
(2014) 12 MAD CK 0305

In the Madras High Court

Case No : Writ Appeal Nos. 119 to 122 of 2014 and M.P. No. 1 of 2014

Om Metal Infra Projects Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 03-12-2014

Acts Referred:

Constitution of India, 1950 — Article 14, 239

Special Economic Zones Act, 2005 — Section 2(g), 3, 3(10), 4, 4(1)

Citation : (2015) 324 ELT 469 : (2014) 8 MLJ 641

Hon'ble Judges : N. Paul Vasantha Kumar, J;K. Ravichandra Babu, J

Bench : Division Bench

Judgement

K. Ravichandra Babu, J.—The appellants in all the four Writ Appeals are the Writ Petitioners. The appellant in W.A. Nos. 119 and 122 of 2014 is one and the same. Likewise, the appellant in W.A. Nos. 120 and 121 of 2014 is one and the same. In effect, totally there are two appellants.

2. The appellants filed W.P. Nos. 17059 and 17060 of 2010 praying for issuance of Writs of Mandamus, directing the first respondent-Ministry of Commerce and Industry, SEZ Section, Union of India, New Delhi, to issue the Notification under Section 4(1) of the Special Economic Zones Act, 2005 (for short, "the SEZ Act") for the establishment of SEZ Project by the fourth respondent-Pondicherry Special Economic Zone Company Limited in Pondicherry.

3. They subsequently filed W.P. Nos. 23801 and 23802 of 2013 challenging G.O. Ms. No. 3/2013-Ind. A, dated 19.8.2013 issued by the second respondent-Government of Puducherry and consequently to forbear the respondents from in any manner acting contrary to the agreements, namely, Development and State Support Agreement, dated 28.8.2006, Share Subscription and Shareholders' Agreement, dated 28.8.2006 and Lease and Possession Agreement, dated 13.2.2008.

4. The learned single Judge dismissed all the Writ Petitions. Following are the facts and circumstances involved in these matters:

(i) A policy decision was taken by the Government of Pondicherry to establish a Special Economic Zone (for short, "SEZ") at Pondicherry. For establishment of such project, the said Government invited applications from private promoters by issuing advertisement. The Government of Pondicherry also decided to constitute a Special Purpose Vehicle (for short, "SPV"). The Pondicherry Industrial Promotion, Development and Investment Corporation Limited (for short, "PIDIC") was appointed as Nodal Agency for the Project. In pursuant to the advertisement calling for Expression of Interest in participating for the establishment of the Project, issued during the month of December 2004, the Government of Pondicherry received 20 bids from various Companies, out of which, 11 companies were invited to give Presentation. One of the appellants, namely SPML Infra Limited, was one among them.

(ii) In pursuant to the Presentation made by those 11 Companies on 10.3.2005, the Internal Committee set up by the Government of Pondicherry shortlisted three applications, out of which, the abovesaid appellant, namely SPML Infra Limited was placed at No. 1 in the order of preference. Consequently, a Letter of Intent, dated 31.5.2005 was issued to the appellant-SPML Infra Limited by requesting the said Company to submit a Detailed Project Report (for short, "DPR") within a period of 45 days and the said Company prepared the DPR and submitted the same on 15.7.2005. The Government of Pondicherry approved the DPR without any change. However, in the meantime, the SPML Infra Limited requested the Government of Pondicherry to include the other appellant, namely M/s. Om Metal Infra Projects Limited as a strategic partner. Such a request was readily agreed by the Government. On 19.6.2006, the SPV was incorporated, which is the fourth respondent herein.

(iii) The appellants, the third respondent and their nominees, were the shareholders of the SPV. In pursuant to the request made by the SPV for formal approval of the SEZ Project, the Ministry of Commerce and Industry, Government of India granted its formal approval on 21.8.2006, followed by execution of agreement, namely Development and State Support Agreement between the Government of Pondicherry and the SPV on 28.8.2006. Another agreement, namely Share Subscription and Shareholders Agreement was also executed between the appellants and the third respondent, providing 26% equity to the third respondent and the balance to the developers, including the other appellant, namely Om Metal Infra Projects Limited. Subsequently, the Government of Pondicherry approached the Ministry of Home Affairs of the Government of India for granting ex-post-facto approval for the transfer of lands measuring about 336 hectares. By proceedings dated 6.8.2007, the Union Home Ministry granted its ex-post-facto approval for 336.12.52 hectares of lands. On finding by the Development Commissioner, MEPZ, in pursuant to the inspection of the site, that the parcels of lands were intercepted by pathways and canals, another extent of 10.36.12 hectares were sought to be acquired for the purpose of establishing contiguity. Therefore, a request was made to the Union Home Ministry seeking its permission for the said purpose. In the meantime, the Board

also extended the formal approval of the Project by one year from 20.8.2009.

(iv) As the Notification under Section 4(1) of the SEZ Act, 2005 was not issued and as the approval granted would also expire shortly, the appellants herein being the private developers, filed the above referred Writ Petitions in Nos. 17059 and 17060 of 2010, seeking for issuance of Writs of Mandamus to issue the Notification under Section 4(1) of the SEZ Act.

(v) In those Writ Petitions, the Ministry of Commerce and Industry filed counter affidavit contending that the Ministry of Home Affairs has stated that the selection of developer was not through transparent procedure and therefore, a direction was issued to cancel the agreement and resume the lands. It was also further contended that the Planning Commission and the Department of Economic Affairs questioned the process adopted to select the strategic partner.

(vi) While those Writ Petitions were pending, the Government of Puducherry issued the impugned G.O. Ms. No. 3/2013-Ind. A, dated 19.8.2013, cancelling the agreement entered into for executing the Project. Consequently, the third respondent herein also issued proceedings, dated 20.8.2013, cancelling the agreements executed with the SPV. Those proceedings are challenged by the appellants herein in the other two Writ Petitions in W.P. Nos. 23801 and 23802 of 2013.

5. The contentions of the appellants as writ petitioners before the Writ Court in a nut-shell, are as follows:

The selection was made only by the Government of Pondicherry and the Ministry of Home Affairs of the Union of India having given ex-post-facto approval, has no right to direct the Government of Pondicherry to cancel the bidding process and resile from the promise already made. Thus, the action of the respondents is hit by the principles of "promissory estoppel". The selection process was fully transparent and the writ petitioners have invested considerable amount towards the Project, and therefore, the Government of Pondicherry cannot withdraw from the transaction. Insofar as the inclusion of Om Metal Infra Projects Limited as a strategic partner is concerned, such Company was included as a strategic partner only by the Government of Pondicherry, and therefore, the third respondent is not entitled to contend that such inclusion was through backdoor method. The Union Home Ministry has no connection with the establishment of SEZ or the selection of developer. On the other hand, the Government of Pondicherry selected the developer and such selection was also approved by the Cabinet. The dispute was only with regard to 10 acres of lands sought to be acquired for the purpose of establishing contiguity and therefore, at this stage, the entire Project cannot be cancelled, notwithstanding the transfer of larger extent of lands earlier to the SPV. Since the impugned action would involve civil consequences, passing of the same without affording an opportunity of hearing to the appellants/writ petitioners, violates the principles of natural justice.

6. The above contentions of the appellants/writ petitioners were vehemently

opposed by the respondents by contending that the very selection of the developer was not transparent and the name of the private developer was not disclosed earlier, even though a request was made by the Government of Pondicherry to grant ex-post-facto approval. Another Company, namely Om Metal Infra Projects Limited, which was no way connected with the tender process, was taken as a partner through backdoor method and the Ministry entertained serious doubts about the credentials of the said developer and the process adopted for selection.

7. It was contended by the Government of Pondicherry that it has committed a bona-fide error in issuing the Notification for selection first and to prepare the Project Report later and that too by the selected private developer. It is their contention that preparation of DPR is a mandatory requirement before calling for Notification for selection of private developer. It was also admitted by the Government of Pondicherry that the mistake was committed in taking Om Metal Infra Projects Limited as a partner, when the said Company has not participated in the selection process and not given a Presentation like the other bidders. Above all, it was submitted that the Government of Pondicherry has now abandoned the proposal to establish the SEZ and the lands will be used for any other public purpose to boost the economic development of the Union Territory of Pondicherry. The third respondent contended that the Writ Petitions, at the instance of the private developers, are not maintainable, as they are only shareholders in the SPV.

8. The learned single Judge, after perusal of the respective pleadings, materials, submissions and the original files of the Government of Pondicherry, dismissed the Writ Petitions, with the following findings:

(a) No documents are available in the files produced by the Government of Pondicherry to show that the merits of the applicants were assessed by the Committee.

(b) The other Company, namely Om Metal Infra Projects Limited was tagged in through backdoor method, that too after issuing the Letter of Intent.

(c) No Consultant with technical knowledge was appointed to ascertain the merits of the applicants.

(d) No Project Report was prepared before calling for applications for selection of the developer.

(e) The shortlisted applicants were given only ten Minutes for Power Presentation and it was like a "fashion-show".

(f) Om Metals Infra Projects Limited was not an applicant and not even referred to as a partner in the application submitted by SPML Infra Projects Ltd.

(g) After the Power Presentation, further shortlisting of three Companies was made by placing the SPML Infra Projects Ltd. in Sl. No. 1 without any basis.

(h) No Minutes were prepared by the Committee with regard to the comparative performance, assessment of past performance and plan of action of the concerned Companies so shortlisted, in order to place them in the order of preference.

(i) There is nothing on record to show any comparative Minutes of the three shortlisted Companies in the order of preference and the de-merits of others including the marks given to each of them. Therefore, the Union Home Ministry was fully justified in saying that it was not a transparent selection process.

(j) The In-principle approval issued on 24.12.2004 by the Ministry of Commerce is much earlier to the selection of developers. After selecting the developer, the Government of Pondicherry requested M/s. KITCO Limited, a Government of Kerala establishment to prepare a Project Report.

(k) The Development Commissioner, Government of Pondicherry expressed his concern about selecting the developer without preparing DPR and a competitive bid.

(l) The selection of providing developer must obtain a previous consent of the Central Government, in view of various exemption from taxes.

(m) The Home Ministry was not having any occasion earlier to examine the selection process undertaken by the Government of Pondicherry to select the private developer, since the Government of Pondicherry at all points of time referred only the name of SPV, and its composition was not disclosed, and therefore, it cannot be said that the Central Government having approved the selection of the developer, cannot direct the Pondicherry Government later to cancel the selection.

(n) Only in the meeting held on 23.4.2008, the Union Home Ministry, for the first time, examined the selection process, that too only after receipt of proposal for transferring 10.36.13 hectares of Government lands to the SPV.

(o) The claim made by SPML Infra Limited was not cross-verified at any point of time.

(p) The writ petitioners are only shareholders of SPV and the said SPV has not filed the Writ Petitions, and therefore, at the instance of the shareholders, the Writ Petitions seeking for issuance of Notification, are not maintainable.

(q) The question of issuing the notice to the writ petitioners does not arise, since the decision taken by the Government of India was later accepted by the Government of Pondicherry. Even otherwise, no other order could be passed, in view of several infirmities committed by the Pondicherry Administration and ultimate realisation of such mistakes by the said Government itself.

(r) The Government of Pondicherry has now taken a decision not to establish the SEZ and to use the lands for other public purpose, and therefore, there is no question of directing the Government to issue the Notification under Section 4(1)

of the SEZ Act.

9. Mr. P.S. Raman, learned Senior Counsel argued on behalf of the appellants in W.A. Nos. 120 and 121 of 2014 and Mr. R. Muthukumaraswamy, learned Senior Counsel argued on behalf of the appellants in W.A. Nos. 119 and 122 of 2014. Since both the Senior Counsels have sailed together and placed their submissions, mutually complimenting each other, their submissions in common are stated, in short, hereunder:

The entire selection process was done following the norms spelt out in the Notification issued by the Government of Pondicherry for setting up the SEZ. The constitution of Internal Committee was fully known to the Home Ministry. SPML Infra Limited and Om Metal Infra Limited were selected by the Internal Committee and the Ministry of Commerce granted its formal approval to the developer, namely SPV for a period of three years, followed by entering into the Development and State Support Agreement and Share Subscription and Shareholders Agreement on 28.2.2006. The Ministry of Home Affairs has granted ex-post-facto approval only after having complete knowledge of every step. Prior to the selection of SPML Infra Limited as a strategic partner, on the very same grounds, a Public Interest Litigation (PIL) was filed challenging the selection of the appellants in respect of another Project, namely Port Project and a Division Bench of this Court upheld the selection process and the matter was taken on appeal before the Honourable Supreme Court, which confirmed the order of this Court, upholding the selection of SPML/OMIL for the Port Project. Central Vigilance Enquiry was initiated only in respect of the Port Project, and therefore, that cannot be a ground for finding fault with the selection process in the year 2009. SPML Infra Limited is in existence for over four decades and more and executed various Projects and it is a successful infrastructure Company including the Projects which had been awarded by the Ministry of Home Affairs in the years 2010 and 2011. The Ministry of Home Affairs as well as the Government of Pondicherry are bound by the principles of promissory estoppel. The Notification issued by the Government of Pondicherry calling for Expression of Interest, permitted the strategic partner to include any Indian investor or financial institution by way of a consortium for executing the Project. Therefore, the inclusion of Om Metals was transparent with the knowledge and consent of the State Government. Regarding the contiguity of lands, neither the Ministry of Home Affairs in letter dated 6.8.2009, nor the Government of Pondicherry raised any issue on lack of contiguity. Even otherwise, there is a power to relax the contiguity under Rule 7 of the SEZ Rules. The impugned communication dated 6.8.2009 is arbitrary and the same has not even been communicated to the SPV or the appellants, as strategic partners. The Ministry of Home Affairs is concerned only with the transfer of lands and it has no locus to find fault with the selection process. There is no pleading or justification as to what are the fresh materials or evidence available for the change of mind. The impugned Notification in G.O. Ms. No. 3/2013-Ind. A, dated 19.8.2013 reveals complete arbitrariness and mala-fides, as the same has unilaterally cancelled the

agreements in which the appellants were parties, without even notice or an opportunity of hearing to the appellants. The appellants are 74% equity shareholders/strategic partners of the said Project and however they can proceed with any activity only after it is notified under Section 4 of the SEZ Act, 2005, and therefore, the plea that the appellants had not done any work on the SEZ Project and the lands had been lying vacant, is not correct. The appellants have invested/spent huge money for the Project as follows:

(i) An expenditure of Rs. 13,56,34,355/- has been shown in the Balance Sheet of the fourth respondent-Company, for the financial year ending upto 31.3.2010.

(ii) Rs. 29 crores had been invested by the appellants, as has been admitted by the Chief Secretary of the Government of Pondicherry, in his letter dated 19.6.2009, against 74% of their equity holding in the SPV. Therefore, the appellants have altered their position/suffered a detriment based on the agreement entered into with the Government of Pondicherry, and therefore, the doctrine of promissory estoppel as well as the legitimate expectation would clearly apply to their case.

10. The following are the case laws relied on by the learned Senior Counsels for the appellants in support of their submissions:

- (a) Union of India (UOI) and Others Vs. Indo-Afghan Agencies Ltd.,
- (b) Century Spinning and Manufacturing Company Ltd. and Another Vs. The Ulhasnagar Municipal Council and Another,
- (c) Motilal Padampat Sugar Mills Co. Ltd. Vs. State of Uttar Pradesh and Others,
- (d) Jit Ram Shiv Kumar and Others Vs. State of Haryana and Others,
- (e) Union of India (UOI) and Others Vs. Godfrey Philips India Ltd.,
- (f) Delhi Cloth and General Mills Ltd. Vs. Union of India (UOI),
- (g) Navjyoti Coo-Group Housing Society etc. Vs. Union of India and Others,
- (h) Food Corporation of India Vs. M/s. Kamdhenu Cattle Feed Industries,
- (i) I.T.C. Bhadrachalam Paperboards and Another Vs. Mandal Revenue Officer, A.P. and Others,
- (j) State of Punjab Vs. Nestle India Ltd. and Another,
- (k) Southern Petrochemical Industries Co. Ltd. Vs. Electricity Inspector and E.T.I.O. and Others,
- (l) L.M.L. Ltd. Vs. State of U.P. and Others,
- (m) Pepsico India Holdings P. Ltd. Vs. State of Kerala and Others,
- (n) 5 M and T Consultants, Secunderabad Vs. S.Y. Nawab and Another, and

(o) State of Tamil Nadu and Others Vs. K. Shyam Sunder and Others,

11. Mr. T.P. Manoharan, learned counsel appearing for the third respondent in his oral and written submissions, submitted as follows:

The method and procedure for participating in the selection process as "a single Company" and as "a consortium of Companies" are entirely different. The third respondent as the nodal agency to the SEZ, has published advertisement in newspapers on 27.12.2004 seeking for Expression of Interest for developing SEZ at Puducherry and to select a strategic private investor. 19 companies including one of the appellants, namely M/s. SPML India Ltd. (formerly M/s. Subhash Projects and Marketing Ltd.) participated as a single Company and submitted their Expression of Interest. No consortium of Companies has submitted and participated in the selection process. The pre-qualification of the parties for selection is based on the assessment and satisfaction of the technical and financial criteria and also the construction of infrastructure projects of comparable magnitude by the participants during the last five years. The Committee constituted did not contain a technical member and therefore, the Committee itself was incompetent to assess the technical criteria of the participants. The files would show that the Committee has observed that strategic partner has to be selected based on the presentation of the three shortlisted Companies before the Chief Minister and the Lieutenant Governor, by the spot inspection of the projects executed by the said Companies. However, no such presentation was made before the Chief Minister and the Lieutenant Governor by the SPML Infra Ltd. The Committee has not made any spot inspection. The financial criteria of the SPML Infra Ltd., also was not verified, tested and satisfied. In view of Section 3(10) to (13) of the SEZ Act, 2005, the Central Government has to approve the selected strategic partner. However, there is nothing on record to show that such approval was granted by the Central Government. Therefore, the selection of SPML Infra Ltd. was not legal and valid. When once the inception itself is bad, all other subsequent developments of signing the agreements, etc., cannot give any right to the appellants. There is no provision in the advertisement conferring a right of a single Company participating in the selection process to include another third party non-participant Company as a strategic partner and developer of SEZ. Even otherwise, eligibility information of the other appellant, namely Om Metal Infra Projects Ltd., was not placed before the Committee and the same was not verified, tested and satisfied by the Committee. Therefore, the Om Metal Infra Projects Ltd. was permitted to enter through backdoor as a strategic partner and developer. In view of Article 239 of the Constitution of India, the fifth respondent is having power, authority and jurisdiction to prevent the perpetuation of such illegality at any time. Actual physical possession of the acquired lands was not handed over to the appellants and they have not entered into the same, nor done any work and spent any money till this date. The financial statement of the fourth respondent ended on 31.3.2010 would show that its total equity share capital is Rs. 50.40 crores, out of which, Rs. 22 crores was the value of the

shares issued by it to the third respondent in lieu of cash payment of a portion of the premium lease amount. Therefore, the appellants have brought in only a sum of Rs. 28.40 crores and even the said sum was spent only for payment of salaries to the staff appointed by them, their own travelling expenses, accommodation etc., and they have not spent any money towards physical progress of setting up of the SEZ till this date. The fourth respondent-SPV is the "developer" within the meaning of Section 2(g) of the said Act and as per Section 4(1) of the said Act, only the developer can seek the Central Government to notify, that too after satisfying the conditions prescribed therein. If the Central Government fails to notify, only the fourth respondent has legal right, cause of action and locus-standi to file the Writ Petition. The appellants-Companies cannot maintain the Writ Petitions. The Honourable Supreme Court has held against the very same SPML Infra Limited (originally M/s. Subhash Projects) in another matter that they secured contract by dubious means and such decision is reported in Subhash Projects and Marketing Ltd. Vs. West Bengal Power Development Corporation Ltd. and Others,

12. In support of the above submissions, Mr. T.P. Manoharan, learned counsel for the third respondent relied on the decision of the Honourable Supreme Court reported in State of Orissa and Another Vs. Mamata Mohanty,

13. Mr. G. Rajagopalan, learned Additional Solicitor General of India appeared for respondents 1 and 5 and made his submissions as follows:

The Government of Pondicherry, by means of G.O. Ms. No. 9/2004-Ind., dated 9.8.2004 decided to establish the SEZ and for the said purpose, it made the application to Ministry of Commerce and Industry. On 24.12.2004, an In-principle approval was given for a period of one year, within which time a detailed proposal was to be submitted to the Union Government for formal approval. A perusal of the records would show that only 10 Minutes Presentation by each candidate was made and there was no technical member present in the Committee. Technical and financial criteria were not followed. The relevant files would show that there was no discussion at all as to how the selected candidate stood better than others. Therefore, the proceedings dated 6.8.2009 issued by the Government of India is wholly justified, since several infirmities in the selection process were found, apart from the fact that there was no transparency in the bidding process. Insofar as the Government of Pondicherry is concerned, the Ministry of Home Affairs of the Central Government is the appropriate authority. No land can be transferred without prior approval from the Ministry of Home Affairs. Though in-principle approval was granted by the Ministry of Home Affairs to the SPV, later on, reports from Vigilance Commission and the Planning Commission made the Central Government to examine the matter, followed by the decision taken, which is impugned in these proceedings. The Planning Commission, by proceedings dated 14.10.2008 found that there was no transparent procedure adopted in selecting the strategic partner. Apart from the above basic objections, the lands in question are also lacking contiguity. For the

establishment of SEZ, the area identified as a project area should be contiguous area, because the area is tax free and the third parties who are not connected with the area, should have no access to the SEZ, which has several exemptions. Though the land is not contiguous, the appellant, namely SPML has mentioned in the application as if the land is contiguous. After the formal approval, dated 21.8.2006, an inspection was made by the Central Government authority and it was noticed that the land was not contiguous, as at various places, there are channels, public thoroughfares etc., of an area of over 10 hectares. It has been falsely stated in the application that the area was contiguous. Even though the Ministry of Commerce has taken a decision on 11.8.2009 to examine in respect of such lack of contiguity, on 6.8.2009 itself, Ministry of Home Affairs had directed the Pondicherry Government to cancel the entire process. 346 hectares were transferred to the SPV without any prior approval from the Central Government. The other appellant, namely Om Metal Infra Projects Ltd., was brought within the ambit of the project, which admittedly did not participate in the tender process. Though there was a condition in the formal transfer order, dated 21.8.2006 that within three years, the developer should implement the project, the land(s) continued to remain vacant only. The SPV also failed to take any steps for completion of the project within the stipulated time. The issuance of Notification under Section 4(1) of the SEZ Act is not automatic, unless mandatory requirements are satisfied. Since the entire project was found to be defective right from the beginning, the question of issuing the Notification under Section 4(1) does not arise. The SPV is a separate legal entity and has not questioned the impugned proceedings. Equally, the Pondicherry Government, which was originally the applicant, has not questioned the proceedings. Since the entire tender process is vitiated on account of the non-transparency, as is evident from the records, issuance of any notice to the appellants will not serve any purpose. Therefore, they cannot plead violation of principles of natural justice. Even otherwise, such observation of the principles of natural justice would be an empty formality. The validity of the letter of approval has also lapsed on 21.8.2009. The first respondent is not party to the agreements, dated 28.8.2006. If the value of the contract/agreement is more than Rs. 5 crores, prior approval of the Ministry of Home Affairs is necessary before signing the agreement. In this case, the Government of Pondicherry did not seek any such prior or ex-post-facto approval from the Ministry of Home Affairs. The appellant-SPML was debarred by the SEBI for a period of two years from the Stock Exchange for manipulating their Rights Issue. The in depth examination by the Ministry of Home Affairs, inter-ministerial consultation and further examination of fresh request of the Government of Pondicherry to support the proposal, was done by the Ministry of Home Affairs and in the light of the issues that emerged during such process, the Union Home Ministry Secretary recommended for cancellation of the agreements and suggested that if the Government of Pondicherry was still willing to go ahead with the project, they could go in for transparent competitive bidding process. The recommendation of the Union Home Secretary and the facts available on record were examined by the Union

Home Minister, who directed to advise the Government of Pondicherry to cancel the entire agreement with the strategic partner and not to part with the lands in favour of SPV and if any part of the land had already been transferred, the same should be resumed immediately. A self-explanatory detailed letter dated 19.9.2009 was sent to Commerce Secretary by the Union Home Secretary with a request not to issue the order for notifying the SEZ and also to take steps to withdraw the order in the light of the decision taken by the Ministry of Home Affairs.

14. In support of his submissions, the learned Additional Solicitor General relied on the following decisions:

- (i) Sterling Computers Limited and Others Vs. M and N Publications Limited and Others,
- (ii) Ramana Dayaram Shetty Vs. International Airport Authority of India and Others,
- (iii) Kasturi Lal Lakshmi Reddy, Represented by its Partner Shri Kasturi Lal, Jammu and Others Vs. State of Jammu and Kashmir and Another, and
- (iv) Ashok Kumar Sonkar Vs. Union of India (UOI) and Others, and

15. Mr. T. Murugesan, learned Government Pleader (Pondicherry) appearing for the second respondent has argued and also furnished written submissions, the crux of the same is as follows:

The written arguments filed by the respondents 1, 3 and 5 are adopted by the second respondent. The SEZ project was initiated pursuant to the special economic policy announced by the Government of India, keeping in view the potentialities for economic development in the Union Territory of Pondicherry. Accordingly, the Government of Pondicherry decided to set up SEZ at Sedarpur and Karasur Revenue villages and appointed PIPDIC as the Nodal Agency for implementing the project. An extent of 309.64.27 hectares of lands were acquired and handed over to the PIPDIC. The cost of the lands was provided by the Government of Puducherry. The Government of Puducherry approached the Ministry of Home Affairs, vide letter dated 23.4.2007 seeking for ex-post-facto approval and for having handed over the lands to the PIPDIC. The Government of Puducherry has not prepared the DPR before calling for the Notification for selection of private developer to establish the SEZ. The Government of Puducherry was not having previous experience in the matter of establishing SEZ. The established procedure like technical and commercial criteria has not been followed in the tender process for selection of the private developer. The selection of the firm, namely the appellant-SPML Infra Ltd., was not done through a valid method. It was done only through Power Presentation. Likewise, inclusion of the other appellant, namely Om Metal Infra Projects Ltd. as a strategic partner, was also not in order, since Om Metal was not at all a partner. The Development Commissioner, MEPZ-SEZ, Chennai, vide letter dated 5.6.2007

informed the Government of Puducherry that the lands are not contiguous, which is in violation of Section 3 of the SEZ Act. Thus, on the advise of the Development Commissioner, an extent of 10.36.13 hectares were transferred to the Department of Industry and Commerce. Thereafter, the Government of Puducherry approached the Ministry of Home Affairs for approval of the transfer of 10.36.13 hectares. The Ministry of Home Affairs did not approve the same. On the other hand, they sought remarks on several infirmities in the selection process pointed out by the Planning Commission. The Ministry of Home Affairs communicated that they are not approving the selection of strategic partner and also the transfer of lands to PIPDIC and further advised to cancel the entire agreement with the strategic partner. Article 2 of the Development and State Support Agreement, dated 28.8.2006 entered into between the second and fourth respondents contains a clause for termination and according to the said clause, the agreement shall be subject to termination, if the Zero Date does not occur within 36 months. The Zero Date shall mean the date or extended period. In view of the said stand taken by the Ministry of Home Affairs, the Government of Puducherry, vide letter dated 22.1.2010, communicated to PIPDIC, directing them to handover the lands within a month to the District Collector, Puducherry. The Government of Puducherry cannot implement the project without the approval of the Government of India. It is the first respondent which has to issue the final Notification under Section 4 of the SEZ Act. In view of the termination and cancellation of the agreement, the PIPDIC handed over the entire lands to the District Collector, Puducherry. The PIPDIC which was the applicant for setting up of the SEZ, by returning the entire lands to the Government of Puducherry, has in effect, abandoned the entire project and as such, the appellants who are only strategic partners, cannot challenge the termination of the agreement and resumption of the lands by the Government of Puducherry.

16. Heard the learned counsel appearing on either side, perused the materials placed before this Court and the relevant records produced by the respondents.

17. Based on the extensive arguments advanced and the submissions made by both parties, the following questions are formulated for consideration in these Writ Appeals:

(i) Whether the selection process done by the second respondent, namely the Government of Puducherry in selecting the strategic partner of SPV, was proper and in accordance with the minimum expected norms and procedures?

(ii) Whether the inclusion of the other appellant, namely Om Metals Infra Projects Ltd. as the consortium partner, after selecting the developer, namely the appellant-SPML Infra Ltd., is proper and valid?

(iii) Whether the Ministry of Home Affairs, Union of India, is justified in directing the Government of Puducherry to cancel the entire agreement with the strategic partner?

(iv) Whether the appellants are entitled to raise the grounds of "promissory

estoppel" and "legitimate expectation" under the facts and circumstances of the case?

(v) Whether the appellants are entitled to insist upon issuance of the Notification under Section 4(1) of the SEZ Act, when the PIPDIC, the applicant for setting up of the SEZ, had returned the entire lands and abandoned the entire project? and

(vi) Whether the impugned actions have violated the principles of natural justice and whether following of such principle is warranted under the facts and circumstances of the present case?

18. Since we have extracted the factual aspects of the matter, culled out from the respective pleadings and submissions of the parties and the same having been discussed in detail by the learned single Judge in his common order, in order to avoid repetition, we are not reiterating those facts in detail once again hereunder. Thus, we proceed to answer the questions above formulated as follows:

Question (i): Whether the selection process done by the second respondent, namely the Government of Puducherry in selecting the strategic partner of SPV, was proper and in accordance with the minimum expected norms and procedures?

The Government of Puducherry took a policy decision to establish SEZ at Puducherry. A Special Purpose Vehicle (SPV) was constituted by the Government of Puducherry for the said purpose and accordingly, the PIPDIC, namely the third respondent herein was appointed as the Nodal Agency for the project. Advertisement was issued through paper publications, calling for applications from private promoters to participate in the establishment of the project. Admittedly, bids from 20 companies were received, out of whom, 11 companies were invited to give Presentation. It is not known as to how these 11 companies, including the appellant-SPML Infra Ltd., were brought under the zone of consideration, out of 20 applicants. However, those shortlisted 11 companies were called upon to give their Presentation on 10.3.2005. It is seen that only 10 Minutes Power Presentation was given by each of the companies before the Internal Committee set up by the Government of Puducherry under the Chairmanship of the Chief Secretary. Among those 11 companies which gave their Power Presentation, three were shortlisted by the Internal Committee, in which, the appellant-SPML Infra Ltd. was placed in No. 1 in the order of preference. It is admitted by the Government of Puducherry that they have not followed the established procedures like technical and commercial criteria in the tender process for selection of the private developer. It is also an admitted fact that the Government of Puducherry has not prepared the Development Project Report (DPR) before selecting the private developer to establish the SEZ. It is their case that the Government of Puducherry was not having previous experience in the matter of establishing SEZ, and therefore, these lapses have occurred. It is also seen that the Internal Committee set up by the Government

of Puducherry to select the private developer, did not consist a technical person having knowledge and experience in respect of the project for which such selection of a private developer was made. Further, it is seen that out of three shortlisted companies, the appellant-SPML was placed in No. 1 without there being any discussion of comparative merits of those participants and as to how the appellant-SPML was better than others to be placed in No. 1 in the order of preference. A perusal of the files would disclose that no such discussions were made, supported by any material. The project, namely establishing SEZ is a huge project involving huge expenditure of Government exchequer as well as parting of vast extent of lands, viz., 336.12.52 hectares in total in this case, which according to the findings of the learned single Judge, is 5% of the total extent of lands in Pondicherry. Therefore, the above discussed slipshod method adopted by the Government of Puducherry in selecting the private developer, cannot withstand the scrutiny of law. The learned single Judge has rightly pointed out that the files produced by the Government of Puducherry do not contain the Minutes of the meeting and there were no documents to show the merits assessed by the Committee. It is the very basic requirement that before selecting the developer, the Government of Puducherry should have prepared the DPR and kept the same in its hands. In other words, preparation of the DPR must necessarily precede the selection of the developer for the project. Only when the Government of Puducherry knows what the project is about and what sort of developmental activities are required to be done by the developer in establishing the SEZ, it would be in a position to select the suitable developer thereafter. In this case, admittedly, it has been vice-versa. The cart has been put up before the horse. It is not known as to why such a hurried selection was made without following even the minimum basic expected procedures. Only the explanation of the Puducherry Government is to the effect that they do not have previous experience in the matter of establishing the SEZ. Technical and commercial criteria had not been followed. No technical person was there in the Selection Committee. There was no discussion of the merits of the shortlisted companies or participants. With all these uncondonable lapses, the appellant-SPML was selected as a private developer. Certainly, such selection cannot be sustained. In this case, the peculiar circumstance is that the very selectee, namely the Government of Puducherry, concedes that such selection was bad, as the same was made not by going through the established procedures.

19. Such being the facts and circumstances, we are of the view that selection of the appellant-SPML is bad, as the very inception itself is against the well-established procedures in the tender process for selection, especially when the project for which such selection was made, involves huge expenditure of public money as well as parting of vast extent of Government lands. At this juncture, it is useful to refer to the decision reported in *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, wherein, the Honourable Supreme Court has observed in paragraph 11 as follows:

"11..... Some interests in Government largesse, formerly regarded as

privileges, have been recognised as rights while others have been given legal protection not only by forging procedural safeguards but also by confining/structuring and checking Government discretion in the matter of grant of such largesse. The discretion of the Government has been held to be not unlimited in that the Government cannot give or withhold largesse in its arbitrary discretion or at its sweet will..... "

20. Further, in the decision reported in *Kasturi Lal Lakshmi Reddy, Represented by its Partner Shri Kasturi Lal, Jammu and Others Vs. State of Jammu and Kashmir and Another*, , the Apex Court observed in paragraph 22 as follows:

"22..... The State must be free in such a case to negotiate with a private entrepreneur with a view to inducing him to set up an industry within the State and if the State enters into a contract with such entrepreneur for providing resources and other facilities for setting up an industry, the contract cannot be assailed as invalid so long as the State has acted bona fide, reasonably and in public interest. If the terms and conditions of the contract or the surrounding circumstances show that the State has acted mala fide or out of improper or corrupt motive or in order to promote the private interests of someone at the cost of the State, the court will undoubtedly interfere and strike down State action as arbitrary, unreasonable or contrary to public interest..... "

Therefore, we answer the first question against the appellants.

21. Question (ii): Whether the inclusion of the other appellant, namely Om Metals Infra Projects Ltd. as the consortium partner, after selecting the developer, namely the appellant-SPML Infra Ltd., is proper and valid?

We have perused the Notification issued by the Nodal Officer, SEZ, PIPDIC, published in the newspapers calling upon applications for selection of a private developer. From the said Notification, it is seen that the SPV, a subsidiary of PIPDIC, was being formed and would have a strategic private investor having maximum participation/stake. It was further made clear therein that the partner may be a single company or a consortium of companies. It was further made clear therein that pre-qualification of parties for selection of the strategic partner, will be based on technical and financial criteria. Admittedly, out of these two appellants, the appellant-SPML was the applicant in response to the abovesaid advertisement. It is also not in dispute that the appellant-SPML made the said application as a single company and not as consortium of companies. Therefore, it is evident that the application submitted by the appellant-SPML as a single company, cannot be treated or construed as application by the consortium of companies subsequent to the selection of the appellant-SPML and by including the appellant-Om Metal thereafter. It is not known as to how such inclusion of the appellant-Om Metal was permitted by the Government of Puducherry, when the appellant-Om Metal did not take part in the process of selection; did not make any Power Presentation; did not satisfy that they have participated or invested in the construction of infrastructure project of comparable magnitude

during the last five years as required under the eligibility criteria referred to in the Notification. Such entry of the appellant-Om Metal is only through backdoor, which was unfortunately approved by the Puducherry Government. The reasons for such blind-folded approval are best known to them only. As the application filed by the appellant-SPML was not the application of consortium of companies, the inclusion of the appellant-Om Metal subsequent to the selection of the appellant-SPML, is bad and cannot be sustained even for a minute. The learned single Judge has rightly pointed out that the appellant-Om Metal Infra Ltd. was brought in through backdoor method, after issuing the Letter of Intent.

22. No doubt, both the appellants have raised very many points to contend that they are competent and having rich experience in the field of developing the subject matter project. By contending so, the appellants want to sustain the selection. It is also urged that similar selection in respect of another project, viz., Port Project was sustained by this Court and upheld by the Honourable Supreme Court. It is needless to say that facts and circumstances of each case have to be considered and decided on its own merits. Selection of these appellants in respect of the other project will not entitle them to claim that the present selection is also to be approved automatically. In fact, whether the appellants are meritorious among the participants and whether they are having the maximum points for selection to the project, are not the real questions that need to be gone into and answered in these Writ Appeals. This Court is not here to make the selection. The appellants may be qualified and richly experienced. Still, whether they are the only and fully qualified and experienced, is the question that has to be considered and decided only by the competent Selection Committee, that too by going through the established procedures in the tender process of selection. There might have been persons better qualified with better experience than the appellants. No comparative discussion of merits is available to discard their doubt. Unless a thorough analysis of comparative merits and abilities is made and set out in the selection proceedings in writing, the appellants cannot claim themselves as the most suitable persons for executing the project. Therefore, we are of the view that the merits and abilities of the appellants, as claimed by them, even assuming to be true, itself, cannot give rise to a cause of action for them to challenge the impugned proceedings, when the very inception of the appellants, itself is bad in the eye of law, as discussed supra. Hence, we answer the second question also against the appellants.

23. Question (iii): Whether the Ministry of Home Affairs, Union of India, is justified in directing the Government of Puducherry to cancel the entire agreement with the strategic partner?

It is not in dispute that the Government of Puducherry cannot act on its own, especially in the matters involving economic policy and also parting of lands for any developmental activities, in view of Article 239 of the Constitution of India. It has to necessarily obtain the approval from the Ministry of Home Affairs, Government of India. It is true that originally, the Ministry of Home Affairs, Union

of India has given its ex-post-facto approval for the transfer of 336.12.52 hectares of lands by the PIPDIC to the Puducherry Special Economic Zone Company Limited, for speedy implementation of the SEZ project, by communication dated 6.8.2007. In the very same communication, it was made clear that the Union Territory Government is to refrain from taking anticipatory action in such matters and seeking post-facto approval thereafter. The said proceedings of the Ministry of Home Affairs is strongly relied upon by the appellants to contend that the said Ministry, having given such approval, cannot go back later and direct the Puducherry Government to cancel the agreement. The abovesaid proceedings, dated 6.8.2007 is extracted hereunder:

"No. U-13034/31/2007 GP Government of India Ministry of Home Affairs

North Block New D, Dated the 6th August 2007

To

Shri Pradip Mehra, Chief Secretary, Government of Puducherry, Puducherry

Subject: DID (Ind.&Com)-Setting up of Special Economic Zone at Sedrapet & Karassur, UT of Puducherry-Ex-post factor approval for transfer... land-regarding

Sir,

I am directed to refer to the correspondence resting with your letter No. 11017/5/2003/Ind. A dated 2nd July, 2007 on the above and convey the ex post facto approval of the Central Government to the transfer of 336.12.52 hectares of land by the Puducherry Industrial Promotion Development and Investment Corporation Ltd. (PIPDIC) to M/s. Pondicherry Special Economic Zone Company Ltd. for speedy implementation of SEZ Project in the UT of Puducherry. However, UT Government is directed to refrain from taking anticipatory action in such matters and seeking post facto approval thereafter.

2. This issues in consultation with the Integrated Finance Division vide... Dy. No. 835/AFA(P)/07 dated 31.7.2007.

Yours faithfully,

(Aindri Anup) Director"

24. From a perusal of the above proceedings, it is clear that the ex-post-facto approval was given for transfer of the lands by PIPDIC to SPV only. However, the PIPDIC and SPV have not chosen to challenge the subsequent impugned proceedings of the Ministry of Home Affairs and on the other hand, they returned the entire lands to the Government of Puducherry by abandoning the project itself. Under those circumstances, the appellants being only developers, cannot have any independent claim or right to challenge the cancellation, as admittedly they cannot act independently or parallely, that too against the interest of the PIPDIC or SPV. In fact, the Ministry of Home Affairs, by proceedings, dated 22.5.2007 sought for certain details from the Government of Puducherry in

pursuant to the request made by them for grant of ex-post-facto approval and the said proceedings, dated 22.5.2007 reads as follows:

"B.A. Coutinho, Joint Secretary (UT) Tel. No. 23092514 Fax No. 23093750

Ministry of Home Affairs Government of India North Block, New Delhi-110001

D.O. No. 13034/31/2007-GP

Dated, the 22nd May, 2007.

Dear Sir,

Please refer to your letter No. 11017/5/2003/Ind. A dated 23rd April, 2007 regarding ex-post facto approval of the Government of India to the transfer of 336.12.52 Hectares of land by Pondicherry Industrial Promotion Development and Investment Corporation Ltd. for setting up a Special Economic Zone at Sedarapet-Karasur.

2. Without keeping the MHA in the picture, Puducherry Government has now requested to accord ex-post facto approval. The proposal does not even give the following information:-

- (a) The name of the Developer Company;
- (b) The financial capacity of the Developer Company;
- (c) The criteria adopted for selecting the Developer Company;
- (d) The period for which the lease has to be signed;
- (e) What happens to the land in the event of Developer Company defaulting or going into liquidation?
- (f) What are the types of Industries to be promoted?
- (g) What would be the concessions extended to the Developer Company? Would any of them require approval of MHA, Government of India?

3. It is requested that information on all the above points may please be furnished immediately to enable us to process the proposal further.

With regards

Yours sincerely,

(B.A. Coutinho)

Shri Pradip Mehra, Chief Secretary, Government of Puducherry, Puducherry.

Copy to Puducherry Special Economic Zone Co. Ltd., Puducherry, for information please.

(Baldev Singh) Under Secretary to the Government of India".

25. No doubt, inspite of the abovesaid communication, dated 22.5.2007, the Ministry of Home Affairs has granted ex-post-facto approval on 6.8.2007 as stated supra. That does not mean that the Ministry of Home Affairs cannot reconsider their earlier decision of granting approval and direct for cancellation of the agreement, if it is brought to the knowledge of the said Ministry that the very selection of the developer was bad and without following the procedures. After all, the Ministry of Home Affairs has to ultimately safeguard the interest of the Government of Pondicherry and its exchequer, as well as to see that the entire project is being carried out in accordance with law. In this connection, it is useful to refer the Office Memorandum of the Planning Commission, dated 14.10.2008, addressed to the Ministry of Home Affairs, which reads as follows:

"N-14070/62/08-Infra. Planning Commissioner (Secretariat for Committee on Infrastructure)

Yojana Bhavan, Sansad Marg, New Delhi-14th October, 2008

OFFICE MEMORANDUM

Subject: Setting up of a SEZ at Sedarpet, Karasur, Puducherry.

The undersigned is directed to refer letter No. U-13034/31/2007-GP dated 23rd September, 2008 of MHA, in connection with the above mentioned subject and enclose a copy of the observations of Planning Commission on the above proposal.

Encl: as above

(K. Ranga Reddy) Jt. Adviser (PPPA) Tel. 2309 6530

Shri J.P. Misra, Director (ANL), Ministry of Home Affairs, North Block, New Delhi.

Subject: Setting up of a SEZ at Sedarpet, Karasur, Puducherry

The proposal of Govt. of Pondicherry/MHA for setting up of a SEZ at Sedarpet, Karasur, Puducherry has been examined and the comment/observations are indicated below:

1. All the PPP project of State Govts., seeking viability gap funding under VGF Scheme would have to be got approved by the Empowered Institution (EI) and Empowered Committee, chaired by Additional Secretary and Secretary, DEA respectively.
2. All the PPP projects of Govt. of India, its undertakings and Statutory Entities under the administrative control of the Ministries of Govt. of India have to be approved by Public Private Partnership Projects Approval Committee (PPPAC) chaired by Secretary, DEA.
3. In this case, no VGF Grant has been sought. MHA has to take a view whether this project falls under the category of State Project or Central Project. In case, it is considered as a Central Project, then approval of PPPAC is mandatory.

4. M/s. Subhash Projects & Marketing Ltd. has been selected as the private developer for the SEZ project. The award of project is not based on a transparent and open competitive bidding process. The bidding should have been based on a specific bidding parameter.
5. Approval of MHA should have been obtained or the representatives of MHA should have been involved in the negotiations/process right from the beginning so that GOP could have got a better advice/feedback from Govt. of India.
6. The commercial parameters of the project, revenue sharing pattern, pre-fixed tariff and pre-fixed formula for revision of tariff, latest cost estimates, etc. have not been clearly indicated. These should have been settled before the award of the project and entering into the Agreement with the private developer.
7. Govt. of Pondicherry, has not obtained services of professional consultants and experts in the field of award of PPP project on BOT basis.
8. The Leasing Authority as well as the lessee are same i.e. PIPDIC for this SEZ Project. This is not proper as there is a conflict of interest involved in the transaction.
9. The Management Control of the SPV to implement the SEZ has been vested to the private developer, although it has spent only Rs. 4.58 crore, while PIPDIC has spent Rs. 70.61 crore. While GOP can appoint two Directors on the Board, private developer has been conceded to the power to appoint 3 directors on the Board of SPV. This is not fair.
10. As per the equity sharing arrangement, the PIPDIC has contributed Rs. 22 crore (26% of equity), the developer should have contributed Rs. 63 crore (74% of the equity). The private developer, as can be seen, has contributed only Rs. 4.58 crore and acquired much greater powers in excess of the financial commitment made by it.
11. GoP has provided Rs. 52 crore, towards land acquisition, to the Company at an interest rate of 6% p.a. This arrangement is very lopsided and the interest rate charged (6%) is very low. The private partner would, thus, derive undue benefit from this arrangement which is not in fair.
12. GoP has not conveyed its response to the conditions/queries of MHA raised in the meeting held on 23.04.2008, regarding transfer of 10.36 ha of land and other issues.
13. The response of GOP regarding a corruption complaint in award of Port Project is awaited. GOP also needs to clarify/respond to the observation of MHA regarding the CVC angle and also the procedure adopted for selection of the private developer for the SEZ project."
26. The abovesaid Office Memorandum submitted by the Planning Commission to the Ministry of Home Affairs is self-explanatory. It is also to be noted that such Office Memorandum was issued subsequent to the abovesaid ex-post-facto

approval granted by the Ministry of Home Affairs. When such irregularities and illegalities were brought to the knowledge of the Ministry of Home Affairs by the Planning Commission, though subsequent to the grant of ex-post-facto approval, it cannot be said that, still, the Ministry of Home Affairs should keep quiet without re-considering the earlier approval granted and consequently directing the Puducherry Government to cancel the agreement. The learned single Judge has also dealt with this issue in detail by referring to various proceedings from the files, which we do not wish to reproduce once again hereunder in order to avoid multiplicity.

27. Learned Senior Counsels appearing for the appellants relied upon a decision of the Honourable Supreme Court reported in 5 M and T Consultants, Secunderabad Vs. S.Y. Nawab and Another, to contend that the respondents herein are not entitled to make "U" Turn and decide against the appellants, even assuming that there are some lapses. It is true that in paragraph 17 of the said decision, the Apex Court observed that, "...It is by now well settled that non-floating of tenders or absence of public auction or invitation alone is no sufficient reason to castigate the move or an action of a public authority as either arbitrary or unreasonable or amounting to mala fide or improper exercise or improper abuse of power by the authority concerned.... ". It is needless to say that such observations made by the Apex Court, were based on the facts and circumstances of that case and therefore, it has to be seen as to whether the facts and circumstances of the present case would also come within the purview of such observations. When the facts of that case are seen, it appears that the case involved therein is with regard to the permission granted by the Corporation of Hyderabad to the appellant therein to erect or display any advertisement/street signs/direction boards/arches on the public roads/colonies etc., within the twin cities of Hyderabad and Secunderabad. It is also found by the Honourable Supreme Court therein that not only the Municipal Corporation has no financial commitments in getting such works by any expenditure therefor, which were to be executed by the appellant therein only on self-financing basis, but ultimately, the whole works have to be left with the Corporation and it is not to be removed by the appellants therein. Therefore, it was noted that no such financial commitments were there in the Municipal Corporation therein. The facts of the present case are totally different. In this case, the public money and vast extent of Government lands are involved in the SEZ Project of Puducherry. Therefore, the said decision cannot be relied upon by the appellants.

28. At this juncture, it is relevant to note the recent decision of the Honourable Supreme Court reported in Manohar Lal Sharma Vs. The Principal Secretary, , namely the Coal Case, wherein in paragraph 154, it has been observed as follows:

"154. To sum up, the entire allocation of coal block as per recommendations made by the Screening Committee from 14.07.1993 in 36 meetings and the allocation through the Government dispensation route suffers from the vice of

arbitrariness and legal flaws. The Screening Committee has never been consistent, it has not been transparent, there is no proper application of mind, it has acted on no material in many cases, relevant factors have seldom been its guiding factors, there was no transparency and guidelines have seldom guided it. On many occasions, guidelines have been honoured more in their breach. There was no objective criteria, nay, no criteria for evaluation of comparative merits. The approach had been ad-hoc and casual. There was no fair and transparent procedure, all resulting in unfair distribution of the national wealth. Common good and public interest have, thus, suffered heavily. Hence, the allocation of coal blocks based on the recommendations made in all the 36 meetings of the Screening Committee is illegal."

29. We have already pointed out that the very inception of the appellants was not in accordance with the well-established procedures. Therefore, such selection undoubtedly suffers on the ground of arbitrariness and legal flaws. Consequently, the Ministry of Home Affairs cannot be found fault with in directing the Government of Puducherry to cancel the entire agreement. Accordingly, we hold that the Ministry of Home Affairs is justified in their action and thus, we answer this question also against the appellants.

30. Question (iv): Whether the appellants are entitled to raise the grounds of "promissory estoppel" and "legitimate expectation" under the facts and circumstances of the case?

On this issue, the learned Senior Counsels appearing for the appellants relied on the following decisions to contend that the respondents are estopped by the principles of "promissory estoppel" and "legitimate expectation" by their own conduct:

- (a) Union of India (UOI) and Others Vs. Indo-Afghan Agencies Ltd.,
- (b) Century Spinning and Manufacturing Company Ltd. and Another Vs. The Ulhasnagar Municipal Council and Another,
- (c) Motilal Padampat Sugar Mills Co. Ltd. Vs. State of Uttar Pradesh and Others,
- (d) Jit Ram Shiv Kumar and Others Vs. State of Haryana and Others,
- (e) Union of India (UOI) and Others Vs. Godfrey Philips India Ltd.,
- (f) Delhi Cloth and General Mills Ltd. Vs. Union of India (UOI),
- (g) Navjyoti Co-operative Housing Society etc. Vs. Union of India and Others,
- (h) Food Corporation of India Vs. M/s. Kamdhenu Cattle Feed Industries,
- (i) I.T.C. Bhadrachalam Paperboards and Another Vs. Mandal Revenue Officer, A.P. and Others,
- (j) State of Punjab Vs. Nestle India Ltd. and Another,

(k) L.M.L. Ltd. Vs. State of U.P. and Others,

(l) Pepsico India Holdings P. Ltd. Vs. State of Kerala and Others, and

(m) Southern Petrochemical Industries Co. Ltd. Vs. Electricity Inspector and E.T.I.O. and Others, .

31. Since all the above decisions referred to by the learned Senior Counsels appearing for the appellants for the purpose of emphasising one and the same point, in order to avoid multiplicity, we would like to refer the last decision, namely Southern Petrochemical Industries Co. Ltd. Vs. Electricity Inspector and E.T.I.O. and Others, , wherein, the Apex Court has held in paragraphs 128, 130 and 133 as follows:

"128. In MRF Ltd., Kottayam Vs. Assistant Commissioner (Assessment) Sales Tax and Others, it was held that the doctrine of promissory estoppel will also apply to statutory notifications."

"130. We, therefore, are of the opinion that doctrine of promissory estoppel also preserves a right. A right would be preserved when it is not expressly taken away but in fact has expressly been preserved."

"133. Legitimate expectation is now considered to be a part of the principles of natural justice. If by reason of the existing state of affairs, a party is given to understand that the other party shall not take away the benefit without complying with the principles of natural justice, the said doctrine would be applicable. The legislature, indisputably, has the power to legislate but where the law itself recognises existing right and did not take away the same expressly or by necessary implication, the principles of legitimate expectation of a substantive benefit may be held to be applicable."

32. There is no quarrel about the said proposition. At the same time, it cannot be disputed that the requirement of application of those principles depends upon the facts and circumstances of each case. It is needless to say that a person who seeks application of the principles of promissory estoppel and legitimate expectation, must prove on facts that he has a legal basis or right to seek for application of those principles to the facts and circumstance of his case. Hence, the appellants herein, unless succeed in their attempt in establishing their legal right to sustain the very selection itself based on the facts and circumstances of the present case, they cannot be permitted to plead that the conduct of the respondents is against the principles of promissory estoppel and legitimate expectation. A person who was not selected through well-established procedures, cannot plead for application of those principles. When the very inception of such person itself is bad, question of application of those principles does not arise. Here in this case, on facts, as admitted by the very selectee themselves, the selection of the appellants is bad and cannot withstand the scrutiny of law, as discussed supra. At the risk of repetition, we once again formulate as to how the selection is bad in short form. The application was made only by the appellant-

SPML and not by both the appellants as consortium of companies. However, both the appellants were taken into picture as developers. The selection process was not done by following technical and commercial criteria, which is the very basic mandatory requirement of the established procedures. No project report, namely DPR was prepared before making the selection. The Committee which selected the appellant-SPML was not having a technical member. No comparative assessment of merits and abilities was made and no discussion is available in the files to justify as to how the appellant-SPML was selected and placed in No. 1 out of the shortlisted companies. The appellant-Om Metal entered through backdoor, which was approved by the selectee just like a cake-walk. With all these lapses, irregularities and illegalities, if the selection is made, certainly the selected person, namely the appellants, can never be permitted to plead that the action of the respondents in cancelling the agreement subsequently, is hit by the principles of promissory estoppel and legitimate expectation. Certainly, such principles have to be applied only in deserving cases, where the facts and circumstances permit for application of those principles as well. If the promise given was on suppression of facts or against the well-established principles and procedures of law or without appraisal of the entire facts, the promisor can always withdraw from such promise either by direct action or by implication, if those lapses come to his knowledge at a later point of time. Justification for making the promise must not only exist at the time of making it, but also should continue to exist till the end of the transaction or event. Subsequent developments, if any, warranting change of mind, will have to be taken note of to decide as to whether the promise must continue or to be withdrawn. Under those circumstances, the person who obtained such promise, cannot plead estoppel against the promisor. This is what the position in the case of the legitimate expectation also. Therefore, we are of the view that the appellants cannot succeed in their attempt to seek for application of those principles based on the above referred case laws, which are factually distinguishable compared to the facts and circumstances of the present case. Moreover, we have already discussed in detail and found that the very inception of the appellants, itself, is bad. If such inception is bad, any subsequent action or conduct of the parties cannot make such inception good or sanctified. Therefore, based upon such subsequent conduct, the party whose inception was found to be bad, cannot plead promissory estoppel or legitimate expectation.

33. At this juncture, it is useful to refer to the decision of the Honourable Supreme Court reported in *State of Orissa and Another Vs. Mamata Mohanty*, wherein the Apex Court observed in paragraph 37 as follows:

"Order bad in inception

37. It is a settled legal proposition that if an order is bad in its inception, it does not get sanctified at a later stage. A subsequent action/development cannot validate an action which was not lawful at its inception, for the reason that the illegality strikes at the root of the order. It would be beyond the competence of

any authority to validate such an order. It would be ironic to permit a person to rely upon a law, in violation of which he has obtained the benefits. If an order at the initiate stage is bad in law, then all further proceedings consequent thereto will be non est and have to be necessarily set aside. A right in law exists only and only when it has a lawful origin. Vide *Upen Chandra Gogoi Vs. State of Assam and Others*, *Mangal Prasad Tamoli (Dead) by Lrs. Vs. Narvedshwar Mishra (Dead) by Lrs. and Others*, and *Ritesh Tewari and Another Vs. State of U.P. and Others*, ."

Accordingly, we answer this question also against the appellants.

34. Question (v): Whether the appellants are entitled to insist upon issuance of the Notification under Section 4(1) of the SEZ Act, when the PIPDIC, the applicant for setting up of the SEZ, had returned the entire lands and abandoned the entire project?

Section 4(1) of the SEZ Act is relevant to be extracted hereunder:

"Section 4: Establishment of Special Economic Zone and approval and authorisation to operate it to, Developer--(1) The Developer shall, after the grant of letter of approval under subsection (10) of section 3, submit the exact particulars of the identified area referred to in sub-sections (2) to (4) of that section, to the Central Government and thereupon that Government may, after satisfying that the requirements, under sub-section (8) of section 3 and other requirements, as may be prescribed, are fulfilled, notify the specifically identified area in the State as a Special Economic Zone:

Provided that an existing Special Economic Zone shall be deemed to have been notified and established in accordance with the provisions of this Act and the provisions of this Act shall, as far as may be, apply to such Zone accordingly:

Provided further that the Central Government may, after notifying the Special Economic Zone, if it considers appropriate, notify subsequently any additional area to be included as a part of that Special Economic Zone."

On a perusal of the above Section, it is clear that the developer cannot compel the Central Government to notify the area as a Special Economic Zone and discretion is given to the Central Government to satisfy itself that the requirements under sub-section (8) of Section 3 and other requirements of the said Act prescribed, are fulfilled by the developer to notify. In this case, in view of our discussion made above in answering the other questions, we are of the view that the appellants-writ petitioners are not entitled to seek for issuance of Writ of Mandamus to direct the issuance of Notification under Section 4(1) of the SEZ Act, as they do not have any legal right to seek for the same. In fact, the lands transferred to PIPDIC were withdrawn and a direction was issued by the Ministry of Home Affairs to cancel the entire agreement with the strategic partner and not to part with the lands in favour of PIPDIC or Pondicherry SEZ Company Ltd. Neither the PIPDIC nor the SPV has chosen to challenge the impugned

action. On the other hand, they returned the lands to the Government of Puducherry in pursuant to the impugned communication issued by the Ministry of Home Affairs. They have also abandoned the project. It is also specifically pointed out by the learned single Judge in paragraph 63 of his order that the Government of Pondicherry has taken a decision not to establish the SEZ and to use the lands for other public purpose to improve the economic condition. This fact is not disputed. Under such circumstances, the appellants who are not having any independent right more than what PIPDIC or SPV can have, cannot seek for issuance of the Notification under Section 4(1) of the SEZ Act. Therefore, we answer this question also against the appellants.

35. Question (vi): Whether the impugned actions have violated the principles of natural justice and whether following of such principle is warranted under the facts and circumstances of the present case?

It is well settled that application of the principles of natural justice is not a straight-jacket formula to be applied in each and every case. Certainly, facts and circumstances of each case should be gone into to decide as to whether such principle needs to be applied or not. The purpose of applying such principle is to put the affected person on notice and to get his views or explanation as to why such proposed action cannot be taken. If the person so affected, on receipt of notice gives explanation and satisfies the authority that the proposed action cannot be taken and/or it is not at all warranted, then the authority who is competent to take action, can take a view or decision based on such explanation. Therefore, it is crystal clear that such explanation or objection to be given by the affected person, must have a bearing on the decision to be taken by the authority concerned. In other words, such objection or explanation must be in a position to make the authority concerned to take a different view also, other than the one proposed already. To put it in a nut-shell, there must be two views possible, one in favour and the other against the noticee. Only under such circumstances, the requirement of issuing notice and following the principles of natural justice arises. If no other view is possible or the explanation or objection to be made by such person cannot alter or have any bearing on the decision to be taken, there is no need to issue such notice. In those cases, issuance of notice would be only an empty formality.

36. In this connection, it is useful to refer the decision of the Honourable Supreme Court reported in Ashok Kumar Sonkar Vs. Union of India (UOI) and Others, , wherein, in paragraphs 26 to 28, it has been observed as follows:

"26. This brings us to the question as to whether the principles of natural justice were required to be complied with. There cannot be any doubt whatsoever that the audi alteram partem is one of the basic pillars of natural justice which means no one should be condemned unheard. However, whenever possible the principle of natural justice should be followed. Ordinarily, in a case of this nature the same should be complied with. Visitor may in a given situation issue notice to the employee who would be effected by the ultimate order that may be passed. He

may not be given an oral hearing, but may be allowed to make a representation in writing.

27. It is also, however, well settled that it cannot put any straightjacket formula. It may not be applied in a given case unless a prejudice is shown. It is not necessary where it would be a futile exercise.

28. A court of law does not insist on compliance with useless formality. It will not issue any such direction where the result would remain the same, in view of the fact situation prevailing or in terms of the legal consequences. Furthermore in this case, the selection of the appellant was illegal. He was not qualified on the cut-off date. Being ineligible to be considered for appointment, it would have been a futile exercise to give him an opportunity of being heard."

(Emphasis supplied)

37. Going by the facts and circumstances of the present case, as discussed supra, it would undoubtedly show that there is no necessity for issuing notice to the appellants, as the fact remains that the selectee, namely the Puducherry Government has decided to abandon the project itself. It is needless to say that establishing SEZ is the economic policy of a Government, with which Court cannot interfere.

38. At this juncture, the observations of the Honourable Supreme Court in the decision reported in Bhavesh D. Parish and Others Vs. Union of India and Another, , are relevant to be quoted:

"26. The services rendered by certain informal sectors of the Indian economy could not be belittled. However, in the path of economic progress, if the informal system was sought to be replaced by a more organised system, capable of better regulation and discipline, then this was an economic philosophy reflected by the legislation in question. Such a philosophy might have its merits and demerits. But these were matters of economic policy. They are best left to the wisdom of the legislature and in policy matters the accepted principle is that the courts should not interfere. Moreover in the context of the changed economic scenario the expertise of people dealing with the subject should not be lightly interfered with. The consequences of such interdiction can have large-scale ramifications and can put the clock back for a number of years....."

(Emphasis supplied)

39. In the decision reported in Sterling Computers Limited and Others Vs. M and N Publications Limited and Others, , the Honourable Supreme Court observed in paragraphs 17 to 19 as follows:

"17. It is true that by way of judicial review the Court is not expected to act as a court of appeal while examining an administrative decision and to record a finding whether such decision could have been taken otherwise in the facts and circumstances of the case. In the book Administrative Law, Prof. Wade has said:

"The doctrine that powers must be exercised reasonably has to be reconciled with the no less important doctrine that the court must not usurp the discretion of the public authority which Parliament appointed to take the decision. Within the bounds of legal reasonableness is the area in which the deciding authority has genuinely free discretion. If it passes those bounds, it acts *ultra vires*. The court must therefore resist the temptation to draw the bounds too tightly, merely according to its own opinion. It must strive to apply an objective standard which leaves to the deciding authority the full range of choices which legislature is presumed to have intended. The decisions which are extravagant or capricious cannot be legitimate. But if the decision is within the confines of reasonableness, it is no part of the court's function to look further into its merits. "With the question whether a particular policy is wise or foolish the court is not concerned; it can only interfere if to pursue it is beyond the powers of the authority.""

But in the same book Prof. Wade has also said:

"The powers of public authorities are therefore essentially different from those of private persons. A man making his will may, subject to any rights of his dependants, dispose of his property just as he may wish. He may act out of malice or a spirit of revenge, but in law this does not affect his exercise of his power. In the same way a private person has an absolute power to allow whom he likes to use his land, to release a debtor, or, where the law permits, to evict a tenant, regardless of his motives. This is unfettered discretion. But a public authority may do none of these things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest.

There are many cases in which a public authority has been held to have acted from improper motives or upon irrelevant considerations, or to have failed to take account of relevant considerations, so that its action is *ultra vires* and void."

18. While exercising the power of judicial review, in respect of contracts entered into on behalf of the State, the Court is concerned primarily as to whether there has been any infirmity in the "decision making process". In this connection reference may be made to the case of *Chief Constable of the North Wales Police Vs. Evans* (1982 (3) All.E.R. 141) where it was said that: (p. 144a)

"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 or enjoined by law to decide for itself a conclusion which is correct in the eyes of the court."

By way of judicial review the court cannot examine the details of the terms of the contract which have been entered into by the public bodies or the State. Courts have inherent limitations on the scope of any such enquiry. But at the same time as was said by the House of Lords in the aforesaid case, *Chief Constable of the North Wales Police v. Evans* (1982 (3) All.E.R. 141) the courts can certainly examine whether "decision-making process" was reasonable, rational, not arbitrary and violative of Article 14 of the Constitution.

19. If the contract has been entered into without ignoring the procedure which can be said to be basic in nature and after an objective consideration of different options available taking into account the interest of the State and the public, then Court cannot act as an appellate authority by substituting its opinion in respect of selection made for entering into such contract. But, once the procedure adopted by an authority for purpose of entering into a contract is held to be against the mandate of Article 14 of the Constitution, the courts cannot ignore such action saying that the authorities concerned must have some latitude or liberty in contractual matters and any interference by court amounts to encroachment on the exclusive right of the executive to take such decision."

40. Therefore, this Court cannot compel the Puducherry Government to have or not to have the SEZ, as such decision is undoubtedly an economic policy decision, that too involving huge expenditure of Government exchequer and parting of vast extent of lands. It is better to leave it in the hands of the Puducherry Government to take its own decision, considering the various aspects of the matter and the interest of the public. That being the position, the appellants being the private developers, cannot compel the issuance of Notification under Section 4(1) of the SEZ Act to develop the SEZ project, especially when it is found that they do not have a legal right to do so. Therefore, this question is also answered against the appellants.

41. The appellants, in fact, projected their case as if the impugned decision was taken only because of the change of men in power, without there being any valid reason. In support of such contention, the decision of the Honourable Supreme Court reported in State of Tamil Nadu and Others Vs. K. Shyam Sunder and Others, was relied upon by the learned Senior Counsels appearing for the appellants, wherein, in paragraph 20, the Apex Court observed as follows:

"20. Thus, it is clear from the above, that unless it is found that act done by the authority earlier in existence is either contrary to statutory provisions, is unreasonable, or is against public interest, the State should not change its stand merely because the other political party has come into power. Political agenda of an individual or a political party should not be subversive of rule of law."

42. We are not convinced to agree with such submission of the learned Senior Counsels appearing for the appellants, based upon the facts and circumstances of the present case. What this Court has to see is as to whether the selection was done as per the well-established procedures and whether such selection gives an irrebuttable presumption that the same is beyond any doubt about its genuineness. The facts discussed supra would disclose that such selection made cannot pass the above test, and therefore, the above decision also will not help the appellants in any manner.

43. It is seen from the respective pleadings of the parties that it is claimed by the appellants that certain amounts have been spent by the appellants in respect of the said SEZ Project, Puducherry, which according to the respondents, were

only towards payment of salary to staff of the appellants, etc., and it has nothing to do with the developmental activities of the said Project. We do not want to go into such disputed question, as we propose to leave such question to be decided in appropriate civil proceedings, if the appellants want to recover such money from the Puducherry Government, if the appellants have any legal right to do so.

44. We find no merits in all the four Writ Appeals and the same are dismissed. No costs. The Miscellaneous Petitions are closed.