes a departure from the earlier policy of the State and the Government order dated 25.5.1995 and 13.6.2001 were given a go bye by the said Government order. The claim of the respondents is heavily based on the Government order dated 25.5.1995 and the case of the respondent No. 4 is that the area being newly discovered and applied by the respondent No. 4, the lease has been granted to the respondent No. 4 on the basis of "first come first serve" as per Government order dated 25.5.1995. The State Government having departed from the Government order dated 25th May, 1995 and having circulated new policy by the Government order dated 27.8.2002 for notifying the new areas also and settlement after inviting application the grant in favour of the respondent No. 4 on the strength of the Government order. Dated 25th May, 1995 cannot be sustained. The Government order dated 25.5.1995 is thus not available to the respondent No. 4 to fall back upon it for sustaining the grant in his favour.

18. The Division Bench of this Court in Jagmohan Dutt Sharma's case had upheld the grant in pursuance of the Government order dated 25.5.1995. The said judgment was rendered by the Division Bench of this Court on 11.12.1997. The Government order dated 25.5.1995 having itself given a go bye by subsequent Government order dated 27.8.2002, the Division Bench judgment in Jagmohan Dutt Sharma's case does not help the respondent No. 4 in the present case.

19. The next question for consideration is as to whether the notice under Rule 72 was required to be published before settling the area in favour of the respondent No. 4. Rule 72 of the U.P. Minor Minerals (Concession) Rules, 1963 is as follows :-

"72. Availability of area for re-grant on mining lease to be notified, _____ (i) If any area, which was held under a mining lease under Chapter II or on reserved u/s 17A of the Act becomes available for re-grant on mining lease the District Officer shall notify the availability of the area through a notice inviting for applications for grant of mining lease specifying a date, which shall not be earlier than thirty days from the date of notice and giving description of such area and a copy of such notice shall be displayed on the Notice Board of his office and shall

also be sent to Tehsildar of such area and the Director.

(ii) (iii)"

20. Rule 72 (i) provides that the area which was held under mining lease under Chapter II or was on reserved u/s 17A of the Act become available for re-grant of mining lease. The District Officer shall notify the availability of the area. The opening words of Section are "if any area, which was held under a mining lease under Chapter II" thus Rule 72 pre-supposes holding of an area under mining lease under Chapter II. It is not the case of either of the parties that the area granted in favour of the respondent No. 4 was ever held under a mining lease. Further the words used in the Rule 72 (i) are "become available for re-grant". These words further denotes that the area has to become available for re-grant. The word "re-grant" used in Rule 72 (i) has been consciously used. Thus Rule 72 in its plain term is applicable when the area was earlier held under a mining lease. Learned counsel for the petitioner in support of his submission that Rule 72 is applicable, has placed reliance on the apex Court judgment in M/s. A-One Granites Vs. State of U.P. and Others, In the case before the apex Court the area which was leased out, was earlier held under lease granted under Chapter IV. The argument raised was that since the lease was not held under Chapter II Rule 72 is not strictly available. The apex Court repelling the submission of non applicability of Rule 72 held that by accepting the interpretation that Rule 72 shall apply when the lease was held under Chapter II and not Chapter IV the object of the Rule will be frustrated. Following was held by the apex Court in paragraph 19 :-

"19. The language used in Rule 72 (1) on a literal meaning being given, would undoubtedly support the contention of Mr. Das and Mr. Sanghi appearing for the appellant that this procedure would not apply when the area in question had been held under a lease not under Chapter II but under Chapter IV. But such an interpretation should be avoided inasmuch as the very purpose for which Rule 72 has been engrafted in the Rules will totally get frustrated. The object of having such provision is transparency in the matter of granting mining lease and restrict any underhand dealing with the minerals by the permit-granting authority. The object of notifying the availability through a notice by the District Officer is to bring it to the notice of the public at large, so that an interested applicant can make an application and such application could be considered on its own merit, when more than one applications are received in respect of the same area. The lease under Chapter II of the Rules could be granted for a period not exceeding ten years, as provided in Sub-rule (1) of Rule 12 and under Sub-rule (2) of Rule 12, but if the State Government is of the opinion that it would be necessary in the interest of mineral development it may grant the lease for any period exceeding ten years but not exceeding fifteen years. The Rules also contemplate renewal of such lease. Rule 19(2) empowers the State Government to determine any lease on the grounds indicated thereunder, after giving the lessee a reasonable opportunity of stating his case. The area which was being operated upon on the basis of a lease obtained under Chapter II when becomes available

for re-grant if the prescribed procedure under Rule 72 is not followed, then it may lead to favouritism and bias, ultimately resulting in corruption of the permit-granting authority. It is to prevent such abuse the legislature has brought into the Rules the procedure prescribed under Rule 72, the duty of notifying the availability of the area by the District Officer. In case of auction-lease, it is not necessary, since the procedure prescribed for grant of auction-lease in Rule 27 itself indicates that the District Officer or the Committee authorised is duty-bound to at least give a notice 30 days before the date of auction in the manner indicated under the Rules by providing the date, time and place of auction and if for any reason, the auction is not completed on the notified date, then a fresh auction could be held after giving a shorter notice of at least seven days. Thus the procedure followed for grant of lease by auction as provided under Rule 27 or tender as provided under Rule 27-A or auction-cum-tender, as provided under Rule 27-B is itself sufficient notice to the public to enable them to participate in the auction/tender/auction-cum-tender and question of any clandestine dealing in such case would not arise. But in a case when the area was held under auction/tender/auction-cum-tender under Chapter IV and the State Government withdraws the area from the said procedure, where after provisions of Chapter II, the normal procedure for granting lease becomes applicable as in the case in hand, then if Rule 72 is interpreted in the manner, as contended by the learned counsel for the appellant, it would frustrate the purpose of transparency and openness engrafted in Rule 72 and such an interpretation will be against the legislative intent. It is a cardinal principle of construction that the courts must adopt a construction which would suppress the mischief and advance the remedy. In other words, the court must adopt a purposive interpretation of the provisions under consideration. So construed, it is difficult for us to accept the contention of Mr. Das appearing for the appellant that Rule 72 has no application to the case in hand merely because the area in question had been held by the previous lessee for some period under auction/tender basis under Chapter IV, particularly when on 30.3.1995 the District Magistrate withdrew the area held under auction/tender system to the normal procedure of grant of mining lease under Chapter II w. e. f. 1.4.1995."

21. The above judgment of the apex Court is not applicable in the present case since in the present case the area was never held under a lease either under Chapter II or Chapter IV. The case before the apex Court was not a case in which lease was never held prior to the grant in issue in that case.

22. The submission of counsel for the petitioner thus that the notice was required under Rule 72, cannot be accepted.

23. Now coming to the last submission of the counsel for the petitioner that according to the Government order dated 28.2.2004 the lease could not have been granted on 21.6.2004 by the District Officer. A copy of the Government order dated 28.2.2004 is Annexure-13 to the writ petition. The said Government order stated that the State has taken a decision to cancel the earlier Government

order dated 2.11.2002 and to grant lease in accordance with Chapter II and Chapter VI of U.P. Minor Minerals (Concession) Rules, 1963 which fact was stated in paragraph 2 of the Government order. In the same paragraph it was also stated that in 1963 Rules the necessary amendment under Rules 9, 9-A and 53-A are being separately made which is shortly being issued. The paragraph states that the Concession of Minerals shall be permissible thereafter after following the available procedure. The Government order clearly intended that the concession of minerals be made according to Chapter II and Chapter VI after amendment are made under Rules 9, 9-A and 53-A. Rule 9 deals with the preferential right of certain persons and Rule 9-A deals with preferential right of certain persons in respect of sand. The State Government has notified its policy for reverting to Chapter II and Chapter VI and it intimated that the necessary amendments under Rules 9, 9-A and 53-A are being shortly issued. The message was clear that the minerals concession be granted after the said amendment. Paragraph 3 directed that the minerals concession be done in accordance with the above procedure prescribed under the Government order. This Government order was sent to all the District Magistrates of the State. The amendment as mentioned in the Government order dated 28.2.2004 was made under Rules 9, 9-A and 53A by notification dated 22.6.2004 copy of which is filed as Annexure-14 to the writ petition. Thus according to Government order the leases under Chapter II and Chapter VI were required to be done after the amendment. All the District Magistrates having communicated that the necessary amendment are being shortly issued there is no hurry for issuing lease in favour of the respondent No. 4 on 21.6.2004 and the grant of lease on 21.6.2004 in favour of the respondent No. 4 was clearly against the intent and purpose of the Government order dated 28.2.2004. The lease granted in favour of the respondent No. 4 is thus also clearly in breach of the Government order dated 28.2.2004.

24. The revisional court while dismissing the revision of the petitioner has stated that the lease was granted in favour of the respondent No. 4 on the basis of the judgment of this Court dated 23.7.2003, further it referred the judgment of the High Court passed in writ petition No. 27945 of 1997 Vijay Bahadur Singh v. State of Uttar Pradesh (correct parties name being Jagmohan Dutt Sharma v. State of Uttar Pradesh and Ors.). Thus revisional court gave only two reasons for dismissing the revision, (i) that the judgment of the Division Bench in writ petition No. 27945 of 1997 dated 11.12.1997 laid down that the right to get a lease is of person who is first discoverer; (ii) the judgment of this Court dated 23.7.2003 passed in writ petition No. 31172 of 2003. As observed above the judgment in the case of Jagmohan Dutt Sharma's case was delivered on 11.12.1997 on the basis of the then policy of the Government as per Government order dated 25.5.1995, as noted above vide Government order dated 27.8.2002 the earlier Government order dated 25.5.1885 was departed with. Thus the judgment of Jagmohan Dutt Sharma's case can not be applied in favour of respondent No. 4. Secondly, the Division Bench judgment of this Court dated 23.7.2003 in Nisar Ahmad v. State of Uttar Pradesh and Ors. only

directed requiring the District Magistrate to consider and decide the application filed by the petitioner. The entire judgment of this Court was as follows :-

"I heard the learned counsel for the petitioner.

The learned standing counsel representing the respondents has also been heard.

The sole grievance of the petitioner is that even though an application praying for the grant of mining lease in form M M-1 had been submitted before the competent authority on 18.10.2001 raising a claim based on a right available to a person of preferential category and in spite of depositing an amount of Rs. 3,000/-k as required under the Rules, the concerned authority is keeping the said application pending without any justifiable reason putting the applicant to an unnecessary inconvenience and hardship and uncalled for monetary loss. It is urged that the omission on the part of the concerned authority in this regard is most arbitrary in nature.

Taking into consideration the facts and circumstances as brought on record, this writ petition is disposed of finally requiring, the District Officer/ District Magistrate, Siddharth Nagar to consider and decide the application filed by the petitioner referred to herein above, a true copy of which has been filed as Annexure-6 to the writ petition, giving a reasoned order and after affording an opportunity of hearing to all the concerned parties within a period not later than six weeks from the date of production of a certified copy of this order before the said authority alongwith a copy of the application dated 18.10.2001, to which a reference has been made, herein above.

Ordered accordingly."

25. From the above judgment of the Division Bench of this Court it is clear that this Court has not examined the entitlement of the respondent No. 4 to get the lease under Chapter II or entitlement of respondent No. 4 to get lease on the principle "first come first serve". This Court only directed for consideration of application of the respondent No. 4. The District Magistrate while granting lease on 21.6.2004 was required to consider the entitlement of the respondent No. 4 on merits. The District Magistrate was also liable to consider as to whether the application dated 18.10.2001 survives or can be allowed. The judgment of this Court dated 23.7.2003 only directed for consideration. This Court never directed that the lease be granted in favour of the respondent No. 4. The order of the District Magistrate granting lease in favour of respondent No. 4 has already been brought on record as Annexures 1 and 2 to the supplementary counter affidavit. The said order does not give any reason for grant in favour of respondent No. 4 and has, dismissed the revision on erroneous grounds.

26. In view of forgoing discussions the grant in favour of respondent No. 4 dated 21.6.2004 is not in accordance with law and is liable to be set aside. The writ petition succeeds. The order of the State Government dated 1.11.2004 as well as the order of the District Magistrate dated 21.6.2004 are set aside. Steps be

taken for grant of mining lease of area in question in accordance with law expeditiously. Parties shall bear their own costs.