**(2014) 11 BOM CK 0134**

**In the Bombay High Court**

**Case No :** Public Interest Litigation Nos. 131 of 2003 and 48 of 2004

Sanjay Kumar Surve and Others APPELLANT

Vs

State of Maharashtra and Others RESPONDENT

**Date of Decision :** 21-11-2014

**Acts Referred:**

Constitution of India, 1950 — Article 14, 226
Maharashtra Regional and Town Planning Act, 1966 — Section 113, 154, 159

**Citation :** (2014) 11 BOM CK 0134

**Hon'ble Judges :** Abhay Shreeniwas Oka, J;A.S. Gadkari, J

**Bench :** Division Bench

**Advocate :** Harinder Toor i/b Kishore Shriyan, Advocates for the Appellant

## Judgement

Abhay Shreeniwas Oka, J.—The challenge in these two Petitions under Article 226 of the Constitution of India is to the action of the City and Industrial Development Corporation of Maharashtra Limited (for short "CIDCO'') of allotting a large plot of land in the city of Navi Mumbai to the Fifteenth Respondent in PIL No. 48 of 2004 and the Fourth Respondent in PIL No. 131 of 2003. The said Respondent is M/s. K. Raheja Corporation Private Limited (for short ''M/s. K. Raheja''). On the basis of the resolution passed on 17th September 2003 by the Board of Directors of CIDCO, agreement of lease dated 16th December 2003 was executed by and between CIDCO and M/s. K. Raheja. The description of the property which is the subject matter of allotment in the resolution is plot Nos. 39/1, 39/6 to 39/15 in Sector 30A at Vashi including 3611 square meter plot reserved for IT totally admeasuring approximately 29,000 square meters. The description of the property which is the subject matter of allotment in the agreement to lease is plot Nos. 39/1, 39/6 to 39/15 together with open space in Sector 30A at Vashi totally admeasuring 30,621.35 square meters. The allotment was on lease for a period of sixty years for commercial as well as residential use.

FACTS OF THE CASE

2. It will be necessary to make a reference to the facts of the case in brief with a

view to enable the Court to appreciate the submissions canvassed by learned counsel representing the parties. In the late sixties, the State Government took a decision of establishing a twin city of Navi Mumbai with the object of reducing congestion in the city of Mumbai. The CIDCO which is a government company was appointed as the New Town Development Authority for the area designated as the site of the new town of Navi Mumbai by exercising powers under sub-sections (1) and (3A) of Section 113 of the Maharashtra Regional and Town Planning Act, 1966 (for short "the MRTP Act"). The twin city of Navi Mumbai was established by en-bloc acquisition of lands situated in 96 villages of the Thane and Raigad districts. On acquisition, the lands were placed at the disposal of CIDCO for the planned development of the twin city of Navi Mumbai. In exercise of powers under Section 159 of the MRTP Act, the New Bombay Disposal of Lands Regulations, 1975 (for short "The said Regulations") were framed. Provisions were made therein for the disposal of lands placed at the disposal of CIDCO.

3. The lands subject matter of these Petitions are a part of Sector 30A at Vashi, Navi Mumbai. The Sector 30A was initially earmarked for promotion and development of IT industries. It was earmarked for International Infotech Park (IT Park). The area constituting Sector 30A was 57,180 square meters. Plots were allotted out of Sector 30A to various IT companies. In accordance with the information technology policy of the State Government, the normal FSI of 1.5 was increased to 3.0 for the IT sector. According to the case of CIDCO, out of the area of 57,180 square meters of sector 30A, an area of 31,232 square meters was allotted to various IT companies. The balance area remained was 25,948 square meters out of Sector 30A. On the ground that there was slump in IT industry from the year 2001, on 30th April 2003, a resolution was passed by the Board of Directors of CIDCO granting approval to the proposal of converting an area of 22,337 square meters out of Sector 30A for residential/commercial and/or office use. Thus, out of Sector 30A, area of 31,232 square meters remained reserved for IT industry and area of 22,337 square meters was converted into residential cum commercial use. For the sake of completion, it will be necessary to make a reference to the material part of resolution No. 8718 dated 30th April 2003. The resolution reads thus:

"RESOLVED THAT the balance plots in International Infotech Park, Sector 30A of Vashi earmarked for Information Technology (IT) use be restored to its original permissible use prescribed in the Development Plan and GDCR."

"RESOLVED FURTHER THAT the Board do and hereby approve the proposal to approach the Govt. for enhancing the FSI 3.00 for such Residential-Cum-Commercial and/or office use for the Plots in Sector 30 Vashi, and to request the Government in UDD to sanction the same by issuing order under Section 154 of MR & TP act and suitable directives to NMMC."

"RESOLVED FURTHER THAT these plots be disposed of through open tender."

4. It appears that on 20th August 2003, an application was made by M/s. K.

 

Raheja to CIDCO. The said application dated 20th August 2003 was for allotment of a plot admeasuring about 25,000 square meters out of the unsold plots out of Sector 30A for establishing a shopping mall, entertainment centre, cinema hall including food court, hotels, office space and residential apartments etc. A request was made to convey the rate and the terms on which FSI of 3.0 will be made available. There is a subsequent communication dated 15th September 2003 addressed by M/s. K. Raheja to the Managing Director of CIDCO. It records that there were negotiations between M/s. K. Raheja and the officers of CIDCO for allotment of an area of 30,403.70 square meters out of Sector 30A. The letter records all details as discussed between M/s. K. Raheja and the officers of CIDCO. The letter records the conditions which were agreed upon by M/s. K. Raheja including a condition of developing and maintaining a Japanese garden on an open land on the north of the plot to be allotted. The proposal of K. Raheja was placed in the meeting of the Board of Directors held on 17th September 2003 vide item No. 28. A resolution was passed on the very day which is subject matter of challenge in these two Petitions. The said resolution No. 8842 reads thus:

"RESOLVED THAT the Board do hereby approve the allotment of plots admeasuring an area of approx. 29,000 sqm. (or actual as found in net measurement) and bearing plot nos. 39/1, 39/6 to 39/15 in Sector 30A of Vashi including the 3611 sqm. plots reserved for IT use to M/s. K. Raheja Corp. with the changed layout as proposed for the R + C use with FSI 3.0 in anticipation of the approval from the Government as given in para 3.0 of agenda Note".

"RESOLVED FURTHER THAT the Board do hereby approve the proposal to charge a rate of Rs. 10,250/- per sqm. with FSI 1.5 and additional Rs. 3,250/- per sqm. at the time of enhancement of FSI from 1.5 to 3.00 after Government''s approval, subject to the condition that a beautiful garden would be developed by them at their own cost in the adjoining plot No. 40."

5. The said resolution mentions that approximate area of 29,000 square meters was decided to be allotted to M/s. K. Raheja. On the basis of the said resolution, a letter of allotment dated 8th October 2003 was issued in respect of Plot Nos. 39/1, 39/6 to 39/15 admeasuring 30,582.87 square meters. In the subject of the letter, apart from the aforesaid plot numbers, an "open space" was also mentioned as the subject matter of allotment without incorporating the specific area of the open space. As stated earlier, the resolution of the Board of Directors mentioned the approximate area of 29000 square meters. But the letter of allotment was in respect of the area of 30,582.87 square meters. As the subsequent discussion would reveal, the open space is in addition to the area of the plots specifically mentioned.

6. An agreement of lease dated 16th December 2003 was executed by and between CIDCO and M/s. K. Raheja. A letter of possession of the same date was annexed to the said agreement of lease. We may mention here that though in both the said documents, the description of the plots allotted together with open

 

space is the same as in the letter of allotment, the area allotted was mentioned as 30,621.35 square meters.

7. PIL No. 131 of 2003 was filed on 1st December 2003. On 17th December 2003, notice for final disposal was issued. After hearing all concerned parties including M/s. K. Raheja and CIDCO, an order of status quo was passed. Thereafter, ad interim order of status quo was continued from time to time. This Court issued rule on the said PIL on 23rd April 2004. The order of status quo was operating till that date. Considering the affidavit in reply filed by CIDCO of Shri D.L.N. Murthy, the General Manager (Information Technology and Special Projects), the ad-interim relief was vacated, but it was clarified that the whole thing will be subject to final outcome as well as further orders in the PIL. Thus, this Petition was filed even before the agreement of lease was executed. PIL No. 48 of 2004 was filed on 24th February 2004. In the said PIL, notice for final disposal was issued on 17th December 2004. On 23rd April 2004, an order was passed in the said PIL that it should be heard with PIL 131 of 2003.

8. As none appeared for the Petitioner in PIL No. 131 of 2003, this Court appointed Mr. M.S. Karnik, learned counsel as amicus curiae.

SUBMISSIONS OF THE PETITIONER

9. We have heard submissions of learned counsel appearing for the Petitioner in PIL No. 48 of 2004 and learned counsel appointed as amicus curiae in PIL No. 131 of 2003. The learned counsel pointed out the relevant documents. The basic submission is that a very valuable public property vested in CIDCO has been disposed of without following a fair and transparent procedure. The argument is that though the resolution dated 30th April 2003 specifically provides that the balance area out of Sector 30A shall be disposed of through open tender, the same was disposed of to M/s. K. Raheja without adopting tender process. The submission based on the letter issued by M/s. K. Raheja dated 15th September 2003 is that the said letter mentions the terms and conditions on which ultimately it was resolved to grant lease to the said company by the Board of Directors of CIDCO within two day from the date on which the said letter was submitted. It is pointed out that agenda note was hurriedly prepared on 16th September 2003 based on the letter issued by M/s. K. Raheja dated 15th September 2003 and immediately on 17th September 2003, a decision was taken by the Board of Directors to allot the plots to K. Raheja. It is pointed out that the terms and conditions incorporated in the letter dated 15th September 2003 of M/s. K. Raheja form an integral part of the resolution passed by CIDCO. It is submitted that such a valuable property has been disposed of without giving an opportunity to others to compete and submit their offers. It is urged that the entire process was completed in great deal of hurry. Inviting our attention to the agenda note which was placed before the meeting held on 17th September 2003, it is pointed out that the Chief Economist of CIDCO had given an opinion against the proposed allotment, but the said opinion is not even discussed in the said agenda note except for a mere reference to it. Inviting our attention to the

 

opinion expressed by the Chief Economist, it is contended that the Chief Economist had opined that the proposed transaction will cause loss to CIDCO. Inviting our attention to clause No. 7 of the agenda note, it was pointed out that on the plain reading thereof and in particular, clause No. 7.10, the transaction was not at all beneficial to CIDCO. It is pointed out that CIDCO has suffered huge monthly loss as a result of the said transaction. Learned counsel pointed out that there were other takers for a part of the same plots. Our attention was invited to the documents obtained under the Right to Information Act, 2005 to show that a third party (M/s. Sarjak Infotech) was interested in the said plots when negotiations between the officers of CIDCO and M/s. K. Raheja were going on. Another important aspect which is pointed out is the report submitted by a single man committee appointed by the State Government of Dr. D.K. Sankaran, who was the then Additional Chief Secretary. It is pointed out that the recommendations of the Sankaran Committee show that a huge monetary loss has been caused to CIDCO to the extent of Rs. 50 Crores in the transaction with M/s. K. Raheja. It is pointed out that the said report was submitted in the year 2005. It is also pointed out that the public undertaking committee in its report for the years 2005-06, 2006-07 and 2007-08 had recommended to conduct an enquiry in respect of three allotments including the allotment made in favour of K. Raheja. Accordingly one man committee of Mr. Sudhakar Joshi, IAS was appointed to conduct the enquiry. It is pointed out that even Joshi Committee found serious fault with the transaction subject matter of the challenge in these PILs. It is also pointed out that even the CAG report has made observations against CIDCO in relation to the transaction. CAG observed that the transfer of plots to M/s. K. Raheja in prime locality without calling for tenders below the market rate amounted to undue favour to a private party resulting in loss of revenue of Rs. 26 Crores. Learned counsel for the Petitioners also pointed out that the first affidavit in reply filed by CIDCO was affirmed by Shri. D.L.N. Murthy who was at the relevant time discharging duties as the General Manager of IT and SP. It is pointed out that a show cause notice was issued by CIDCO on 13th October 2010 to Shri Murthy by pointing out recommendations of Sankaran Committee as well as Joshi Committee and he was called upon to show cause as to why action should not be initiated against him. A specific allegation was made regarding the role of Shri Murthy in irregular allotment made in favour of M/s. K. Raheja. It is pointed out that by exercise of power under Rule 27 of CIDCO Service Regulations, on 4th April 2011 Mr. Murthy was discharged from the employment of CIDCO. In the order of discharge, it is stated that the charge regarding the role played by Shri Murthy in the allotment of a large plot to M/s. K. Raheja without inviting tenders and permitting the change of user of the plot from IT to commercial was established. Learned counsel appearing for the Petitioner pointed out that it is on the basis of the affidavit of the Shri Murthy filed at the admission stage that this Court vacated ad interim relief of status quo granted earlier. Our attention was also invited to the affidavit of Sanjay Gopal Paluskar, Manager (Town Services) of CIDCO affirmed on 23rd September 2014, in which on the basis of the reports of Sankaran and Joshi Committee as well as

 

CNG report, CIDCO has accepted that allotment to M/s. K. Raheja was illegal.

10. Learned counsel appearing for the Petitioner relied upon several decisions. He relied upon decision of the Apex Court in the case of City Industrial Development Thr. its Managing Director v. Platinum Entertainment 2014 SCC OnLine 773, by which Regulation 4 of the said Regulations has been interpreted. He pointed out that the Apex Court following its several earlier decisions held that notwithstanding Regulation 4, CIDCO can make allotments only by adopting a fair and transparent procedure without presence of any element of favouritism. He invited our attention to the observation of the Apex Court that notwithstanding Regulation 4, CIDCO may take all endeavour to make allotments of plots by open tender or competing bids.

11. He also placed reliance on the decision of the Apex Court in the case of Saroj Screens Pvt. Ltd. Vs. Ghanshyam and Others, . He also relied upon a decision of a Division Bench of this Court in the case of M/s. Shakti Commercial Premises Society Ltd. Vs. State of Maharashtra, The City and Industrial Development Corporation Ltd. and Navi Mumbai Municipal Corporation, . Relying upon the said decision, he submitted that after the change of user, the plots ought to have been advertised by CIDCO.

12. He also placed reliance on the decision of the Apex Court in the case of Natural Resources Allocation, In Re: Special Reference No. 1 of 2012, . He submitted that even in the case of Natural Resources, the Apex Court has held that though public tender may not be the only method for allocation of natural resources, the process adopted for allocation of natural resources has to be fair and transparent.

13. Mr. Sandeep Thakur, who intervened, invited our attention to the correspondence made by M/s. K. Raheja. He pointed out that there was a clear assurance given by M/s. K. Raheja to develop a Japanese garden as a condition of allotment of the plots. He pointed out that even the resolution dated 17th September 2003 and the letter of allotment incorporate a condition of M/s. K. Raheja developing a Japanese garden on an area of 10,000 square meters on the Northern side of the plots to be allotted. He also pointed out that admittedly such a garden has not been developed by the M/s. K. Raheja thereby committing a gross breach of an essential condition of allotment. He pointed out that while fixing the consideration payable by M/s. K. Raheja, the cost of such Japanese garden was taken into consideration by the Board of Directors. He also urged that in another proceedings in this Court in relation to the open land abutting the plots of land subject matter of challenge in this Petition, M/s. K. Raheja claimed that the open space was allotted under the agreement of lease dated 16th December 2003. He pointed out that when CIDCO issued notices to M/s. K. Raheja in relation to the said open space, the matter was carried to this Court by M/s. K. Raheja and on two occasions this Court directed CIDCO to consider the case of M/s. K. Raheja. He pointed out that though M/s. K. Raheja claimed that the open plot was allotted under the same agreement of 16th December 2003, it

 

was not disclosed to this Court in other proceedings filed by M/s. K. Raheja that the agreement of lease was itself is a subject matter of challenge in the present petitions. He pointed out that apart from the condition imposed of developing a Japanese garden, Mr. Arvind Digambar Prabhu, who is the authorized representative of M/s. K. Raheja filed an affidavit dated 16th December 2003 giving an undertaking to develop a Japanese garden on adjoining plot No. 40 in terms of clause 18 of the letter of allotment dated 8th October 2003 and the said undertaking has been breached. He pointed out that as a condition precedent for grant of NOC by CIDCO to enable the Municipal Corporation to issue completion certificate, a bank guarantee of Rs. 50 Crores has been furnished by M/s. K. Raheja as the PILs were pending. He also invited our attention to the bond executed by M/s. K. Raheja which refers to the findings recorded by Sankaran Committee. He submitted that even conduct of M/s. K. Raheja will have to be taken into consideration while examining the decision making process adopted by CIDCO.

SUBMISSIONS ON BEHALF OF M/S. K. RAHEJA BY LEARNED SENIOR COUNSEL

14. Learned senior counsel representing M/s. K. Raheja invited our attention to the said Regulations and in particular Regulation 4. He urged that Regulation 4 permits CIDCO to make allotment of lands on the basis of private applications directly made to CIDCO and there is no mandate to invite tenders. He invited our attention to the Board resolution passed on the basis of the agenda note. He pointed out that it is stated in the said agenda note as well as in the affidavit filed for opposing admission that there were no takers for the said plots and in fact a part of the said plots which was allotted to Patni Computers for IT use could not be used by the said company. He also pointed out the affidavit in reply filed on behalf of M/s. K. Raheja by Mr. Arvind Prabhu, its authorized representative. He invited our attention to various assertions in the said reply and in particular, in clause (h) of paragraph 1 of the said reply. He pointed out that apart from he fact that there were no takers, a conscious decision was taken by CIDCO to allot the said plots to M/s. K. Raheja after taking into consideration all the relevant commercial considerations. He pointed out that the material considered and placed before CIDCO showed that considering the disposal of such a large lands at one stroke, CIDCO was likely to get substantial financial advantage. Learned senior counsel submitted that in view of the observations made by this Court in its earlier order, now CIDCO has issued a show cause notice dated 11th November 2014 calling upon M/s. K. Raheja to show cause as to why the allotment made to them should not be cancelled. He invited our attention to a policy decision taken by CIDCO in its Board meeting held on 6th June 2005 which provides for regularization of the alleged illegal allotments in certain cases. He pointed out that under the said decision, various illegal allotments found by Sankaran Committee were divided into different categories. He pointed out that as far as the category in which M/s. K. Raheja fall, the action proposed was to issue a show cause notice followed by recovery of the amount of financial loss. He urged that in the supplementary affidavit, belatedly, CIDCO has

 

taken a stand that the allotment to M/s. is illegal though in the earlier reply, CIDCO had supported the allotment. He urged that now an order will have to be passed by CIDCO on the basis of the show cause notice and it is not necessary for this Court to enter into controversy regarding alleged illegality in the allotment. He urged that the object of filing the Petitions was to ensure that CIDCO takes action as regards the alleged illegal allotment and now that CIDCO has initiated legal action by issuing a show cause notice, this Court should not entertain the present petitions. He submitted that in any event, in view of the policy decision, even assuming that the allotment to M/s. K. Raheja is illegal, against payment of an amount, the cases of allotment which are similar to the case of M/s. K. Raheja will be regularized by recovering money equivalent to the alleged monitory loss. His submission that if this Court enters into the question of the legality of the allotment and decides the case of M/s. K. Raheja on merits, the said company will be deprived of the benefits under the resolution dated 6th June 2005 though other similarly placed persons/companies will get benefit.

15. He submitted that as repeatedly held by the Apex Court, auction is not the only method by which a public property can be disposed of. He urged that there was material before CIDCO to come to a conclusion that the said plots should be allotted to M/s. K. Raheja. He submitted that a writ Court cannot go into the issue of adequacy of material, once it is found that the policy decision of CIDCO was based on material. He urged that on the basis of the material on record after taking into consideration all the relevant commercial factors, CIDCO has taken a policy decision to allot the said plots to M/s. K. Raheja which does not call for any interference in writ jurisdiction. He urged that the decision was not an arbitrary decision as alleged by the Petitioner. He stated that the application for allotment was made by M/s. K. Raheja on 20th August 2003. There were negotiations between M/s. K. Raheja and CIDCO. The outcome of the negotiations was recorded by M/s. K. Raheja by addressing a letter dated 15th September 2003. He pointed out a long agenda note placed before the Board of Directors which takes into consideration several positive factors including commercial advantages for permitting the transaction. He urged that there was every justification for CIDCO to allot the said plots as there were no other takers and M/s. K. Raheja had offered a substantial amount by way of consideration.

16. He placed reliance on a decision of the Apex Court in the case of Sterling Computers Limited and Others Vs. M and N Publications Limited and Others, . He urged that what is open for the scrutiny by a writ Court is the decision making process and not the decision itself. He pointed out that while examining the legality of such a decision, this Court cannot act as a Court of appeal. This Court cannot substitute the decision taken the by authorities by its own decision. Learned senior counsel also relied upon a decision of the Apex Court in the case of Netai Bag and Others Vs. The State of West Bengal and Others, . He submitted that merely because there is a failure to float tenders, it does not amount to exercise of the executive power in an arbitrary manner and the constitutional Courts are not expected to presume the existence of the alleged irregularities,

 

illegalities or unconstitutionality. He urged that a writ Court cannot substitute its own opinion for the bonafide opinion of the executive. He urged that while exercising writ jurisdiction, this Court should not interfere with the policy decision only on the ground that another view was possible. He also relied upon the decision of the Apex Court in the case of Chairman and M.D., B.P.L. Ltd. Vs. S.P. Gururaja and Others, . He submitted that once the Court finds that the power exercised by the statutory authorities can be traced to a provision of a statute, unless and until violation of mandatory provisions is pointed out, the Court will not ordinarily interfere either with the policy decision or the decision of the executive. He submitted that the alleged haste in the decision making process by itself is not sufficient to vitiate the decision making process.

17. Relying upon another decision of the Apex Court in the case of Sunil Pannalal Banthia and Others Vs. City and Industrial Development Corpn. of Maharashtra Ltd. and Another, , learned senior counsel pointed out that it is not open for CIDCO now to change its stand and contend that the transaction entered into in the year 2003 was illegal. He urged that such a stand has been deprecated by the Apex Court in the said decision. He urged that CIDCO cannot take such unilateral stand after allowing M/s. K. Raheja to act upon the allotment. He pointed out that acting upon the allotment, a huge shopping mall and a hotel has been constructed on the said plots long back.

18. Lastly, he relied upon a decision of the Apex Court in the case of Brihan Mumbai Electric Supply Transport Undertaking and Another Vs. Laqshya Media P. Ltd. and Others, . He submitted that even in the said decision, the Apex Court has reiterated that merely because there is no auction held, no illegality can be attached to a transaction. He submitted that even assuming that the normal rule is to invite tenders, it is not without an exception. He urged that in the facts of the case, the relevant Regulation 4 expressly permits disposal of the plots without inviting tender on an application of an individual. Lastly, he reiterated that in view of the action of CIDCO of issuing a show cause notice, this Court should be refrain itself from entering into controversy regarding the issue of alleged illegality in the allotment.

CONSIDERATION OF SUBMISSIONS-PRIME LOCATION OF THE SAID PLOTS:

19. We have given careful consideration to the submissions. We have perused the affidavits on record and documents on record. At the outset, it will be necessary to make a reference to the location of the plots subject matter of these Petitions. In the agenda note of the meeting held on 17th September 2003, in paragraph 5, CIDCO has given the description of the said plots which reads thus:

"Sector 30-A is a prime location in Navi Mumbai. The whole area is having many prestigious complexes like International Infotech Park, Exhibition Ground, plots for various Govt. Guest houses, Multiplex & Family Entertainment Complex, Hospital complexes, Press, Luxury Hotel etc. and is connected to Mumbai Pune

Highway and Palm Beach Marg and also the Railway line."

(emphasis added)

20. Thus, CIDCO has itself stated that Sector 30A in which the said plots are situated is in a prime location in Navi Mumbai having many prestigious complexes such International Infotech Park, Exhibition Ground, plots for various Government Guest houses, Multiplex and Family Entertainment Complex, Hospital complexes, Press, Luxury Hotels etc. The CIDCO itself has recorded that its connectivity to Mumbai-Pune Highway and Palm Beach Road, as well as Railway line makes the location of the plots a prime location. Thus, this Court is dealing with a very large plot having an area of more than 30,000 square meters which were situated in a prime location in the twin city of Navi Mumbai in the year 2003.

LAW RELATING TO DISPOSAL OF PUBLIC PROPERTIES

21. Before we consider the submissions in the light of facts which are brought on record, it will be a necessary to make a reference to the various decisions relied upon by the parties as regards the disposal of property vesting with the State. Firstly, we make a reference to the well known decision of the Apex Court in the case of Akhil Bhartiya Upbhokta Congress Vs. State of Madhya Pradesh and Others, thereof reiterate the well settled principles. The said paragraphs read thus:

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

66. We may add that there cannot be any policy, much less, a rational policy of allotting land on the basis of applications made by individuals, bodies, organisations or institutions dehors an invitation or advertisement by the State or its agency/instrumentality. By entertaining applications made by individuals, organisations or institutions for allotment of land or for grant of any other type of largesse the State cannot exclude other eligible persons from lodging competing claim. Any allotment of land or grant of other form of largesse by the State or its agencies/instrumentalities by treating the exercise as a private venture is liable

 

to be treated as arbitrary, discriminatory and an act of favouritism and/or nepotism violating the soul of the equality clause embodied in Article 14 of the Constitution."

22. The Apex Court again dealt with same issue in the case of City Industrial Development v. Platinum Entertainment & Ors. The issue was considered by the Apex Court in the light of Regulation 4 of the said Regulations. After considering the entire law on the subject and after extensively considering the decision of the Apex Court in the case of Akhil Bhartiya Upbhokta Congress in paragraph 49, the Apex Court held thus:

"52. Rule 4, to which our notice was drawn by the learned counsel appearing on behalf of the respondents, although provided an authority to dispose of plots of land by public auction or by tender or by considering individual applications as the Corporation would determine from time to time, but such action on the part of the Corporation should have been taken rationally and after applying the methods which are more rational and reflect non-arbitrariness and would not be smacked under the clout of favouritism and/or nepotism or being influenced by political personalities. In our opinion, although CIDCO had the power to allot the land in any one of the manners stated in Rule 4 above, but the conduct of such allotment should have been more clear and transparent and without presence of any element of favouritism and/or nepotism and without being influenced by any such thing in exercising the discretion conferred upon CIDCO."

(emphasis added)

23. In paragraph 52, the Apex Court held in respect of Rule/Regulation 4 thus:

"52. Rule 4, to which our notice was drawn by the learned counsel appearing on behalf of the respondents, although provided an authority to dispose of plots of land by public auction or by tender or by considering individual applications as the Corporation would determine from time to time, but such action on the part of the Corporation should have been taken rationally and after applying the methods which are more rational and reflect non-arbitrariness and would not be smacked under the clout of favouritism and/or nepotism or being influenced by political personalities. In our opinion, although CIDCO had the power to allot the land in any one of the manners stated in Rule 4 above, but the conduct of such allotment should have been more clear and transparent and without presence of any element of favouritism and/or nepotism and without being influenced by any such thing in exercising the discretion conferred upon CIDCO."

(emphasis added)

24. In paragraph 54, the Apex Court, while dealing with the Regulation 4 observed thus:

"54. We take serious note and express our anguish, the way the authorities of CIDCO showed undue favour to the respondents and managed to allot the Government land in favour of one person knowing fully well that the aforesaid proprietor of the Company, in different capacity and in dummy names, sought allotments of plots. The way CIDCO has been dealing with the Government property, it is high time, we observe, that notwithstanding Regulation 4, as contained in the Regulations, the appellant CIDCO may take all endeavour to make allotments of plots by open tender or competing bids and shall not take any decision for allotment of Government land at the instance of the Ministers and High Dignitaries for any purposes whatsoever."

(emphasis added)

25. In another decision in the case of Saroj Screens Pvt. Ltd. v. Ghanshyam & Ors., again the Apex Court dealt with the issue of disposal of public property. In paragraph 38, the Apex Court made a reference to same paragraphs No. 65 and 66 of the decision in the case of Akhil Bhartiya Upbhokta Congress. The Apex Court in paragraph 39 held thus:

"39. The factual matrix of the instant case shows that before granting 30 years'' lease of the plot in favour of the appellant, the Corporation neither issued any advertisement nor followed any procedure consistent with the doctrine of equality so as to enable the members of the public to participate in the process of alienation of public property. Therefore, the conclusion reached by the High Court, though for different reasons, that the resolution dated 28-8-1991 and the sanction accorded by the State Government vide Letter dated 12-6-2000 are legally unsustainable does not call for interference by this Court."

26. The Division Bench of this Court in the case of Shakti Commercial Premises Society Ltd. v. State of Maharashtra & Ors. made a reference to the law laid down in the case of Saroj Screens Pvt. Ltd. The Division Bench was dealing with a case where after allotment of a plot, CIDCO permitted change of user from shop-cum-godown to commercial. This was a case where petitioner on the basis of the change of user availed the benefit of maximum permissible F.S.I. In the context of the factual matrix before this Court, in paragraph 27, the Division Bench relied upon the law laid down in Saroj Screens Pvt. Ltd. and observed that if a change of user of the plot is to be considered, it would be appropriate to cancel the allotment and auction the property along with changed use (more profitable user), by CIDCO, to observe fairness in the disposal of the plot.

27. In Special Reference No. 1 of 2012, the Full Bench of the Apex Court answered the reference on various questions. The issue with which we are concerned was dealt with in Question No. 1. The issue was whether the only permissible method for disposal of all natural resources across all sectors and in all circumstances is by conduct of auction. In paragraph 107, the Apex Curt observed thus:

"107. From a scrutiny of the trend of decisions it is clearly perceivable that the action of the State, whether it relates to distribution of largesse, grant of contracts or allotment of land, is to be tested on the touchstone of Article 14 of the Constitution. A law may not be struck down for being arbitrary without the pointing out of a constitutional infirmity as State of Andhra Pradesh and others, etc. Vs. McDowell and Co. and others, etc., has said. Therefore, a State action has to be tested for constitutional infirmities qua Article 14 of the Constitution. The action has to be fair, reasonable, non-discriminatory, transparent, non-capricious, unbiased, without favouritism or nepotism, in pursuit of promotion of healthy competition and equitable treatment. It should conform to the norms which are rational, informed with reasons and guided by public interest, etc. All these principles are inherent in the fundamental conception of Article 14. This is the mandate of Article 14 of the Constitution of India."

(emphasis added)

28. The Apex Court reiterated that when it relates to distribution of largesse, grant of contracts or allotment of land, it is to be tested on the touchstone of the Article 14 of the Constitution of India. The action of allotment of land by the State has to the fair, reasonable, non-discriminatory, transparent, non-capricious, unbiased and without favouritism and nepotism. It has to be in pursuant of healthy competition and equitable treatment.

29. There are various decisions relied upon by the learned Senior Counsel representing M/s. K. Raheja. He relied upon the decision of the Apex Court in the case of Netai Bag & Ors. v. State of West Bengal & Ors. He relied upon the observations made in paragraph 19 of the said decision, which reads thus:

"19. Though the State cannot escape its liability to show its actions to be fair, reasonable and in accordance with law, yet wherever challenge is thrown to any of such action, initial burden of showing the prima facie existence of violation of the mandate of the Constitution lies upon the person approaching the court. We have found in this case, that the appellants have miserably failed to place on record or to point out to any alleged constitutional vice or illegality. Neither the High Court nor this Court would have ventured to make a rowing inquiry particularly in a writ petition filed at the instance of the erstwhile owners of the land, whose main object appeared to get the land back by any means as, admittedly, with the passage of time and development of the area, the value of the land had appreciated manifold. It may be noticed that in the year 1961 the erstwhile owners were paid about Rs. 5.5 lakhs and the State Government assessed the market value of the property which was paid by Respondent 5 at Rs. 71,59,820. The appellants have themselves stated that the value of the land roundabout the time, when it was leased to Respondent 5 was about Rs. 11 crores. There cannot be any dispute with the proposition that generally when any State land is intended to be transferred or the State largesse decided to be conferred, resort should be had to public auction or transfer by way of inviting tenders from the people. That would be a sure method of guaranteeing compliance with the mandate of Article 14 of the Constitution. Non-floating of tenders or not holding of public auction would not in all cases be deemed to be the result of the exercise of the executive power in an arbitrary manner. Making an exception to the general rule could be justified by the State executive, if challenged in appropriate proceedings. The constitutional courts cannot be expected to presume the alleged irregularities, illegalities or unconstitutionality nor the courts can substitute their opinion for the bona fide opinion of the State executive. The courts are not concerned with the ultimate decision but only with the fairness of the decision-making process."

30. However, what is material is what is held by the Apex Court in paragraph 20 which reads thus:

".........One of the methods of securing the public interest when it is considered necessary to dispose of the property is to sell the property by public auction or by inviting tenders. But such a rule is not an invariable rule. There may be situations where there are compelling reasons necessitating departure from the rule. As and when a departure is made from the general rule, it must be shown that such an action was rational and not suggestive of discrimination....."

(emphasis added)

31. Reliance was also placed on Sterling Computers Limited v. M/s. M. & N. Publications Limited & Ors. by the learned Senior Counsel representing M/s. K. Raheja. The said decision reiterates the well settled principle governing the judicial review of administrative action. The Apex Court held that by way of judicial review, the Court is not expected to act as a Court of appeal over the administrative decisions. In short, the Apex Court held that only the decision making process can be examined and not the merits of the decision itself. In the case of Chairman & M.D. BPL Ltd., v. S.P. Gururaja & Ors., the Apex Court was dealing with the Regulations governing disposal of land by the Karnataka Industrial Area Development Board. Reliance has been placed on what is held in paragraphs 20 and 34 which read thus:

"20. It is a well-settled principle of law that different considerations arise for the purpose of fixation of price in respect of the price of land i.e. for a small area vis-a-vis a large area. The allotment price was Rs. 3,72,324 per acre which, having regard to the policy decision of the State as also the facts and circumstances of the case cannot be said to be wholly arbitrary warranting interference by the court. There cannot be any doubt whatsoever that normally allotment of such industrial plots should be done in terms of Regulation 7 aforementioned. But the same by itself did not preclude the authorities of the Board and the State having regard to the fact situation obtaining herein to take recourse to Regulation 13. Once the court finds that the power exercised by the statutory authorities can be traced to a provision of a statute, unless and until violation of mandatory provisions thereof is found out and/or it is held that a decision is taken for an unauthorized or illegal purpose, the court will not ordinarily interfere either with the policy decision or any decision taken by the executive authorities pursuant to or in furtherance thereof."

"34. Undue haste also is a matter which by itself would not have been a ground for exercise of the power of judicial review unless it is held to be mala fide. What is necessary in such matters is not the time taken for allotment but the manner in which the action had been taken. The court, it is trite, is not concerned with the merit of the decision but the decision-making process. In the absence of any finding that any legal malice was committed, the impugned allotment of land could not have been interfered with. What was only necessary to be seen was as to whether there had been fair play in action."

32. Reliance was also placed on the decision of the Apex Court in the Brihan Mumbai Electric Supply & Transport Undertaking & Anr., v. Laqshya Media Pvt. Ltd. & Ors. Paragraph Nos. 37 and 39 thereof read thus:

"37. In the light of the language used in sub-section (1), we are of the view that calling for tenders is a rule and finalising any contract without inviting tenders as provided in sub-section (2) is an exception. We have already adverted to various decisions of this Court as to how properties belonging to Centre/State/its instrumentalities are to be dealt with."

"39. We have already extracted the entire Note placed before the Committee for discussion which did disclose reasons for not adhering to public tender and entering into a contract with Respondents 4 and 5 alone. The "Note" also discloses that thorough discussion was held among the members of the Committee, the General Manager and the Chairman. There is no sale or element of sale in the impugned transaction. However, to ensure fairness in the activities of the State and public authorities, their dealing should be above board. Nothing should be done by the public authorities which gives an impression of bias, favouritism and ordinarily these factors would be absent if the matter is brought to public auction by inviting tenders. We have no doubt that in exceptional cases having regard to the nature of the trade or largesse or for some other good reason, a contract may have to be granted by private negotiation, but clearly that should not be done without adequate reasons as it shakes the public confidence."

(emphasis added)

The Apex Court reiterated that to ensure the fairness in the activities of the State and public authorities, their dealings should be above board and nothing should be done by the public authorities which gives an impression of bias or favouritism. This can be avoided by taking recourse to public auction by inviting tenders and only in exceptional cases and that also for adequate reasons that contracts should be entered into without inviting public tenders.

CONCLUSIONS ON THE LEGAL POSITION:

33. The position which emerges on the review of law laid down by the Apex Court is that State can dispose of public property only by adopting a fair and transparent method. As held in case of Akhil Bhartiya Upbhokta Congress (supra), the decision of disposal of state property has to be founded on a transparent and well defined policy which shall be made known to the public by

 

publication in the Official Gazette and/or other recognized modes of publicity. By entertaining applications of individual companies for allotment of a public property, the State cannot exclude others who are eligible to compete by lodging their claims. The matter of allotment of a public property cannot be treated as a private venture.

34. Hence, the law is that there cannot be any valid policy of allotting public property on the basis of applications made by individuals, bodies, organizations or institutions without an advertisement or public notice by the State or its agency/instrumentality. Any procedure which excludes other eligible persons from making an application or making a competing claim is violative of Article 14 of the Constitution of India, as it is arbitrary and discriminatory. Such a process cannot be a fair and transparent process. The law which can be taken as settled is that if a method of disposal of any public property does not provide for giving adequate publicity to enable eligible persons to apply, the allotment made by such method cannot stand the scrutiny of Article 14 of the Constitution of India and that is the reason why Apex Court in its decision in the case of Platinum Entertainment, after considering Regulation 4 of the Regulations of CIDCO held that though there is a power to allot a land by adopting any of the modes provided in Regulation 4, the conduct of allotment should be fair and transparent and without presence of an element of favouritism and nepotism. In paragraph 49 of the said decision, in the context of Regulation 4, the Apex Court held that even assuming that a Rule or Regulation prescribes mode of allotment by entertaining individual applications, the rule of law requires publicity to be given before such allotment is made and that is the reason in paragraph 54, there is an observation that CIDCO may make all endeavour to make allotments of plot, if any, by open tender or competing bids. It is true that Regulation 4 permits allotment of a plot land to be made by CIDCO on the basis of applications of individuals. But while taking a recourse to Regulation 4, if no opportunity is granted to those who are eligible to make such applications by giving adequate publicity about the availability of the plot sought to be allotted, the action will be hit by Article 14 of the Constitution of India. While adopting the method of allotting land on the basis of individual applications, CIDCO must ensure that adequate publicity is given to the fact that a particular plot or plots are available for allotment on the basis of individual applications. If such publicity is not given or if those who are eligible are not informed about the availability of an opportunity to apply for allotment, the process is discriminatory. Such process, by no stretch of imagination, can be said to be a fair and transparent process. Therefore, Regulation 4 will have to be operated by ensuring that the process is fair and transparent and it does not exclude all others who are eligible for allotment to apply for allotment. The process must be conducted in such a manner that eligible persons are made aware about the availability of plots so that they have an opportunity to offer competing bids or to submit competitive offers. This principle is of paramount importance which needs to be followed by the State while disposing of plots as a commercial venture with the object of

 

earning maximum revenue. The object of getting best price can be achieved only when an opportunity is given to all eligible persons to apply and seek allotment of plots.

WHETHER THE PROCEDURE ADOPTED IN THE FACTS OF THE CASE CAN BE SAID TO BE FAIR AND TRANSPARENT

35. It is in the light of these well settled constitutional principles that the factual aspects of the case will have to be dealt with. As noted earlier, the plots of land which are the subject matter of this petition are part of Sector 30A which was initially reserved for IT industry. A resolution was made by the Board of Directors on 30th April, 2003 for the change of use from IT to residence-cum-commercial. We have already quoted the text of resolution in earlier part of the judgment. It is necessary is to make a reference to what weighted with the Board of Directors in coming to the decision to convert IT industry user to Commercial user. In this context, the Agenda Note of the meeting held on 30th April, 2003 becomes very relevant. As we have noted earlier, out of total area of 57,180 square meters of land forming part of Sector 30A, an area of 31,232 square meters was already disposed of and what remained was an area 25,948 square meters The proposal before the Board of Directors was to convert an area of 22,337 square meters for residential/commercial and/or office use and to continue remaining area of 3661 square meters for IT use. The agenda note records that there was economic downturn in US in the year 2000 which had an impact on the other markets in the year 2001. It considers bursting of "dot com bubble". It also takes a note of the fact that lands became available in Mumbai for IT sector due to opening of mill lands and development of IT parks at Powai and new Link Road. It also considers the issue of demand and supply. It is observed that considering the availability of large number of premises elsewhere for IT Sector, the demand supply equation has been destabilized. Clause 4.0 of Agenda note is very important. It records that the proposed change of user would help CIDCO with an early realization of revenue from the sale of balance plots. Clause 4.2 of the Agenda Note specifically provides that the proposal is to dispose of the balance plots through open tender with a view to obtain better and competitive rates. Thus, the reasons for the change of user appear to be purely commercial reasons which were influenced by the need to generate revenue. That is why in the Resolution No. 8718, while approving the change of user from IT to commercial and/or office use, it is specifically provided that the plots should be disposed of through open tender. The reason was to get better and competitive rates. That is the reason why the same resolution provides that CIDCO should move the Government for enhancing FSI of 1.50 available for residential-cum-commercial use to 3.00.

36. During the course of arguments, the learned Senior Counsel representing M/s. K. Raheja submitted that there was no necessity of giving a notice that plots were available for residential-cum-commercial use, as on the website of CIDCO, the description of the plots was already displayed. We must record here that

 

there is nothing placed on record to show that on the website of CIDCO, Resolution No. 8718 was notified by declaring that large plots in Sector 30A were available for residential-cum-commercial use with a possibility that instead of existing FSI of 1.5 FSI, higher FSI of 3.00 may become available. It is not the case made out that the change of user was notified on the web site and that it was declared that the plots will be allotted on the basis of individual applications. The specific decision of the board of CIDCO was to dispose of the plots in Sector 30A by public tender with the sole object of early generation of revenue and with the object of ensuring that CIDCO gets better and competitive rates. The said decision to go for public tender was never modified.

37. Now, it will be necessary to make a reference to the Resolution under which a decision was taken to allot the plot in question to M/s. K. Raheja. On 20th August, 2003 an application was made by M/s. K. Raheja to CIDCO for allotment of an area of about 25,000 square meters out of Sector 30A for setting up "most up-market project" in Navi Mumbai comprising of retail mall, entertainment centres, food courts, a hotel and high quality residential apartments. The application records that this area is near Vashi Railway Station which is more suitable for a cohesive and vibrant development which will enhance the lifestyle of the city. The application records that M/s. K. Raheja were aware that the plots were available for commercial-cum-residential use. A request was made to retain FSI 3.0 which was available for IT industry. At this stage, we may also note that on 15th September, 2003, M/s. K. Raheja addressed another letter to the Managing Director of CIDCO which refers to the application dated 20th August, 2003. It refers to the area 30,430.70 square meters out of sector 30-A. It will be necessary to make a reference to Clause (1) and (2) of the said letter, which reads thus:

"1. We understand that presently the Corporation can allow FSI of 1.5. The Corporation is in the process of getting FSI 3.00 approved from the Government of Maharashtra, for this plot. The Corporation will endeavour to get this approval shortly.

2. As discussed, the lease premium payable for the net plot area (with 3.00 FSI) will be Rs. 13,500/- per Sq. Mt. of land area that would be available for free development. If the FSI is restricted to 1.5 the price payable will be Rs. 10,250/- per Sq. mt. of net land area that would be available for free development. The entire payment for the FSI available will be made within 60 days of issue of allotment letter to us. If only 1.5 FSI initially permissible the payment will be made for 1.5 FSI and the balance payment will be made immediately after receiving sanction for 3.00 FSI. We understand that provision of the Urban Land (Ceiling & Regulation) Act, 1976 are not applicable."

38. The letter specifically refers to the meetings with the Officers of CIDCO subsequent to the letter dated 20th August, 2003. What is important is that the rate of premium of Rs. 10,250/- per square meter recorded in Clause 2 of the said letter of M/s. K. Raheja has been incorporated in the impugned resolution

dated 17th September 2003 by which the plots were allotted by CIDCO. Thus, it appears that there were negotiations between the Officers of CIDCO and M/s. K. Raheja before the impugned resolution was passed. When the object of change of user was to earn more revenue, while negotiating with M/s. K. Raheja, CIDCO could have always given publicity to the availability of plots so as to ascertain whether any better offer was available in terms of money. In fact, the mandate of earlier resolution dated 30th April 2003 was that the disposal of the plots shall be by a public tender. The CIDCO acted contrary to its own resolution. We must note here that in paragraph 4 of the said letter dated 20th September 2003, a specific assurance has been incorporated by M/s. K. Raheja to develop and maintain a Japanese garden on the open land which is to the north of the plots in question.

39. Now, we turn to the resolution passed on 17th September, 2003. The Agenda Note of the meeting held on 17th September, 2003 quoted the earlier Resolution No. 8718 wherein it was resolved to dispose of the plots through open tender. We have already quoted what is stated in Clause 5.0 of the Agenda Note which shows that Sector 30A is at a very prime location in the city of Navi Mumbai. Clause 7.0 incorporate the factors that influenced the determination of the negotiated rate. Clause 7.5 is a clause which specifically incorporates a factor which influenced CIDCO. The said factor is the offer by M/s. K. Raheja to develop and maintain a Japanese garden on adjoining Plot No. 40 admeasuring approx. 10,000 square meters. Another factor which is incorporated in Clause 7.2 is that the offer was for a bulk land. In fact, Clause 7.10 takes into consideration the cost of development of access to adjoining plot and the development of a Japanese garden. The said cost is taken as Rs. 1 crore. Thus, the rate was determined taking into consideration of the fact that M/s. K. Raheja was to spend a sum of Rs. 1 Crore on the development of a garden and access to the garden plot.

The said resolution No. 8842 reads thus:

"RESOLVED THAT the Board do hereby approve the allotment of plots admeasuring an area of approx. 29,000 sqm. (or actual as found in net measurement) and bearing plot nos. 39/1, 39/6 to 39/15 in Sector 30A of Vashi including the 3611 sqm. plots reserved for IT use to M/s. K. Raheja Corp. with the changed layout as proposed for the R + C use with FSI 3.0 in anticipation of the approval from the Government as given in para 3.0 of agenda Note".

"RESOLVED FURTHER THAT the Board do hereby approve the proposal to charge a rate of Rs. 10,250/- per sqm. with FSI 1.5 and additional Rs. 3,250/- per sqm. at the time of enhancement of FSI from 1.5 to 3.00 after Government''s approval, subject to the condition that a beautiful garden would be developed by them at their own cost in the adjoining plot No. 40."

The resolution provides for grant an area of approximately 29,000 square meters bearing Plot Nos. 39/1, 39/6 to 39/15 in Sector 30A which includes an area 3661 square meters which continued to be reserved for IT use having FSI of 3.0. The rate which is specified in the resolution is in terms of the letter dated 15th September, 2003 submitted by M/s. K. Raheja. We may also note here that the Agenda note refers to the letter dated 20th August, 2003 and not to the letter dated 15th September, 2003. We may also note that the resolution passed in the said meeting dated 17th September, 2003 does not modify the resolution dated 30th April, 2003 bearing No. 8718 which provides that plots out of Sector 30A shall be disposed of through a public tender.

40. Then comes the letter of allotment dated 8th October, 2003. Though resolution passed on 17th September, 2003 mentions the area of the plots as approximately 29,000 square meters, the area of the plots mentioned in the letter of allotment is 30,582.87 square meters. The resolution dated 17th September 2003 is in respect of Plot Nos. 39/1, 39/6 to 39/15 in Sector 30A. In the letter of allotment in the description of the plots allotted, "open space" has been added which is absent in the resolution. We must note here that the rate of premium of Rs. 10,250/- per square meter with FSI 1.5 is mentioned in the letter of allotment. Surprisingly, letter does not record that if FSI 3.00 is made available, additional premium will be charged at the rate of Rs. 3250 per square meter. On the contrary, Clause 15 merely mentions that as and when approval for FSI 3.00 is obtained from Government, payment for additional FSI will be demanded. In this letter, there is no assurance that FSI of 3.00 will be made available and that the additional FSI will be granted at a particular rate. Clause 18 clearly incorporates a condition to develop and maintain a Japanese Garden at the cost of M/s. K. Raheja for the entire lease period. This completely shatters the submission made by learned senior counsel on behalf of M/s. K. Raheja based on the resolution dated 17th September, 2003 that the garden was to be developed only if the FSI was increased to 3.00. Another interesting feature of the letter dated 8th October, 2003 is not only the increase of area to 30,582.87 square meters, but it also refers to allotment of plot No. 39/1, 39/6 to 39/15 together with "open space". What is the area of "open space" is not mentioned. The letter of allotment does not state that any consideration is payable in respect of "open space". Moreover, the resolution of CIDCO passed on 17th September 2003 does not provide for grant of any such open space. By letter dated 23rd October 2003, M/s. K. Raheja thanked CIDCO for the letter dated 8th October 2003 without challenging any of the conditions therein. The condition of developing the garden was not at all disputed. Admittedly, even as of today, M/s. K. Raheja have not made any such garden.

41. In the contest of the object of change of user, it will be also necessary to mention here that in the Agenda Note of the meeting dated 17th September, 2003, there is a reference to an opinion submitted by the Chief Economist of CIDCO. The said opinion dated 16th September, 2003 is a part of PIL No. 131 of 2003. It considers several factors. It also considers factors such as offer for purchase of bulk land, saving cost of infrastructure and development of garden. The relevant part of the said opinion is as under:

 

"The proposal is not favourable to CIDCO. It is felt that though earlier we have sanctioned similar proposal of M/s. Reliance on bulk sale consideration and value addition to the city, there is no need to amalgamate the plots and put to bulk sale when there will be good demand for smaller size plots. Last year in September, 2002, we received the rate of Rs. 20,791/m2 in Sector-12 for C+R use with 1.5 FSI. However, in the present proposal, we propose to allot the plot for C + R use @ Rs. 10,250/m2 with FSI 1.5. In view of above, a conscious decision may be taken in the present proposal.

C.A.O. is requested to offer his views."

(emphasis added)

42. It is true that the opinion is not conclusive. But the fact remains that though the opinion was before the Board of Directors, there is nothing placed on record to show that there was a consideration of the said opinion. The agenda note which runs into more than 20 pages merely refers to it but does not record its contents and the fact that the Chief Economist did not recommend the proposal. All this affects the decision making process. It will be interesting to note what the first affidavit in reply of Shri D.L.N. Murthy-General Manager (IT and Special Projects) states about the opinion of the Chief Economist. In paragraph 19, Shri. Murthy has, in fact, ridiculed the Chief Economist Mr. Raje by stating that he was merely holding a charge of the said post and that he was merely a statistician. It is surprising to note that a Manager of CIDCO has ridiculed the opinion expressed by the Chief Economist of CIDCO. We must note here that there is another issue as to what worth can be attached to the said affidavit, as it is brought on record that a Disciplinary Enquiry was initiated against Shri Murthy wherein one of the several allegations was about the illegality committed by him in the allotment of plots to M/s. K. Raheja which is the subject matter of challenge in these petitions. By order dated 4th July, 2011, Shri. Murthy was discharged from the service of CIDCO by forfeiting 50% of the gratuity amount. Paragraph 5 of the order of this Court in PIL No. 131 of 2003 shows that on the basis of this affidavit that this Court vacated ad-interim relief granted on 17th September 2003.

43. Then comes execution of the agreement to lease on 16th December, 2003. We must note here that on the very day, an affidavit was taken from M/s. K. Raheja recording an undertaking to develop Japanese Garden on the adjoining plot. Surprisingly, the agreement to lease does not contain a clause regarding the condition of development of a Japanese Garden. Nevertheless, it refers to letter of M/s. K. Raheja of 15th September, 2003 in its recital which incorporates the offer of M/s. K. Raheja to develop Japanese Garden. The very fact that on the same day, the affidavit was filed by M/s. K. Raheja to make and maintain a garden shows that both the parties proceeded on the footing that the same was a condition for grant of lease. Another interesting aspect is that the area mentioned in the lease is 30,621.35 square meters. The original demand of M/s. K. Raheja in their letter dated 20th August 2003 was of an area of 25,000 square meters. The resolution dated 17th September 2003 seeks to allot an

 

approximate area of 29,000 square meters. The area is further increased to 30,582.87 square meters while issuing the letter of allotment dated 8th October 2003. In addition to the said area, the letter of allotment adds "open space". There is a further addition in the area in the agreement to lease by few square meters. The description in the agreement to lease also contains a reference to "open space" without mentioning specific plot number. This assumes some importance in the light of the stand taken by M/s. K. Raheja. In the affidavit reply filed, it is specifically contended that the said open space bears Plot No. 39/16 and the allotment of said open space was made along with the plots which are subject matter of the said resolution dated 17th September, 2003. In affidavit dated 24th September 2014 filed by Arvind Digamber Prabhu on behalf of M/s. K. Raheja, in Clause (i) of paragraph 6.17 (Page 18 of the affidavit) it is specifically contended that open plot No. 39/16 was allotted under same agreement to lease and under the same letter of allotment. Thus, not only that gradually the area agreed to be allotted to M/s. K. Raheja is increased from 29,000 square meters provided in the resolution to 30,621.35 square meters, but in addition, the open plot is allotted without there being any resolution by the Board of CIDCO for which admittedly no consideration has been fixed. We are conscious of the fact that in relation to the said open plot some action has been taken by CIDCO and Writ Petitions were filed in this Court. Intervener has made a reference to the orders of this Court by making a grievance that when the matters in relation to the open space were heard by this Court, it was not disclosed by M/s. K. Raheja to this Court that the very agreement on the basis of which the allotment of open space is claimed was a subject matter of challenge in these petitions. Thus specific area of said open plot is not brought on record. One of the orders passed by CIDCO in relation to the said plot, which is produced by the intervener shows that the area of that open space bearing Plot No. 39/16 is 5490.70 square meters. Thus, going by the claim of M/s. K. Raheja, additional open plot in a most prime locality admeasuring 5490.70 square meters was allotted of which there is absolutely no reference in the resolution of the Board of Directors and for which no consideration is paid by M/s. K. Raheja. Such a case of payment of any consideration for such a large open space is not made out either by CIDCO or M/s. K. Raheja.

44. It is true that the contention of CIDCO appears to be that the open area bearing No. 39/16 has not been allotted to M/s. K. Raheja. But the "open space" is mentioned in the letter of allotment and the agreement to lease. In this case we are examining the entire decision making process of CIDCO. There is no explanation forthcoming in the affidavits of CIDCO as to how there is inclusion of the additional open area in the agreement of lease and in the letter of allotment though the resolution dated 17th September, 2013 is silent about it. This reflects on the decision making process of CIDCO and also the manner in which property, which is in most prime area of New Bombay has been dealt with by a public body like CIDCO.

45. There is an argument advanced by the learned counsel for M/s. K. Raheja

 

that there were no takers for the plots in IT Park. It is pointed out by the learned counsel for the petitioner in PIL No. 48 of 2014 that there were takers. According to us, all this is besides the point. There may not be takers available for nearly about 50% of area of Sector 30A for IT use. However, there was a change of user made on 30th April, 2003 permitting the use for commercial-cum-office or residential purposes. It is not the case of any party that any publicity was given by CIDCO to the decision of change of user and the intention of CIDCO to allot the prime plots for residential-cum-commercial use in terms of the decision taken by the Board on 30th April, 2003. There could have been a question of takers provided the takers were made aware that such large plots are available for allotment in a prime area for commercial and residential user. We are dealing with such a large plot of land admeasuring 30,000 square meters in a prime locality. Even before the expiry of four months from 30th April, 2003, M/s. K. Raheja made an application for allotment. As no one was aware that such large plots were available for allotment for residential and commercial use, obviously there were no applications for allotments for residential-cum-commercial use. In fact CIDCO did not allow any one else to apply as the plots were not at all advertised after the change of user. Within a span of only five months from the date of the change of user, the prime plots were allotted to M/s. K. Raheja.

46. Learned Senior Counsel appearing for M/s. K. Raheja tried to submit that Vashi Railway Station is close to the plots in question and there are commercial premises in the Vashi Railway Station complex, which are still vacant. His contention is that there were no takers for the plots at Palm Beach road. Vashi Railway Station is a railway station on suburban railway line. A judicial notice can always be taken that railway stations on suburban lines are always over crowded. Therefore, the comparison of constructed premises forming a part of the Railway Station Complex with the prime open plots cannot be made. In the agenda note which is already quoted, CIDCO has stated that the said plots are in most prime location. The plots on the Palm Beach road are mostly residential plots. Hence, the said argument has no merit.

Moreover, there was never any publicity given to the fact that from 30th April, 2003 such prime plots having such a large area were available for allotment for commercial and residential use.

47. At the cost of repetition, we may state here that the object of providing for disposal by tender was to get a fair and competitive price. From 20th August, 2003 till 16th September, 2003, officers of CIDCO were negotiating with M/s. K. Raheja. As evidenced by the letter dated 15th September, 2003 of M/s. K. Raheja, in fact, the terms were also finalized. During this period, CIDCO never thought it fit to advertise the said plots by inviting individual applications to ensure that best price is fetched for the said plots. Thus, CIDCO did not give any opportunity to all others who could have made individual applications for allotment of the said plots for residential-cum-commercial use. The Resolution dated 30th April 2003 made by CIDCO expressly provides for allotment of the

said plots through open tender. The said Resolution was never rescinded or modified. It is thus obvious that by no stretch of imagination, the process followed by CIDCO can be said to be fair and transparent. The CIDCO was under a legal and constitutional mandate to follow a fair and transparent process. The entire process is vitiated by arbitrariness and discrimination. We must note here that at no stage, CIDCO called upon M/s. K. Raheja to comply with the condition of development of garden, the cost of which is quantified at Rs. one crore. We have already made a reference to the manner in which the area of the plots was increased. We have already pointed out the variance in the area of plots mentioned in the resolution, the letter of allotment and the agreement to lease. Moreover, a large open space is added in the description of the property in the agreement of lease which was not there in the Resolution. It is not the case of CIDCO or M/s. K. Raheja that any premium was paid for the open space. We may note here that we are not entering into the dispute whether the disputed open space is the same as Plot No. 39/16.

48. We are shocked to note the manner in which large plots which are described by CIDCO itself as prime plots have been disposed of. Apart from the fact that the process adopted is completely discriminatory and arbitrary, the process adopted is in gross breach of the resolution dated 30th April, 2003 which mandates that the plots shall be allotted by a public tender. Such gross illegalities cannot be tolerated by Court of law.

49. Now we turn to the report submitted by Dr. D.K. Sankaran. Independently of all the reports, we have recorded our own conclusions about the illegality of the process followed. The sum and substance of the conclusion recorded by Dr. D.K. Sankaran, who was an officer of Indian Administration Service is that there was a huge monetary loss suffered by CIDCO due to this transaction and that the allotment to M/s. K. Raheja is in gross violation of Rules and constitutional norms and in fact, undue favour has been shown to M/s. K. Raheja thereby causing loss of more than Rs. 50 Crores to CIDCO.

50. The affidavit filed by Shri. Sanjay Gopal Paluskar on behalf CIDCO dated 23rd September, 2014 also refers to One Man Committee appointed by the State Government of Shri. Sudhakar Joshi, IAS. Even the said One Man Committee found fault with CIDCO. Moreover even CAG report found fault with CIDCO for disposing of the plots in prime locality below the market rate by showing undue favour without calling any tender.

51. Since we are on these reports, we must note here that in a compilation tendered across the bar by the learned Senior Counsel appearing for M/s. K. Raheja, there is a letter dated 15th September, 2005 addressed to the Managing Director of CIDCO by the State Government which directs CIDCO to take immediate action on the basis of the report of Dr. Sankaran. The action was of cancellation of plots and of recovery of loss. Strangely, till the year 2014, CIDCO took no action in relation to the allotment made to M/s. K. Raheja. It must be noted here that on 18th January, 2005, the development permission was granted

 

to M/s. K. Raheja. CIDCO ought to have taken prompt action for implementation of the recommendations of Dr. Sankaran Committee as directed by the State on 15th September 2005. Considering the manner in which CIDCO has acted, the reasons such long inaction are to obvious.

DEVELOPMENT OF THE PLOTS BY M/S. K. RAHEJA PENDING THE PETITIONS BY TAKING RISK

52. There is one more aspect which we must be noted here. PIL No. 131 of 2003 was filed even before the execution of agreement to lease, in which there was an order of status-quo passed on 17th December, 2003. The said order of status-quo was vacated on 23rd April, 2004 while admitting the PIL No. 131 of 2003 with a specific clarification that "it will be subject to the final outcome as well as further orders." In this context, it will be necessary to make a reference to certain further developments. Knowing fully well that two substantive Public Interest Litigations were pending, on 18th January, 2005, M/s. K. Raheja obtained development permission from the Navi Mumbai Municipal Corporation. Construction was started by M/s. K. Raheja obviously subject to outcome of the petitions and subject to the further orders which may be passed in these petitions.

53. We may also demonstrate here as to how M/s. K. Raheja took the risk. M/s. K. Raheja proceeded ahead with the construction. It appears that after completing the construction, NOC was sought from CIDCO for grant of occupation certificate. CIDCO declined to grant NOC. M/s. K. Raheja moved the State Government and by order dated 14th August, 2008, State Government directed CIDCO to issue NOC on M/s. Raheja furnishing a bank guarantee of Rs. 50 Crores with a direction to keep the said bank guarantee valid and subsisting till final outcome of the pending PILs. We are surprised to note that inspite of earlier letter issued by the State Government directing CIDCO to implement the recommendations of Dr. Sankaran, the State Government by ignoring the said recommendations, issued aforesaid direction. Thus, M/s. K. Raheja took risk of obtaining the NOC of CIDCO subject to final outcome of PILS by furnishing bank guarantee of Rs. 50 Crores. Not only this, but the Navi Mumbai Municipal Corporation insisted on M/s. Raheja furnishing an indemnity as a condition for grant of Occupation Certificate and in fact, such indemnity was furnished by M/s. K. Raheja to the Navi Mumbai Municipal Corporation. The indemnity refers to conclusions drawn by Dr. Sankaran.

54. In the light of the conscious risk taken by M/s. K. Raheja of proceeding with execution of the agreement of lease and proceeding with large development pending the present PILs, the other limb of the argument canvassed on behalf of M/s. K. Raheja will have to be examined. The other limb of the argument is based on the policy decision of CIDCO in the Board meeting held on 6th June, 2005. The first contention is that if this Court decides the issue of legality of the allotment, M/s. K. Raheja will not be entitled to take benefit of the said polity. The second contention is that a show-cause notice dated 11th November, 2014

 

has been issued by CIDCO and therefore, now as CIDCO proposes to cancel the allotment, Writ Court should not interfere. The first submission is based on the fact that during pendency of the present petitions M/s. K. Raheja proceeded to complete the construction and thousands of persons are working in the Shopping Mall. It is alleged that Shopping Mall is one of the best malls in the area. The learned senior counsel tried to rely upon the decision of the Apex Court in the case of Amey Co-op. Housing Society Ltd. Vs. Public Concern for Governance Trust and Others, . It is contended that as done by Apex Court, considering the circumstances, the final relief can be molded.

55. Reliance is placed on the decision of Apex Court in the case of Sunil Pannalal Banthia and Others Vs. City and Industrial Development Corpn. of Maharashtra Ltd. and Another, . It is contended that in the present case, initially in the year 2004 by filing an affidavit of Shri Murthy, CIDCO justified the legality of allotment and now in the year 2014, CIDCO by another affidavit has contended that the allotment is illegal. It is pointed out that the Apex Court has deprecated such a stand taken by CIDCO in the said decision.

56. These Public Interest Litigations have been filed in this Court immediately after the decision was taken by CIDCO to allot the plot. In fact, agreement to lease is executed during the pendency of one of the two petitions. This Court is called upon to examine the legality and validity of the allotment of the plots on the ground that there is a breach of constitutional mandate by CIDCO and that a valuable public property has been disposed of in arbitrary and discriminatory manner. Firstly, M/s. K. Raheja have taken a grave risk of proceeding with such a large construction, though this Court while vacating ad-interim relief had put every party to the notice that everything will be subject to further orders and final outcome of the petitions. They have taken the risk of even furnishing bank guarantee of Rs. Fifty Crores for obtaining NOC for grant of Occupation Certificate. M/s. K. Raheja furnished indemnity to the Navi Mumbai Municipal Corporation. Thus, all steps taken by M/s. Raheja are subject to outcome of the present PILs. They cannot claim any equity on the ground that they have constructed a huge mall. Moreover, such a litigant is disentitled to claim any equity from the Writ Court especially in the light of findings which we have recorded above. Moreover in this case, the agreement to lease was executed after filing of one of the present two PILs. The development permission was obtained by M/s. K. Raheja long after filing of the PILs.

57. The show cause notice issued by CIDCO is essentially based on the conclusions drawn by Dr. Sankaran as well as the observations in the CAG report. It is based on directions issued by the State Government. Therefore, the action initiated by CIDCO is an independent action. Obviously, CIDCO cannot decide whether the procedure adopted by itself was fair and transparent. This issue is raised in the present Petitions. This issue cannot be left to the decision of CIDCO which is a party to illegality and which slept over the matter for considerably long time. Moreover, belated action of CIDCO of issuing a show cause notice cannot

 

prevent this Court from testing the actions of CIDCO on the touchstone of Article 14 of the Constitution of India.

58. That takes us to the decision in the case of Amey Co. Op. Housing Society Ltd., wherein the Apex Court has moulded the relief after finding the allotment to be illegal. What is important is paragraph 56 of the said decision which reads thus:

"56. Considering the enormity of the expenses which had already been incurred in the development of the said six plots and having further regard to the fact that the construction had been raised up to and beyond the 4th floor when the writ petition was moved, we are of the view that even though the High Court was satisfied that undue favour had been shown to the respondent cooperative societies and M/s. Vijay Associates (Wadhwa) Developers, the directions given for forfeiture of the land and the constructions raised thereupon were unrealistic, particularly when an alternate prayer had been made for a fresh valuation of the plots for the purpose of compensating cidco in the event the plots were found to have been undervalued."

59. This was a case where construction had moved beyond the fourth floor when the petition was moved. It is in the light of this peculiar fact that the apex Court moulded the relief after finding that the allotment was illegal. We may note here that in the said decision, the learned Advocate General representing State of Maharashtra submitted that considering the huge expenditure incurred on the development of the plot, State Government was not supporting the forfeiture of the land. The present case is altogether different. By taking risk, M/s. K. Raheja applied and obtained permission after PILs were filed. Even after the direction of the State Government of the year 2005 of implementing the recommendations of Dr. Sankaran, M/s. K. Raheja proceeded with the construction. The Apex Court had moulded the relief considering the fact that when the petition was filed by way of PIL, considerable amount was spent on construction and construction had made substantial progress.

60. If the argument of substantial investment, grant of employment etc. is considered, it will completely defeat the specific order passed by this Court directing that all steps taken will be subject to further orders and subject to final outcome of the PILs. Thus, the Apex Court had moulded the relief in the case of Amey Co-op. Housing Society Ltd. in the light of peculiar facts before it and therefore, the said decision is of no help.

61. Another issue which requires consideration is the submission made by the learned Senior Counsel appearing for M/s. K. Raheja about the policy decision of CIDCO to regularize illegal allotments on payment of certain amount for making good the loss caused to CIDCO. We must note here that in these petitions, there is no challenge to the action of CIDCO of issuing show cause notice. In these petitions, we cannot adjudicate upon question whether an allotment which is illegal can be regularized by CIDCO or whether the policy decision of CIDCO is

 

valid. Nevertheless, it is for M/s. K. Raheja to apply for regularization and it is for the concerned authority to consider whether illegality can be regularized after considering the findings recorded in this judgment and order. Therefore, we propose to grant longer time to M/s. K. Raheja. We may clarify that we have not adjudicated on the issue of entitlement of M/s. K. Raheja to regularization. We are also not making any adjudication on the legality and validity of the policy of CIDCO, if any, of regularizing the illegal allotments. All the said issues are kept open to be decided in appropriate proceedings.

62. As far as the other prayers regarding taking action against officer of CIDCO is concerned, we must note here that CIDCO has taken disciplinary action against the Shri Murthy.

63. Hence, we pass the following order:

I) Rule is made absolute in terms of prayer clause (a) of Public Interest Litigation No. 48 of 2014;

II) We make it clear that as a result of grant of prayer clause (a), even the agreement to lease dated 16th December, 2003 is held as illegal and the same shall not be acted upon;

III) We hold that the allotment made by CIDCO to M/s. K. Raheja is completely illegal and arbitrary which is in violation of the mandate of Article 14 of the Constitution of India;

IV) We grant time of six months to M/s. K. Raheja to restore the plots in question to its original condition and hand over vacant possession thereof to CIDCO;

V) We direct that on expiry of period of six months from today, M/s. K. Raheja shall hand over vacant possession of the said plots to CIDCO;

VI) We make it clear that during this period of six month, M/s. K. Raheja shall not carry out any further construction and shall not create any third party rights in respect of the plots in question as well as the structures thereon and shall not part with the possession thereof to any third party;

VII) We make it very clear that this order will not preclude M/s. K. Raheja from making appropriate application for regularization of the transaction. We further make it clear that the issue whether CIDCO is entitled to regularize the transaction and whether M/s. K. Raheja are entitled to regularization are kept open and no adjudication is made on the said questions;

VIII) As far as Public Interest Litigation No. 48 of 20014 is concerned, we must record that the petitioner has taken up a issue of public importance. We, therefore, direct CIDCO to pay costs to the petitioner quantified at Rs. 50,000/- (Rupees Fifty thousand only) within a period of two months from today. As far as other petition is concerned, the petitioner has not chosen to prosecute the petition;

IX) Before we part with the judgment, we must record our appreciation for the assistance rendered by Shri. M.S. Karnik learned Amicus Curiae as well as the intervener Shri S.S. Thakur in Public Interest Litigation No. 48 of 2014.

64. At this stage, the learned counsel representing M/s. K. Raheja prays for stay of this judgment and order.

65. Since we have granted time of six months to M/s. K. Raheja, it is not necessary to grant stay of the operation of the said judgment.

66. In view of the rule being made absolute in Public Interest Litigation No. 48 of 2014, there is no specific order passed in Public Interest Litigation No. 131 of 2003. It stands disposed of.

 