

(1982) 06 BOM CK 0023

In the Bombay High Court

Case No : O.S. Appeal No. 18 of 1982 in Writ Petition No. 1165 of 1981

State of Maharashtra and A.R. Antulay

APPELLANT

Vs

Padmakar Balkrishna Samant

RESPONDENT

Date of Decision : 10-06-1982

Acts Referred:

Constitution of India, 1950 — Article 14, 38, 39
Evidence Act, 1872 — Section 3
Income Tax Act, 1961 — Section 5
Penal Code, 1860 (IPC) — Section 494

Citation : (1982) 84 BOMLR 427

Hon'ble Judges : S.K. Desai, J; Rele, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

S.K. Desai, J.—I have had the benefit of perusing the erudite and exhaustive judgment prepared for the purposes of this appeal by my brother Rele. He has dealt with all the points arising in the appeal as also with the arguments advanced and authorities cited by the counsel arrayed for the respective parties at the Bar. Whilst I agree broadly with the ultimate conclusions reached, there are certain nuances, intermediate steps, and not so pertinent observations, in my view, with which I am unable to agree with my brother. Accordingly, I propose to give a separate judgment making it clear that on all conclusions not touched by me, I must be taken to have concurred fully with my brother. For the purpose of this separate judgment, as I have made it clear, I propose to restrict my discussion only to one of the important points, according to the, which arises in this appeal. The other points may be mentioned in passing, if at all.

2. This is an appeal under the Letters Patent from the decision of the learned single Judge disposing of substantially in favour of the petitioners, a writ application or petition filed on the original side of the High Court. For the sake of clarity since the two appellants before us are the original respondents in the petition, I shall refer to them as respondents Nos. 1 and 2 and refer to the

contesting respondents in the appeal as the petitioners.

3. The only point which requires serious consideration in this appeal and which alone was seriously urged by Shri Ashok Sen on behalf of the original 2nd respondent is whether on the record it has been established that there was a scheme to make allocation of cement to certain people, i.e., builders on condition that for the purpose of ensuring such allocation of cement they would make donations to one of the two trusts with which the 2nd respondent was connected and indeed in respect of the administration of which he held and continues to hold a dominating position.

4. In order to appreciate the legal submissions it will become necessary to refer to the case as propounded in the pleadings and thereafter to consider as to whether the same has been substantiated and to what extent.

5. The case in the petition is to be found in paragraph 12 of the same. It is alleged in the said paragraph as under:

The petitioners say that since June 1980, the 2nd respondent has been allocating cement permits and allotting large quantities of cement in a arbitrary, capricious, unreasonable and unjust manner to big builders/contractors/industrialists by collecting large sums of money for certain Trusts created by him and of which he is a Trustee, namely, "Indira Gandhi Pratibha Pratish-than", "Sanjay Niradhar Anudan Yojana" and "Konkan Mitra Mandal".

6. Thereafter in paragraph 17 of the petition we find given the names of seven builders who were between themselves allotted 6150 tonnes of cement during the short period April to July 1981. In paragraph 18 thereafter the petitioners have made a grievance that as against heavy allocation to the "D1 Zone (of 16,600 Tonnes) a small quantity of 8,803 tonnes of cement only was in fact given. According to the petitioners, therefore, (see paragraph 22) the statutory rationing and/or distribution system had graded to a halt in the State of Maharashtra and those who had money and/or direct access to the 2nd respondent or to other ministers of the 1st respondent or to officers of the 1st respondent were able to secure large quantities of cement, whilst thousands of ordinary bona fide consumers who had applied in the regular course did not get any cement for building or repairing purposes. It has been alleged further in an earlier paragraph (para 11) that huge quantities of cement were being allotted by the 2nd respondent as well as by other ministers and officers directly from Mantralaya. However, subsequently, it has been averred in paragraph 23(a) that the 2nd respondent has been allocating cement himself and/or having cement distributed on his personal orders and against payment of large sums of money in the two trust funds in which he was intimately interested. In sub-paragraph (b) of paragraph 24 it is submitted that the 2nd respondent was acting as a private individual, distributing cement as he pleased and against benefit received by the trusts set up by him in the circumstances earlier dealt with. It is accordingly submitted in the said sub-paragraph that the actions of the 2nd

respondent constitute gross abuse of power and authority and were both unreasonable and contrary to the public interest.

7. More specific allegations concerning the rate at which donations were being sought (at Rs. 40/- per bag) are also to be found in sub-paragraph (d) of paragraph 24 in which it is alleged that to require an allottee to make a donation (for securing cement) is illegal and also results in a clear conflict of interest and duty. It is submitted further in the said paragraph that the actions of the 2nd respondent were thus mala fide and made for a collateral purpose.

8. We have reiteration of this argument once again in paragraph 27(c) of the petition in which it has been submitted that the 2nd respondent has been exacting large sums of money as donations to trust funds as a condition precedent to allotting cement. It is further submitted that such conduct is clearly mala fide and constitutes grave abuse of power and authority and is therefore, illegal, oppressive, and arbitrary. It is also submitted that it is violative of and ultra vires Articles 14, 38 and 39(b) of the Constitution of India.

9. It is on that footing that relief is sought as indicated in paragraph 29(c), The petitioners have also sought declarations in respect of these donations which declarations are to be found in paragraph 34(a)(iii) and 34(c)(iii).

10. It may be mentioned that in support of their allegations regarding improper allocations of cement from the Mantralaya, copies of ten orders for distribution of cement from the Mantralaya have been annexed as exhibits E-I to E-10 to the petition.

11. When the petition came up for admission a short affidavit opposing admission was filed on behalf of the Government of Maharashtra. That affidavit was of one U.B. Tipnis, Deputy Secretary in the Department of Food and Civil Supplies. In the said affidavit it was submitted that the allocations from the Mantralaya referred to in the petition were out of the quota of cement received by the State of Maharashtra on an ad hoc basis and that about 150 users were allotted about 2,000 tonnes out of such ad hoc allotments. To this affidavit were annexed as Exhibits 6 and 7 statements showing allotment from such ad hoc quota of cement to various categories of allottees, including builders at different periods of time. In paragraph 10 of this affidavit is to be found the basis of what, according to Tipnis, are the factors which influenced such allotment. This paragraph 10 is at page 116 of the compilation. It reads as under:

I say that whenever a quantity of cement becomes available as a result of ad hoc allotment by the Government of India, Government distributes the same to various parties who are in need of cement after considering the urgency of their requirements, their capacity and willingness to take delivery of the cement from outside the State of Maharashtra. The cement is distributed in its discretion by the Government after taking into consideration the above-mentioned factors. I find from the records that the practice of distribution of such cement in the aforesaid manner has been in vogue since January 1979.

12. It would appear from the short order reported in Padmakar Balkrishna Samant and Others Vs. The State of Maharashtra and Others, dictated by Pratap J. at the time of admitting the petition that the learned Judge had called for certain files and observed (in paragraph 16 of his Order) at p. 425 of Padmakar Balkrishna Samant and Others Vs. The State of Maharashtra and Others, that the five files even curiously perused ex facie supported the petitioners. This observation was principally in relation to the allegation that it was the 2nd respondent who was making such allocations. As the Judge himself has recorded (paragraph 25), these were files pertaining to the five of the allottees from as many as 145 parties named in the petition. The Judge also observed that at that stage there was no affidavit made by the 2nd respondent and that sufficient material thus existed for admitting the petition for further inquiry.

13. We now have to see what further affidavits were filed after the petition was admitted and rule issued.

14. After the petition was admitted, we have in the first place several affidavits filed on behalf of the officers connected with the Department of Food and Civil Supplies. In this category there are two affidavits of Shri V.T. Chari, Secretary, and one each of Syed Yakoob, Under Secretary and U.B. Tipnis, Deputy Secretary. In addition, we have the affidavit by way of return of the 2nd respondent as also of D.S. Kamale, the then Minister of State for Food and Civil Supplies. It would appear that the said Minister of State was attending to the matter of distribution of cement. It may be mentioned that quite a few of the allotment orders in respect of which sharp comment has been made in the course of arguments and particularly those concerning the various allottees belonging to what may be called the Raheja Group appear to have been made under the signed instructions of the said Minister of State as noted on the respective applications.

15. In addition we have the affidavits of three of the builders mentioned in the petition and who are also recipients of cement under exhibits E-1 to E-10 annexed to the petition. These three are N.L. Hiranandani who was connected with several builders' concerns of the Hiranandani Group. Shri Zakaria H. L., who is concerned with Bombay Builders as also with a trust called Hanjar Educational Society, and R.A. Maker who is concerned with the Maker Group. The Assistant Controller of Rationing one A.R. Samant has also made an affidavit in reply.

16. All these affidavits have been made during the second fortnight of November 1981 and it is apparent that the reply on behalf of the builders has also been to a large extent prepared by the Government Pleader's Office although one of them, viz., Hiranandani has filed his affidavit through his advocates and solicitors Messrs. Mahimtura A: Co.

17. The principal affidavit on behalf of the Department is of the Secretary Chari. The tenor of his affidavit as well as the earlier affidavit made at the stage of the admission (by Tipnis) was that cement was allotted to the State Government

both by way of what can be called as regular quota as also by way of an ad hoc quota and such ad hoc quota required urgent special action by reason of several features which have been indicated in the affidavits. These were that cement had to be lifted urgently, that the allottee was required to take delivery from the factory and was normally required to remove the goods at his cost by road transport. Accordingly it was submitted that bulk allotment of over 50 metric tonnes alone could be made from this quota and any allotment from such quota could not be given to persons requiring very small quantities for petty repairs of similar purposes. It may be mentioned that we may proceed upon an assumption that the resolution of September 12, 1978 and the three tier system provided thereunder applied to the regular allotment of cement only and not to the ad hoc allotment. It would appear however that there have been at least a few occasions in the past when Regional Level Cement Committees (constituted under the regular system) have allotted cement from the ad hoc quota. However, upto March 31, 1981, we may proceed on the footing which found favour with the learned single Judge and which footing is more favourable to the respondents.

18. Now what is found in the affidavit of the secretary? We have already seen how initially it was stated by the Deputy Secretary Tipnis that these allotments were made from the Mantralaya under the discretionary powers of the Government. Indeed it would appear to be the stand of the secretary that allotments of cement could be made any time from the Mantralaya irrespective of the publicised normal procedure. This broad submission is not restricted to any special quota or occasion but made generally qua all allotments of cement, regular as well as ad hoc. It is difficult to appreciate the source of such extraordinary powers which have been claimed. Perhaps in grave emergency or in order to meet an extraordinary situation which had suddenly arisen resort to such doctrine may become necessary and exercise of such power would be required to be upheld; but it is difficult to envisage and appreciate resort to such powers as claimed in the ordinary or normal course.

19. In the affidavit of the Secretary there is a reference to establishment of two Committees which functioned at the Mantralaya, viz., a State Level Committee which functioned upto February 28, 1981 and a High Level Committee which was set up on the said date and the constitution of which was circulated by a Circular dated March 19, 1981. According to Chari the High Level Committee was meant to assist and advise the State Government in regard to allocation of cement both against regular allotment of quarterly quota as also against the ad hoc quota given by the Central Government to the State Government from time to time. It is pertinent to note that the 2nd respondent does not figure as a Member of either committee in any capacity whatsoever. We have also not found in the affidavit of the secretary any circular, resolution or minute incorporating the principles on which these committees were to function and the practices which they were required to adhere to. Indeed the Minister of State has in his affidavit (paragraph k) somewhat pedantically declared that the principles followed by the State Government in making allocations against ad hoc quota from the Central

Government were as follows:

(a) The allocations had to be made on an ad hoc basis and could not be routed through the stockists and Regional Level Committees and Taluka Level Committees as was done in the case of regular quarterly allotments according to the Government Resolution dated September 12, 197B.

(b) The allocations were made in favour of allottees by an order of allocation of bulk cement of 10 tonnes and above in each case requiring them to lift the quantity allocated to them immediately from the factories concerned and transport the cement by road on their own responsibility. A truck contains 10 tonnes.

(c) The State Government satisfied itself that the persons in whose favour the allocations were made, were in genuine need of the cement for their construction work and that they were not going to sell the cement at profit in the market.

(d) Considerations were shown to the applicants who were, co-operative housing societies and housing societies for weaker section, lower middle class, charitable institutions, hospitals, educational institutions and the like. In fact, a large number of parties to whom allocations were made are such institutions or societies.

(e) Parties, who had already received allocations from the various Government and their constructions had commenced, but whose constructions were interrupted on account of non-availability of cement from regular quarterly allotments were also given allocations against ad hoc allotments made by Central Government in favour of the State Government. The details of such allocations are mentioned in Chari's affidavit.

(f) In specified cases, the State Government sought the recommendations of the High Level Committees and allocations were made in accordance with the recommendations of the High Level Committees as will appear from the Minutes.

(g) The allocation orders have been issued from the Department of Food and Civil Supplies by the appropriate Officers, such as Assistant Secretaries or Superintendents in charge. This was being done from time of the previous Government.

(h) The allocations of cement and issuance of orders against ad hoc allotments from the Central Government have never been done by Collectors or Controller of Rationing, Bombay.

20. The source from which the Minister of State derives these principles for being stated in the affidavit is not mentioned therein nor any elucidation is to be found regarding this aspect from any other affidavit filed on behalf of the respondents or was given to us from the Bar. We were also not explained the basis as to why a particular quantity was thought necessary to be allotted to a particular party and what were his overriding claims which justified his selection vis-a-vis others

equally in need of the said essential commodity. It would accordingly seem that this portion of the Minister of State's affidavit was merely an exercise in ex post facto justification. It would have been appropriate for the Minister to have explained some of the allotments made by him or under his directions and indicated why he chose to accept a particular claim and the basis of the allotment made by him. Mere enunciation of salutary principles was not wanted and must be considered to be an exercise in futility. What was required to be done was an explanation how these principles were applied in given cases. This the Minister failed to give either initially or subsequently even after the affidavit in rejoinder was filed. We are, therefore, left totally unconvinced either that these were indeed the principles that were generally to be followed or that they were in fact followed in any specific case or cases.

21. As far as the affidavit of the 2nd respondent is concerned, we find in the beginning thereof general statements about his style of functioning. According to him various persons and parties used to approach him in respect of diverse matters pertaining to numerous subjects dealt with by various departments of Government and in respect of these grievances or difficulties he would make comments or suggestions on the basis of what appeared to him fit and proper and forward the representations together with his comments to the concerned department for appropriate action (paragraph 2). According to the 2nd respondent further, for this purpose he had constituted a special Secretariat consisting, inter alia, of a former Chief Secretary to the State Government designated as Officer on Special Duty. It is the contention of the 2nd respondent that sometimes the members of his Secretariat also forwarded the representations received from various parties together with their own comments to the concerned department and it was thereafter for the department concerned to take appropriate action on these representations. According to the affidavit in many cases if the departments found themselves unable to accept suggestions or comments then the files or representations were sent back with the departmental note. According to the 2nd respondent this method of keeping in constant touch with public needs and grievances helps speedy redressal of their grievances and strengthens the Government at the grass root level.

22. As far as allotment of cement from the ad hoc quota is concerned, it is the stand of the 2nd respondent that the parties had received allocations from this quota from the Department of Food and Supplies on merits and in accordance with the procedure in force. He has been at pains to point out that these allottees (including builders) had received allotments from the previous Government also. He has been at pains equally to point out that the system followed since his Government took charge in June 1980 with regard to the distribution of cement received from the Central Government by way of ad hoc allotments has been the same as was followed by the previous Government. According to the 2nd respondent, the system was retained because it was found to be rational and fair in promoting the public interest of the State. As regards the allegation made that donations had been exacted from allottees of cement, the 2nd respondent has

stated that there were only a few allottees who had given donations to the two trusts mentioned in the petition and it was his stand that they had given the donations absolutely voluntarily and unconditionally and without any request for donation emanating from the 2nd respondent. According to his affidavit there were 800 and odd applications who had applied to the 2nd respondent and/or his Secretariat for allocations of cement. About three hundred of them had been allocated cement and only a few of the allottees, according to the 2nd respondent, had given donations. There were, according to the 2nd respondent, many donors who despite the fact of giving donations had not received allocation of cement. According to the 2nd respondent the vast majority of allottees who had obtained allocation of cement in their favour against the ad hoc allotment of cement given to the State by the Central Government, have not made any donations to either of the two trusts. Even as far as the few who have made donations are concerned, it is contended that they had done so voluntarily and the donations had no connection with allocation of cement to them. Thus, the allegation of exaction or quid pro quo has been denied.

23. It is necessary in the special circumstances of the case to deal a little more in detail with the affidavit of the 2nd respondent. Indeed he has denied on oath that he allocated any cement, He claims to have made recommendations only which were forwarded to the appropriate Department for action being taken en meritis. As far as the trusts are concerned, fairly serious allegations were made in respect of the representations made by the 2nd respondent and others connected with the Government about the nature of these trusts, Further reference will be made to the trusts when the affidavits of the persons connected with the two trusts are dealt with. According to the 2nd respondent the charge of having taken donations in consideration of certain allocations of cement is false, politically motivated and mischievous,

24. To summarise, the 2nd respondent has denied that he had distributed cement or that cement was distributed under his personal instructions. He has denied the allegation that cement was made available only to those who" had access to him br the other Ministers or the officers. He has stated that he never sought donations from those who had applied to him for allocation of cement or from those whose applications were forwarded by him to the relevant department with sympathetic recommendations. He has denied that there was any conflict of interest and duty as the Chief Minister of the State and interest as the founder trustee of the trusts. It will have to be seen and considered whether these denials and the stand can be accepted fully or partly or at all.

25. As stated earlier, as a result of these affidavits and statements made at the time of admission and inspection given, an affidavit ostensibly in rejoinder was filed by the petitioner in December 1981. Mr. Sen has complained that in this rejoinder there was a change of front or complete volte face, and the case made out in the petition was given a go by to and substituted by a wholly different and new case. He submitted that this ought not to have been permitted. Indeed we

have noted that there was some shift in the impact and tenor of the allegations, but under the circumstances that was not unusual and would be required to be condoned provided full opportunity is afforded to the opposite party to consider, deal with and traverse the further allegations, if so advised.

26. It becomes necessary in the circumstances to deal in some detail with this affidavit in rejoinder.

27. The petitioner No. 1 has made the affidavit in rejoinder in which he deals with the case after considering 11 affidavits filed in reply. Initially he makes a complaint that proper inspection has not been given of various documents and has sought in para 4 an order directing the respondents to produce (and give inspection?) of all relevant documents and records forthwith. This plea is repeated in para 5 also. We then find petitioner No. 1 submitting that the affidavits filed by way of return and the documents which had been offered for inspection revealed that allotment had been made from the ad hoc quota by the Chief Minister himself under his own initials or on his orders. A number of unusual features of such allocation are then pin-pointed. It is alleged that no chronological order has been maintained for allotment from the ad hoc quota. Persons who were allotted cement were allowed to jump the queue. It is "then alleged specifically and clearly that the allotment was made in a totally arbitrary manner and large builders had been clearly favoured. Attention has been drawn to the fact that there was no proper system maintained for receiving applications for allotment from the ad hoc quota and indeed a complaint is made that the general consumer was never informed about the existence of such quota or the manner of applying for the same. It is then submitted (para 7-i) that large donations had been made by the builders to the trusts of the Chief Minister which petitioner No. 1 describes as private trusts. It is submitted that allocation of cement to the builders was by way of quid pro quo for the large donations made for the said private trusts. Indeed it is alleged that only those who were in a position and in tact gave donations to such private trusts were allotted cement (see para 7-k). It is further alleged that those who did not pay (i.e., make donations) but were otherwise eligible and were in a position to lift the cement by road had not been allotted cement.

28. An allegation is made also against the 1st respondent (i.e. the State of Maharashtra) that it had deliberately diverted cement allotted to it and resorted to subterfuge of referring to it as ad hoc quota for making distribution thereof from the Mantralaya, without any authority of law and in a totally illegal, arbitrary and mala fide manner (para 12). The mala fides are, according to petitioner No. 1, brought out by the fact that the Mantralaya publicised one procedure but followed another. This was, according to petitioner No. 1, obviously and clearly for the illegal and mala fide purpose of allowing the 2nd respondent to distribute cement to big builders and industrialists. Apart from arbitrariness, the further allegation, viz., that the cement was distributed to these two categories as quid pro QUO for donations made to his private personal

trusts is repeated. It was submitted that each and every allotment made from Mantralaya was made by the 2nd respondent directly and/or under his personal instructions and directions by his officers, agents, servants and subordinates. According to petitioner No. 1, the papers produced for inspection and the affidavits did not explain how allottees approached the 2nd respondent and how they became aware of the extraordinary procedure followed in the Mantralaya. A comment is made that the quantity of cement being allotted on such private and ad hoc basis had during this period (June-July 1981) steadily increased and it is contended that the increase was engineered by the 2nd respondent for the sole purpose of his private gain and benefit.

29. The petitioner No. 1 has also disputed the claim made by or on behalf of the 1st respondent that all applications for allocations against ad hoc allotment received by Mantralaya in the Department of Food and Civil Supplies were forwarded invariably to the Food and Civil Supplies Department for necessary action and that the same were placed before the concerned Minister before the actual issue of the actual orders. It is suggested bluntly that any such claim was totally false. It is further contended that the allotment was made by the 2nd respondent arbitrarily and capriciously and not on any principles. It is alleged (see para 74) that in reality the Minister of State had nothing to do with the distribution and allocation of cement and the same was distributed and allotted either by the 2nd respondent directly and personally or upon his orders by his own servants, agents, subordinates and officers. It is then contended that the two trusts floated by the 2nd respondent were undemocratic and contrary to norms of a clean and decent administration. They were projected as Government trusts and were only ostensibly public charitable trusts. In reality, however, according to petitioner No. 1, they were trusts under the 2nd respondent's sole control. In these circumstances it has been urged that receipt of huge donations from persons who obtained an essential commodity such as cement disclosed a nexus between the two, viz., allocation of cement after donations to the controlled trusts. Reference is also made to various utterances of the 2nd respondent in speeches. The petitioner No. 1 also refers to several statements made in the legislature by the 2nd respondent as also other member of his Government.

30. We then have in para 92 of the said affidavit in rejoinder allegations giving details of the scheme devised by and the modus operandi adopted by the 2nd respondent in collusion with big builders. The six features of the scheme according to petitioner No. 1 are (in his own words) as follows:

I say that the scheme devised by the 2nd respondent in collusion with the big builders and other allottees of cement on payment of voluntary donations to the private trusts of the 2nd respondent has the following features:

1. A builder may be a partner in several firms, one of which may make the payment" and another receive the cement allotment.

2. A builder may have several projects in hand either in his own name or on behalf of various housing or other societies in favour of whom cement allotments were made against payments by the builders' firms and/or firm and/or subsidiary and/or relative and/or friend.

3. The payments for cement in the garb of voluntary donations were entitled to full exemption under the tax laws so that it is honest persons and tax payers like the petitioners who ultimately bear the entire cost of higher price for the cement.

4. Donations to trusts and other charitable projects are exempt only to the extent of 10% of the gross income of the donor as under 80-G of the Income Tax Act, making it necessary for the builders to distribute the full payment being made by them over a number of donors, so that ultimately the builders themselves and they alone in the ultimate analysis paid at the rate of Rs. 40/- per bag of cement allocated by the 2nd respondent to or for schemes propounded by any of his own firms/companies or societies in which he has an interest as builder.

5. The builders would raise the donation payment from several companies, firms, builders and non-builders.

6. The ultimate result of this entire process is the allotment of cement by the 2nd respondent according to the requests of the builders.

I say that the entire effort was to make it as difficult as possible to trace the nexus between the donor, donee and allottee; to trade in an essential committee as though it were private property and to give Income Tax exemption to such fraudulent donors at the cost of honest tax payers like the petitioners.

31. Dealing with the affidavits made on behalf of Hiranandani, Maker and Bombay Builders, it is submitted in the rejoinder that since they have admitted the making of donations, "such admission of both gives rise to a presumption of a nexus and a sequester of cement after allocation and which has not been specifically denied and/or proved to be false".

32. It may be mentioned that after the affidavit in rejoinder which was filed in December 1981, fresh affidavits were allowed to be filed and indeed by order made on December 10, 1981, the learned single Judge very rightly observed that this was not a matter which was required to be disposed of on technicalities and full opportunity was required to be given to the respondents before him to deal with the case now revealed by the affidavit in rejoinder.

33. We find that the matter was adjourned for four days and by way of reply to the rejoinder, the Secretary, Chari filed his affidavit. Two persons connected with the two trusts, viz., Shri R.R. Bhole, M.P., a trustee of the Pratibha Pratishthan and A.B. Bhise, of the Konkan Unnati Mitra Mandal also filed their affidavits. The 4th affidavit was of Z.M. Azad connected with the Bombay Builders. However, no affidavit was filed by the 2nd respondent or by the Minister of State. The two trusts will be referred to hereinafter as the "PP Trust" and "the KUMM Trust" for

the sake of brevity.

34. It was submitted in the course of arguments that the failure to file an explanatory affidavit by the 2nd respondent as also the Minister was very significant and most material. It was also submitted that the affidavits filed by the Department as well as by two persons connected with the trusts, were unsatisfactory and did not disclose a frank, honest and bona fide approach.

35. As far as the Department's affidavit is concerned, the Secretary has ingeniously sought to explain away the endorsements made on the application by the Chief Minister. It has been contended that in a number of cases, the quantity recommended by the 2nd respondent was not allowed and a smaller quantity was allotted. It has been similarly claimed that the applications for allocation against the ad hoc allotment from the Central Government were dealt with by the Department of Food and Civil Supplies (see para 6 of Chari's affidavit in sur-rejoinder).

36. It is submitted in the said affidavit of Chari that there was no question of maintaining a chronological order of applications. No reason is offered for this. It is then somewhat naively submitted in para 10 of the affidavit that consumers of cement were aware of the availability of cement from ad hoc allocations and it is contended, that no complaint was received against the system. Indeed, this submission to be found in para 10 appears to be putting the cart before the horse. It is the secrecy of the system which precludes complaints being raised till such time as Deolekar raised the issue in his press conference. It is then claimed that it is not possible for the Department to explain how applications came to be made to the 2nd respondent and that they were not aware of the donations made or supposed to be made by any of the allottees. What was taken into account in any particular allocation and why it was given to particular builder and not to another is not at all explained and indeed was not even sought to be explained even during the course of arguments. Perhaps there was no real explanation other than the one offered by the petitioners.

37. Some particulars regarding the donations to the PP Trust are to be found in the affidavit of Bhole. Exhibit "I" to the said affidavit is copy of the deed of trust. According to this affidavit, the total donations received by the PP Trust came to Rs. 5.18 crores which included Rs. two crores received from the State Government. Donations from Maker and Hiranandani have been admitted. Donations from Hanjar Education Society is also admitted but it is contended that such donations cannot have any connection with the allotment of cement to Bombay Builders. The Treasurer Trustee of KUMM Trust Bhise has also made his affidavit to which he has annexed the memorandum of association and Rules and Regulations of KUMM Trust as exhibit V. It is a registered society. The said Society is also registered as a public charitable trust. Dealing with exhibits E-1 to 10, Bhise states that out of 142(138) allottees only 10 had given donations to KUMM Trust. During the course of arguments it was rightly commented that more frankness was expected from the persons connected with the two Trusts.

38. After all these affidavits in sur-rejoinder, we have a final affidavit of petitioner No. 1 by way of reply or sur-sur-rejoinder. In the said affidavit, it has been averred that from the material on record it would be amply borne out that the 2nd respondent was connected with the sanctioning of the allotments made directly from the Mantralaya in favour of the big builders. The argument that this quota was required to be allotted to this category has been repelled and it has been urged that there were several large allottees such as Maharashtra State Housing Board, Housing Repair Board and Bombay Municipal Corporation and similar public bodies who would have been able and willing to lift this cement in bulk (that is in quantities over 50 m.t.) and by road at slightly higher cost. There is also in the said affidavit in rejoinder a reference to the agenda of the High Level Committee meeting held on March 31, 1981. It has been alleged that a close and proper perusal of certain items on the agenda would show that 3570 m.t. of cement were allotted by the 2nd respondent and the committee was merely informed of his action. It may be noted at this juncture that in our opinion this is clearly borne out by the agenda which discloses that this allocation from the 2nd respondent seems to have been adjusted both against ad hoc as well as regular quotas and spread over two quarters. This gives a direct lie to his plea that he was not concerned with allocating cement. The final affidavit of petitioner No. 1 deals with some minor aspects and in particular with two co-operative housing societies, Ganga Bhavan and Bhadra, which were denied by Chari as having connection with the Raheja Group. In our view, what is stated by petitioner No. 1 is correct and it would be appropriate to reject Chari's contention in this behalf and to treat the two societies as falling within the Raheja Group. The reasons for such conclusion are summarised in this affidavit which we accept.

39. Irrespective of considerations of impropriety, arbitrariness and capriciousness in the matter and manner of allocating cement from the ad hoc quota, which allegations seem to have been established on the record beyond any doubt there still remains the question of considering and arriving at a decision on the further allegation, viz., whether allocation of cement was made for a quid pro quo.

40. These other allegations, however, have bearing even on this question although to a limited extent. It is required to be noted that the petitioners' case has varied at different stages and the variations must be noted in order to appreciate the problem in the proper perspective. The different cases propounded are as under:

Case No. 1 : Right from June 1980 with the formation of the new Government by the 2nd respondent, the 2nd respondent directly or indirectly allocated cement to big builders for a quid pro quo which was the making of donations to the two trusts with which he was intimately connected.

Case No. 2: that at any rate in the short period June and July 1981, large allocations of cement from ad hoc quota were made to big builders for this quid

pro quo.

Case No. 3s (A slight variation of Case No. 2): That the big builders and the 2nd respondent had devised a scheme whereunder they were to get allocations of cement in return for donations but were also to get Income Tax relief for these either at 50% of the donations or 100% of the donations.

As far as the allegation of cover up is concerned, the scheme or the modus operandi further alleged is that in order to suppress the evidence or a nexus or a connection, the donations were to be made in diverse names, particularly in individual names so that a person not in the know could not discover this scheme.

Case No. 4: That allocations were made to some big builders from whom donations were extracted or exacted as price or consideration for the allotment.

41. In order to appreciate properly the nuances underlying the allegations and before reaching a conclusion one way or the other, one further clarification is required to be made. We have two parties A and B, A is alleged to have done something for B in order to secure, exact, extract or -coerce donations from B. Thus cement is allotted only because B gives donation. This is the primary allegation which has to be considered. To put in rather simple language the question to be considered is whether it has been established that cement was given because of or against donation. In other words allotment of cement is the act and giving of donation is the price or consideration therefor. We are not concerned with the reverse case, viz., whether because A did or had done something or was to do something for B, A thought it prudent to do something in turn for A. Equally irrelevant is whether B did something for A in the hope of securing some favour in future. To put it in similar simple language, this would be the reverse case, viz., that B gave donation because he had been allotted cement. Here donating is the act and allotment of cement is the consideration therefor.

42. What is to be established is a scheme, a method or a modus operandi whereunder A (the 2nd respondent) did something for B (builders - all or some) in return for the specific consideration pleaded, viz., donations to the two trusts. The question to be considered is whether this has been established for any of the four cases above indicated, i.e., case No. 1 for the entire period June 1980 onwards for all the builders or cases Nos. 2 and 3 for June 1981 and July 1981 for all the builders or case No. 4 in any specific case.

43. In determining these questions, we will have to proceed on the footing already indicated that allocations from ad hoc quota were being improperly, arbitrarily and capriciously made and that the entire scene was dominated by the 2nd respondent whose wish couched in the form of a suggestion was treated as a command.

44. Much time was taken by counsel, and rightly so, in arguing the question of burden of proof. However, before dealing with the arguments and stating the

correct principles which then Will be required to be applied, it is essential to state the essence of the charge against the 2nd respondent. It would appear that whichever be the case to be considered from cases 1, 2, 3 or 4, the grave man of the accusation against the 2nd respondent is that he has abused his official position and misused the power of allocation in order to gain pecuniary advantage - not directly to himself but for the two trusts which he had floated and in whom he was interested and over the affairs of which he had a dominant position. Put it in this way it is moot point whether such allegation would not be tantamount to alleging corruption. We are not concerned with whether or not the 2nd respondent is or is not a Government servant or whether he would be, if the accusations are proved, guilty of contravening any section of the I.P.C. or of the Prevention of Corruption Act. The charges levelled against him, whether we consider case No. 1 or Case No. 4, are serious charges and entailing serious consequences, both political and perhaps criminal.

45. It is true that this is a writ petition made to the High Court in its Constitutional Jurisdiction and to that extent it would not be correct to fully embody in the question of onus of proof the principles which would be more appropriate to criminal proceedings. In criminal proceedings the person accused ordinarily need not offer any explanation, need not lead any evidence in rebuttal and despite this at the end of the trial a submission made on his behalf that the prosecution's case has not been proved beyond reasonable doubt may be required to be accepted. In a criminal trial ordinarily, unless there is some express provision in the Statute, the burden of proof is always on the prosecution and the prosecution must fail unless that heavy burden is adequately discharged.

46. There is not and cannot be direct evidence of the scheme alleged against the 2nd respondent. The conclusion has to be arrived at after drawing the correct inferences from various facts established. In a criminal trial where the charge is based upon the inferences to be elicited from proven circumstances, we have the well-settled principle that the circumstances proved in the case must admit of a single hypothesis which is the one alleged by the prosecution. If logically and in arguments it is possible to submit that another hypothesis cannot be ruled out, the prosecution case must be rejected as not having been proved beyond reasonable doubt.

47. The same constraints would not apply to non-criminal proceedings. However, such proceedings do not fall within one simple category and the standard of proof required would depend upon the type of proceedings, nature of allegations, seriousness of the consequences which may be envisaged and such other considerations. The standard of proof is undoubtedly less in such matter than the one which prevails in a criminal trial but it may not be very much less in certain matters which the Courts have regarded as quasi-criminal. For example in Election Petitions where there are serious charges which may involve penalties such as dis-qualification or in matrimonial matters, where a charge of adultery is made which is also a criminal offence (in certain cases covered by Section 494),

the standard of proof has been indicated to be almost the same as applicable in criminal proceedings. A civil proceeding will have to be decided on preponderance of probability. The standard required is not as high or as harsh as it is in a criminal trial. It would appear however to be the correct position of law as far as standard of proof is concerned, to state that the graver the charges, the higher the degree of proof which the Court ought to require before it can hold the charge to be proved or established. This is the substance of the legal position, both in England as well as in India. However, although the principle may be easily enunciated the application of this simple principle has often caused much difficulty. The difficulty is likely to be more pronounced when we do not have direct evidence as regards the charge but the charge is required to be inferentially proved from a number of circumstances established or held established. In the case being considered by us some further difficulty is caused by the fact that the full material has not been brought on record. We have also seen to a certain extent how even full disclosure on affidavits has not been made. Indeed one of the difficulties of holding such serious charges proved in writ applications arises because such proceedings are normally decided on affidavits and oral testimony is not recorded nor tested by cross-examination. We then have to consider a mass of affidavits as also the question whether there has been any failure to plead properly, and whether adverse inference has to be drawn and if so, what.

48. It is in the background of this position that we may now examine the record and scrutinise the conclusions arrived at by the learned single Judge on the same, particularly, as regards findings (h) and (i) given by him which are the findings that have been seriously assailed in this appeal.

49. It would be appropriate to indicate at the outset the conclusions of the learned single Judge, which conclusions and findings are summarised by him in paragraph 52. These are:

(a) Read by itself and as a whole, Government Resolution dated September 12, 1978 pertains to regular quarterly allotments only and not to ad hoc allotments received from the Central Government;

(b) Government Circular dated March 31, 1981 is valid and binding;

(c) The hypothesis of mistake and misunderstanding advanced by the State Government in issuing the Government Circular dated 31st March 1981 is rejected;

(d) The criticism levelled by the State Government against the learned Advocate General is unwarranted and the attempt to mulct him cannot but be deplored;

(e) As long as Government Circular dated 31st March 1981 is in force, it must be acted upon and unless any allotment is earmarked for a particular purpose by the Central Government or any condition is attached thereto by the Central Government distribution of ad hoc allotments must be in accordance with the law

and in the light of Government Circular dated 31st March 1981 read with Government Circular dated 2nd March 1981 and on the guidelines laid down in Government Resolution dated 12th September 1978;

(f) The version of the 1st and 2nd respondents that no allocations were made by the 2nd respondent, is rejected;

(g) The Petitioner's charge of arbitrariness against the 2nd respondent in making allocations is justified;

(h) Nexus and quid pro quo between allotments made by the 2nd respondent in favour of certain builders and donations made by them directly or indirectly, is established;

(i) Once nexus and quid pro quo are manifest, mala fides on the part of the 2nd respondent must be the natural sequitor;

(j) The challenge to the petitioners' locus is repelled.

50. In accordance with these findings, the learned single Judge made the Rule absolute in terms of prayers (c)(ii) and (c)(iii) with the addition of the words "except as provided by the law" at the end of prayer (c)(ii). He also gave a direction to the State Government to act in accordance with the circular dated March 31, 1981, which direction need not be repeated here inasmuch as today the said Circular had been withdrawn and substituted by fresh instructions in view of the fundamental changes affecting the question of distribution of cement.

51. During the course of judgment, the learned Judge has in paragraph 39 onwards, dealt with the question whether nexus in fact has been established by the petitioners. After dealing with the donations made by Raheja group, it is observed:

While no blame can be attached to anyone making donations to a cause he considers worthy, the inescapable inference in this case is that there is a nexus between allotments and donations made by the Raheja concerns, and family members, and that one was quid pro quo for the other.

52. Similarly, after dealing with the donations made by the Hiranandani group, it is observed:

Once again the proximity between the donations and allotments, and the quantity allotted and amounts donated cannot but lead to the irresistible inference- of quid pro quo between the one and the other. Nexus is established.

53. Similar is the conclusion regarding Makers which is in the following words:

The proximity between the allotment and donations and the quantity allotted and amounts donated, cannot but lead to the irresistible inference of quid pro quo between the one and the other. Nexus is established.

54. Pausing here for a moment it is not very clear whether the learned single

Judge was considering the question as posed earlier, viz., whether A made the allocation in consideration for the donations or the reverse case, viz., whether B made the donations for having received the allocations. The former allegation directly affects the 2nd respondent, whereas the latter merely exposes the hollowness of the charitable intentions of B.

55. Thereafter in paragraph 40 of the Judgment we find an observation that there was failure on the part of the respondents to give requisite inspection of documents and other material despite the request by the other side. It is also observed that because of such failure it is not possible to say whether donations were received from other builders as well and/or their friends, relations and associates. I have found, however, that apart from the direction to keep the records of the trusts present in Court, which direction is recorded in the minutes, there is no further specific order directing inspection or recording failure to give inspection despite specific direction in that behalf, of the Court. Presumably, this was because there was a failure on the part of the petitioners to seek clear and specific directions from the Court. About the production of the record of the trusts in Court, we have divergent statements made at the Bar by respective counsel. Before us in this appeal, we had at the outset asked counsel for the respondents in the appeal, the original petitioners, whether they desire the appellants to produce any record. It was made clear that if necessary application was made to us we would give necessary directions and if thereafter there was failure on the part of the appellants to produce necessary records an adverse inference would be drawn against them. This was made clear on three separate occasions by me but the response was in the negative accompanied by a general statement that the counsel for the original petitioners did not want to make any such application and it was for the appellants to produce the record if they so desired. Acting by ourselves (i.e. without any application on behalf of the original petitioners) we had directed the State Government to produce the Inward Register regarding applications allegedly processed by the Minister of State. This Register was not produced and we have drawn the necessary inference from the failure to do so. In view of the attitude adopted in this appeal by the petitioners, it has become debatable whether any adverse inference should be drawn specifically against the State of Maharashtra or the original 2nd respondent, although it may be possible to take the view that they could have been more forthright, frank and could have, if they so desired, laid all their cards on the table.

56. I think it is now time to summarise what in my opinion the record establishes. This may be stated in the form of statements or propositions.

1. That in the State of Maharashtra at all times, i.e., both prior and subsequent to June 1980, a distinction was made between what were described as "Regular Allocations of Cement" by the Government of India as distinguished from "ad hoc allotments".

2. As far as the latter category (ad hoc allotments) were concerned, we have not

been informed of what were the guidelines or the principles" for making allocations or who constituted the Supervisory Committees exercising control over distribution and deciding on allocations.

3. As far as the latter category (ad hoc) is concerned, it would appear that sometimes the Regional Level Committees were called upon to make allocations. But this was subsequently given a go-by to and there was a concentration of power in the Mantralaya,

4. That as per the professions made in the affidavits, the Mantralaya claims some overriding discretionary power to make the allocations of cement from both the regular as well as ad hoc quota without revealing or indicating the source of such authority or the parameters of its ambit.

5. The dominating position of the 2nd respondent over such matters including expressly the question of making allocation of cement seems to be abundantly clear on the material placed before the Court. It is equally clear that this was a de facto exercise of power without de jure regularisation of position. This power was exercised because of his position rather than conferment by any Rules of Business or because he was constituted a member of any Steering Committee or High Powered Committee for the purpose etc.

6. From the figures it is clear that fairly large quantities of cement out of the allocations from Mantralaya were being allotted to builders having or being connected with building projects, particularly in Greater Bombay.

7. No real explanation of the basis of the allotments to these builders has been offered in any of the affidavits filed on behalf of Respondents Nos. 1 and 2. There is also no attempt in the affidavits to justify the large allotments to those persons vis-a-vis the ordinary user or even the large scale users such as the Bombay Municipal Corporation or the Housing Board or the Repairs Board.

8. On 31st March 1981 a circular duly authenticated in the name of the Governor was issued which was publicised, acted upon and remained unrevoked till April 1982. The contents of the Circular provided that no applications for allotment of cement should be received or entertained at the Mantralaya.

9. Despite the above Circular, applications continued to be made from builders at the Mantralaya for allotments from "Bombay Quota" or the "Chief Minister's Quota" and there is no explanation as to how or why the applicants despite the Circular moved the Mantralaya and to what quota they were referring?

10. There was no system for dealing with these applications. There was no Inward Register and in cases where the applicants received a sympathetic endorsement how they were subsequently processed by the Department has not at all been indicated, made clear or established. In my opinion the so called processing was a mere formality for carrying out the directions of the 2nd respondent which directions, although occasionally couched in the form of suggestions, were in effect treated as (and meant to be treated as) orders.

11. The affidavit of the Minister of State as also of the Secretary, principally because of the failure to offer justification for these allocations or explanations as to the processing, clearly substantiates the claim of the Petitioners that these allocations were made principally and to a very large extent by the 2nd respondent acting sometimes directly, but sometimes through the O.S.D., sometimes through the Minister of State, sometimes through the High Powered Committee and sometimes through the Department. In other words the decisions were his, although the processing adopted many disguises and ultimate orders made by the hand of any subordinate.

12. The above may be regarded as the fundamental or the basic premises of the situation which would be required to be considered in order to come to any conclusion confirming findings (h) and (i) or not. Indeed these reveal, indicate and illustrate a sordid spectacle of unreasoned arbitrariness and capricious discretion resulting in unprincipled favouritism which remains unexplained and appears to be unjustified. There is no explanation either for the whole class or the favoured few. Similarly there is no explanation as regards the quantities suggested and allotted.

13. As stated earlier, the agenda of the meeting of the High Powered Committee held on March 31, 1981 establishes beyond doubt the pervading presence and indeed the omnipotence of the 2nd respondent in these matters. He could make allocations from the present as well as the future quota and from the ad hoc quota as well as the regular quota and these allocations are just intimated to this Committee without their consideration, approval or rectification being sought. The agenda starting reveals the true state of affairs regarding distribution of cement in the murky corridors of the Mantralaya.

57. I will put in a caveat at this juncture. Although I agree that the submissions concerning the Circular of March 31, 1981 are made only to justify a course of conduct which was contrary to the authenticated Circular and clearly constitute a belated attempt to wriggle out of an unhappy situation. I do not share the view that the interpolations in the minutes had been made for any improper reasons. To any one who reads the minutes together with the agenda the interpolations, it would be clear, would require to be accepted as slips or mistakes and not an attempt to mislead having sinister overtones.

58. With this background we now come to the establishment of the Trusts, The trusts have laudable objects. There is nothing unusual about Charitable Trusts seeking and obtaining exemptions for Income Tax purposes, although it is understandable in our country that trusts in which important politicians are interested get such exemptions very quickly -- indeed so quickly that one is left with the suspicion whether any real scrutiny has taken place. A similar suspicion may also be raised regarding scrutiny by the Charity Commissioner, who is supposed to be the watch-dog of the interest of the charity. But the Charity Commissioner is a Government servant and having observed how the backbone of the bureaucrats in the Food and Civil Supplies Department was shattered, it is

not difficult to conceive that this watchdog may turn into a mere lap dog where we have two trusts created so to say by the 2nd respondent and over the affairs of which he holds a commanding position. Unlike the Food and Civil Supplies Department, a dominant position has been expressly conferred upon the 2nd respondent under the rules and regulations or the Deeds of Trusts as a matter of legal right. I wish to express no further opinion as to whether such provisions are valid or proper and/or whether such trusts ought to be registered as public charitable trusts. These are matters which can be gone into, if necessary, in appropriate other proceedings.

59. Thus we have on the one hand large allocations of cement, a scarce commodity, being made from the Mantralaya. If the apparent facade is pierced, we may have to substitute the words "by the 2nd respondent or at his instance" instead of "from the Mantralaya". We have also perceived the exercise of unfettered, unprincipled discretion bordering on capriciousness and favouritism.

60. It is at a late stage in this drama that the trusts are brought into existence. We have already perceived how a particular category of claimants for this scarce commodity had established contact with the Mantralaya from where forsaking all canons of propriety and without any authority of law or logic they were receiving large allocations which have not been explained or even sought to be justified.

61. We then find that some of the favoured few have made substantial donations to the two trusts. Reading and re-reading the speeches and the writings and the utterances of the 2nd respondent one is left with no doubt that the donations must have been at his instance or suggestions or hints direct or indirect or through intermediaries or friends. If a man is obsessed on the desire to collect donations from the rich for these trusts constituted for the benefit of the artists and the Konkan region, as" he himself confesses, that compulsion or obsession will almost certainly induce him to tap those whom he has favoured with the allocation of a scarce commodity.

62. Now to go back to the simple case of consideration for allocation of cement that we postulated earlier can we not envisage one further possibility other than two which we have indicated? Possibility No. 1 is what is alleged by the petitioners and held as conclusively established by the learned single Judge, viz., that the allocation of cement was against the donations. The second possibility which I indicated earlier is that a few of the favoured category thought of repaying the favours or trying to remain within the favoured category by pleasing the favour dispenser and this was done by donating to his pet charities. The third possibility which we can envisage is that the 2nd respondent tapped a few of the persons who had received these favours, perhaps undeservingly and certainly without the backing of legality and propriety, and induced them to contribute to his pet charities. Bearing in mind the dynamism and vigour displayed by him and the normal psychology of those dealing frequently with the Government which borders often in sycophancy they submitted to his demands. The first possibility is allocations against contributions; and second possibility may be described as

donation as reward for favours past, present and future. The third possibility may be donations occasioned by the ordinary sycophancy displayed by businessman whose business and profits depend upon the permits and permissions, licences and relaxations, authorities and exemptions to be obtained from the Government.

63. On the material on the record which will include the pleadings as well as the statements annexed thereto as also handed over to the Court from time to time, it has now to be decided which of the three possibilities is to be held established on a preponderance of probabilities.

64. As already stated earlier, in this matter a decision has to be taken not on testimony given in Court and tested by cross-examination, but on affidavits and documentary material both produced and withheld.

65. On sheer probability if left to myself, I am of the opinion that it is the third possibility which must be regarded as most likely. I will now briefly indicate my reasons for the aforesaid view.

66. As earlier stated, we have a favoured class to whom cement was being allocated from the Mantralaya and this preference existed even before the coming into being of the two trusts. It is not that favouritism was shown or undue preference given or excessive quantity granted only after the establishment of the two trusts. The next circumstance which will have a logical bearing on the selection of possibility is the question whether any of the parties in respect of whom donations have been established and with regard to whom nexus has been found were recipients of similar allocations or not earlier. If they received allocations of cement for the first time near about the time when they made the donation, then the first possibility must be accepted as having been established. If the Rahejas or the Hiranandani or Bombay Builders had received cement for the first time only after the trusts had been established and also nearabout the period when they made donations, then one could be logically certain that cement was allocated to these persons only because they had agreed to give donations to either or both of these two trusts. It would then be a case of establishing allocation of cement against a consideration, the consideration being the making or agreeing to make the donations to either or both of the two trusts. In such a case whether there is a rate or no rate or whether same is Rs. 40/- per bag or not would seem to make little difference.

67. In order to hold the first possibility as conclusively proved, I think it has to be shown (a) that donors had received large allocations for cement a little before or little after they made donations; (b) that previously they had not got any or such large allocations of cement; (c) that subsequently also they did not receive any allocation of cement. If these allocations and donations had taken place during the months of June and July 1981, then it must be held that the petitioners' case must be regarded as conclusively proved - not perhaps as regards the entire category of builders to whom cement was allotted but at least for a few of them.

68. On the other hand if these donors whose cases have been dealt with in detail in the penultimate paragraphs of the Judgement of the learned Single Judge and in even greater depth by my brother Rele had been recipients of similar favours earlier and subsequently when the question of making donations did not arise, then having regard to the reasonable and probable course of human conduct it would appear to me that either the second or the third possibility should be accepted in preference to the first. It would then be a case of extracting donations from persons favoured or the persons favoured giving donations with a hope of carrying favours in future or at least receiving similar sympathetic consideration. We must not forget that we are dealing with a class who are land developers, builders, promoters of co-operative societies and for their business purposes they require various permissions, sanctions, no objections, allotments and final certificates. At every level there is a local body or Board or a Department to be approached and satisfied. If this class had already been recipients of the scarce commodity and hopes to receive further favours and to secure further benefits in future, then it would be possibility No. 2 which will have to be held established. It is to be noted that this type of people are always responsive to suggestions for making certain types of financial contributions. These contributions can be for various purposes including political and one of such purposes can be a pet charity of the person having influence and wielding tremendous power. Why do they become charitable was the question posed at the Bar. The second question posed was why do they become charitable to this extent so far as these two trusts are concerned. The answer is fairly obvious. They become charitable and are inclined to donate generously because to do so would please the 2nd respondent. They are repaying him for favours done in past and investing by way of donations to these two trusts for favours or benefits to be extended to them in future. This is an undesirable feature concomitant with the Permit Licence Raj which has come to be in our country. It is equally possible, as already stated earlier, that the favoured few had been sounded directly by the 2nd respondent or indirectly by the several persons hovering around him within the orbit of his authority and induced to give donations. Such course of conduct would not at all be strange for a person who professes to be obsessed with a desire to collect funds for charitable and deserving causes. The important thing further is to observe that improper as one may regard these sort of tactics, the impropriety is of a totally different type than the one alleged by the petitioners and held as proved by the learned single Judge.

69. The P.P. Trust was founded on October 18, 1980. The KUMM Trust was registered as a Public Trust on April 13, 1981. If we consider the case of the earlier trust viz., the P.P. Trust, it is nobody's case (at least no case sought to be substantiated by any proper material) that allocation of cement was made against donations immediately after the creation of the trust. Was the scheme devised subsequently? Were the earlier allocations without a quid pro quo and only those in June and July 1981 for the quid pro quo alleged? The answer to these questions, some of them being inconvenient, would require a comparative

study to be made of all allocations from the ad hoc quota to the favoured class of builders co-related with a scrutiny of the donations from October 1980 to the P.P. Trust and from April 1981 to the KUMM Trust. No such study has been made. It may be contended that this being a public interest litigation, it is for the respondents to make the necessary studies and details available. That would not appear to be the correct position, although some latitude may have to be shown in such public interest litigation. The duty of the respondents is to disclose all the relevant material and give inspection thereof as may be ordered by the Court. If there is a failure to disclose necessary material or to give inspection after being ordered to do so, then certainly an adverse inference must be drawn. Nevertheless, the burden of proving the allegation, of substantiating the same on a preponderance of probabilities must always remain on those who allege. Whatever be the nature of the litigation, the burden is on the persons who move the Court and it is they who must fail if the said burden is not adequately discharged.

70. On the other hand, it would seem to be the position that if enough material has been brought on record which requires explanations or justifications, then, if there is a failure to offer necessary justification or explanation, the initial burden must be deemed to have been discharged and the allegations held to be substantiated by reason of the failure to offer satisfactory explanation or even make an attempt to doing so.

71. There is much to be said as regards the contention raised on behalf of the appellants (original respondents 1 and 2) that as against a total quantity of 2,63,000 metric tonnes available from the ad hoc quota only a quantity of 73,270 metric tonnes of cement was allotted to the builders. The total number of these fortunate and favoured class comes to 1894. It may be that the allotments were unjustified and there was undue favouritism shown to this class. The question, according to the appellants was that not many of these allottees have been alleged and shown to be donors to the two Trusts. It was contended that a very small number of these 1894 have given donations to either of the two trusts. Both the number and the quantity of cement allotted to the donors would be required to be considered. Ultimately we have in the penultimate paragraphs of the impugned judgment left only within a score of cases falling within six or seven groups. Have these six or seven groups got far better allotments than others? Did they get allotments only during the period round about which they have made donations or did they get allocations both earlier and subsequently? These are very pertinent questions and would be required to be necessarily answered before coming to a definite and certain conclusion on findings (h) and (i) either for the entire class or for some of them.

72. It is impossible to hold on the record that this entire class was favoured with allocations of cement because of the quid pro quo of making donations to the two trusts. At the highest, the record suggests that some of them only who had been favoured with allocations of a scarce commodity had been shown to have

donated either to the P.P. Trust or to the KUMM Trust or in a rare case to both. The question then is whether this was a price paid for the allocation or an exaction for favours conferred or repayment or return for favours already received and expected to be received in future.

73. As stated earlier, there are three distinct possibilities and the first possibility which constitutes the substance of the allegation is to me less likely logical than the other two. Certainly on the positive material on record it is difficult to agree with a finding that the first possibility is conclusively established.

74. There are, however, certain other factors which are required to be considered at this juncture. Some appear to be mere red herrings and would appear to me to be devoid of any consequence. On the other hand, there are few which deserve serious consideration, particularly because of the failure to give the necessary explanation or justification.

75. To cite only one matter which I would consider to belong to the former category, I see nothing startling in the speed with which orders are passed or allocations made or necessary directions given. Speed even when substituted by the somewhat derogatory expression haste is not concomitant with impropriety or illegality. What is done with expedition is not necessarily ill-considered, ill-advised or necessarily improper. Equally there is no guarantee that because time is taken for the same the decision given is well considered, appropriate or even correct.

76. On the other hand why the builders were making the applications to the Chief Minister or reference being made to the "Chief Minister's Quota" certainly required some explanation. None has been forthcoming. The utter informality with which the applications were treated is a cause for some concern as such informality allows undue latitude which is necessarily requisite for taking improper decisions. It may be pointed out however that impropriety of the decision is not sufficient to conclude that the impropriety or favouritism was the result of some consideration or the alleged consideration.

77. Exhibit 7 to the petition suggests allocations to four builders which have been shown to have given donations, 1894 builders in ail were allotted about 73,270 metric tonnes of cement whereas the four donor-builders were allotted 3,250 metric tonnes. The first works out to an average of 38 metric tonnes to each builder, whilst the second works out to 812 metric tonnes for each donor-builder. To a certain extent, the failure to explain this high allocation to the second category, to justify the same, to reveal the procedures and the processing which was done in respect of these applications must have some bearing on the question and the ultimate answer to be given on these two findings.

78. It may be added that even as far as the second of the three possibilities is concerned, which I have earlier indicated in paragraph 35, it would amount to the 2nd respondent exploiting his position in obtaining donations for the two trusts. However, it has not to be forgotten that even the huge donation from the

State appears to be suspect and if we peruse the statements of the then Finance Minister it would seem that even the Members of the Legislature were to some extent misled.

79. A very pertinent comment which was made was that the 2nd respondent constituted the common link between the allocation of cement from the Mantralaya and the two trusts. We have already noted how his influence and dominating position is perceivable through the proceedings in the matter of allocation of cement from the Mantralaya. Without direct participation it would seem that he has indirectly controlled almost totally the allocations of this scarce commodity made from the Mantralaya. On the other hand we have the self-confessed obsession for collecting funds for the poor and also for these two trusts. We must also note the special position of the 2nd respondent vis-a-vis the two trusts. He is the creator and to a large extent all in all as far as the management of the trusts is concerned. True there are eminent persons associated with the trusts. But they are perhaps, to use the expression of Dr. Jennings, only the planets and the sun undoubtedly is the 2nd respondent.

80. Though the donations were given in odd figures or that there is some apparent co-relation between the quantum of allocation and the figure of donation does not, in my opinion, carry the matter much further. 11 "B" has received some favours from "A" then "B" would have some rough and ready formula for returning the favours or repaying "A" for the favours. The favours given by "A" to "B" can certainly amount to arbitrary or improper exercise of power or may constitute unprincipled favouritism or unjustified sympathy for an undeserving person or class. By itself, however, this is not sufficient for taking the next step, viz., that all this was necessarily done for a quid pro quo.

81. To sum up, I am of the opinion that to conclude decisively and with a fair degree of confidence and certainty that allocations of cement were made for a quid pro quo, there would have to be some scrutiny of the detailed list of donors, ascertainment as to who amongst them had any connection with building activities and to find out thereafter whether there was any co-relation in point of time between the donations made by them and allocations of cement to them. In order to be certain further as to which of the three possibilities had occurred, there will have to be some scrutiny of the motives of those donors. This could only be done if they were before the Court as parties and obliged to file affidavits and be subjected to cross examination. The matter could have been certainly gone into properly and in depth if there had been a Commission of Enquiry. But that indeed is a futile suggestion because it is the Government which appoints such Commissions and in the present case we have allegations of improper exercise of Governmental power at the instance of a person who had headed the Government at the material time. In these circumstances, common sense will require acceptance of a position that no Commission of Enquiry was likely to have been appointed. Indeed one may also comment that although a Commission of Enquiry is a more satisfactory method of arriving at the truth, in

the set-up which exists in our country, the reports of these Commissions of Enquiry are not given the same respect as decisions of Courts of law. This is surprising when Commissions of Enquiry are headed by persons who hold or have held high judicial office or where such persons constitute a single-member Commission.

82. However some conclusion would certainly be required to be arrived at in these proceedings although in a relatively unsatisfactory manner as also without the totality of the material which ought to be on the record. But the question is who is responsible for this lacuna in the record and for this unsatisfactory state of affairs? I have already made a comment about the difficulties of public interest litigation and already noted the handicaps from which the petitioners or the plaintiffs in such litigation suffer. These are not usual adversary proceedings where the Court may find against the plaintiffs or the petitioners because of failure to produce necessary material before the adjudicating forum. In this case, we have also noted a number of circumstances giving rise to grave doubt and suspicion about the propriety and legality of allocations of cement from the Mantralaya. We have also commented on the overpowering influence and towering position of the 2nd respondent in these matters. We have at several places commented on the failure to produce necessary material before the Court and to observe standard procedures. We have similarly adversely commented upon the failure to offer necessary explanations or justify the things done. We have rejected the chant of discretionary power noting that this "Mantra" is put forward only to conceal abuse of power.

83. As far back as 1917 the Privy Council has commented AIR [1917] P.C. 6 upon the failure of parties to litigation in India to furnish to the Courts the best material for its decision. In the present matter the blame can only attach to respondents Nos. 1 and 2 and if that be so, they must be also responsible for the consequences of their failure.

84. Under the circumstances, I am of the opinion that an adverse inference has to be drawn against the respondents Nos. 1 and 2 in the circumstances already noted. At the stage of the affidavit in rejoinder, the petitioners had already made a case which although not very strong or conclusive was still substantial enough requiring a proper rebuttal. Explanations and justifications were necessary to be given in respect of several allegations made and supported prima facie by substantial material. As noted, in our opinion, a further affidavit was required to be made by the 2nd respondent, which has not been done. He, the common link between the allocations of cement and donations has, perhaps under advice chosen to remain silent. In my opinion it is only by drawing an adverse inference that it is possible to come to the conclusion that the petitioners' allegations in respect of a quid pro quo - at least in respect of a number of builders -- must be deemed to be proved.

85. Even here I put in a slight logical reservation. Although it is necessary, in my opinion, to draw adverse inference both against respondents Nos. 1 and 2, even

after drawing such adverse inference, it may be logically contended that all the three possibilities earlier noted are equally probable and the one alleged by the petitioners cannot be said to have been proved by a preponderance of probabilities which is necessary. However, judicial experience teaches us that life is often larger than logic. Persons whose conscience is clear and whose hands are clean do not take refuge behind the dogma of discretionary power and shelter behind a string of evasive denials and incomplete explanations most of which have been exposed to be hollow. In this view of the matter, I must hold that findings (h) and (i) as recorded by Lentin J. and earlier set out in paragraph 45 above must also be deemed to have been proved although I would not agree that the allegations are "conclusively" proved. To put it in other words, if this had been a criminal trial, I would have given the persons charged benefit of the doubt. As the proceedings are civil, the charges must be deemed established on a preponderance of probabilities although the other possibilities are logically attractive and cannot be totally ruled out. I may admit that to a considerable extent I have been influenced by the conclusions recorded with utmost certainty and confidence by the learned Single Judge and my brother Rele. This does not appear to be a fit case where I am required to differ even in respect of these two findings from them though I would make it amply clear that this must be held as proved only qua the specific groups of builders who were allotted cement as mentioned by Lentin J. and not for all builders who were favoured with allocations of cement from the Mantralaya. Further such acceptance of these findings is mainly based on adverse inferences which are properly drawable against the respondents 1 and 2.

86. It is indeed an unsatisfactory state of affairs where decisions have to be given without scrutiny of the entire material and on probabilities and after seeking support from adverse inferences and after raising presumptions from unsatisfactory pleadings. For this state of affairs, however, respondents Nos. 1 and 2 are themselves responsible and so must suffer the consequences. I have nothing further to add.

Rele, J.

87. The original respondents Nos. 1 and 2 have preferred this appeal against the judgment and order dated January 12, 1982, passed by a Single Judge of this Court directing the State Government (Original respondent No. 1) to distribute ad hoc allocation of cement in accordance with the law and in the light of the Government Circular dated March 31, 1981 read with Government Circular dated March 2, 1981 and the guidelines laid down in Government Resolution dated September 12, 1978. By a further order the second appellant is restrained from in any manner whatsoever allotting cement and from giving any orders and directions whatsoever to his officers, servants and agents to allot and distribute cement to any person, except as provided by the law. The second appellant is further restrained from in any manner whatsoever collecting any money by way of donations for the purpose of the said trust funds as a condition precedent to

the allotting of cement or from collecting money for any other such illegal and extraneous purposes as a condition precedent to allotting cement to any person.

88. The appeal involves vital questions about the rule of Law and the obligation of the executive to distribute cement without arbitrariness and according to law and in regard to the standard of proof that is required in a case where it is alleged that arbitrary allocation of cement and allocation of cement quid pro quo is made.

89. The respondent Nos. 1 to 3 are the original petitioners. They are social workers. They are members of an organisation known as "Samajwadi Manch", an organisation committed to ensuring that the production, distribution and sale of essential commodities is carried out in a manner which best subserves the common good. The first appellant is the State of Maharashtra and the second appellant was at the relevant time its Chief Minister. The fourth respondent is the Union of India.

90. The petitioners filed a petition alleging that they received numerous complaints that persons who secured recommendations of the second appellant were getting cement in large quantities while bona fide applicants were denied cement. The petitioners applied to the deputy controller of rationing (Bombay Region) for five bags of cement each but no cement was made available to them. The petitioners have set out the legislative history of distribution and control of cement and they have submitted that detailed procedure for the distribution, allotment and sale of cement has been provided for under Maharashtra Govt. Resolution dated September 12, 1978 read with Maharashtra Cement (Licencing and Control) Order, 1973. The petitioners have alleged that distribution of cement was done from the Mantralaya in violation of the statutory scheme of distribution of cement.

91. The petitioners have alleged that the contents of the notice found put up on the Mantralaya by the first petitioner in June 1981 and the statement of Shri Umesh Tipnis made to him that no application for cement would be received at the Mantralaya are false and they have annexed as exhibits E-1 to E-10 copies of orders for distribution of cement directly from Mantralaya during the period from April 1981 to July 1981.

92. The petitioners have alleged that the second appellant allocated cement in large quantities in an arbitrary, capricious, unreasonable and unjust manner to big builders by collecting large sums of money for the two trusts created and controlled by him, viz., Pratibha Pratishtan and Konkan Unnati Mitra Mandal. They have given some instances known to them for the second appellant's such alleged arbitrary allocation Quid pro quo for the donations.

93. The petitioners have stated that the trusts, viz., Pratibha Pratishtan and Konkan Unnati Mitra Mandal, are under the sole control of the second appellant in his personal capacity and they have nothing to do with the first appellant or the office of the Chief Minister. It is the petitioners' case that the said two trusts

are private trusts under the sole charge and control of the second appellant.

94. The petitioners have further alleged that the second appellant by allocating cement to big builders quid pro quo to their giving donations to the said trusts has violated and circumvented the statutory scheme of distribution of cement as envisaged by the said Government Resolution dated September 12, 1978. They have given the names of nine builders to whom cement was allocated and they have specifically named three builders who gave donations to the two trusts.

95. The petitioners have presented a picture of arbitrariness by stating that in "D" Zone (Bandra to Dahisar) 4128 urgent applications for cement were kept pending for want of cement; that "IV Zone was allotted 16,600 tonnes of cement by the Deputy Controller of Rationing during the period April to July 1981 but it received only 8,803 tonnes while during the same period 142 applicants shown in exhibits E-I to K9 received an aggregate quantity of 20,260 tonnes of cement and out of them seven applicants received 6,150 tonnes of cement; that only a meagre percentage of a large number of bona fide applicants received small quantities of cement for monsoon repairs and that not one out of 900 new applicants in 1981 received cement.

96. The petitioners have challenged the executive action of the second appellant in allocating cement as totally arbitrary and capricious in total violation of Article 14 of the Constitution of India as it discriminates between persons similarly situated. The petitioners have alleged that the second respondent devised scheme for purpose of allocating cement, among them being the Foreign Exchange Scheme, with the sole object of favouring big builders to the detriment of the petitioners as well as large number of applicants who have been denied their right to receive cement even in small quantities. The second appellant has thus put himself in a position in which there is a clear conflict of interest and duty and has thus disqualified himself from taking any part in the distribution of cement. The executive action of the second appellant is also challenged as mala fide as the second appellant either by himself or through any other person has exercised powers for collateral purposes.

97. The petitioners, therefore, prayed inter alia for a writ of Mandamus or any other appropriate writ against the appellants ordering the first appellant to carry out the allocation and distribution of cement in accordance with the procedure prescribed by law in particular the statutory scheme of distribution of cement; for an order restraining the second appellant in any manner whatsoever allotting cement and further restraining the second appellant from collecting donations to the said trust funds as a condition precedent to the allotting of cement.

98. During the course of the hearing of the writ petition for admission Shri U.B. Tipnis, Deputy Secretary, Food and Civil Supplies Department, filed his affidavit affirmed on September 15, 1981, for the limited purpose of opposing the admission of the writ petition and the interim reliefs prayed therein. Five files were produced in Court at that time by the first appellant, viz., File No. 1 of

Century Builders; File No. 2 of Bombay Builders; File No. J of Hiranandani; File No. 4 of Makers Development Services Private Limited; and File No. 5 of K.D. Corporation. Pratap 3. by order dated September 23, 1981, reported in Padmakar Balkrishna Samant and Others Vs. The State of Maharashtra and Others, issued rule nisi and on September 24, 1981 Pratap J. passed interim orders. Thereafter further affidavits to the said petition were filed as follows: (1) affidavit of Shri V.T. Chari, Secretary to Government, Food and Civil Supplies Department, affirmed on November 21, 1981; (2) Supplementary affidavit of Shri V.T. Chari, affirmed on November 21, 1981; (3) affidavit of Shri Syed Yakub, Under Secretary, Food and Civil Supplies Department, affirmed on November 21, 1981; (4) affidavit of Shri U.B. Tipnis, who explained the circumstances under which he issued letter dated April 6, 1981; (5) affidavit of the second appellant, affirmed on November 23, 1981; (6) affidavit of Shri D.S. Kamble, Minister for State for Food and Civil Supplies Department, affirmed on November 21, 1981; (7) affidavit of Shri N.L. Miranandani, affirmed on November 23, 1981; (8) affidavit of Shri Zakerja H.L. Aglutdi, affirmed on November 24, 1981; (9) affidavit of Shri R.A. Maker, affirmed on November 23, 1981; (10) affidavit of Shri A.R. Sawant, affirmed on November 16, 1981. Briefly stated, the case made out in the affidavits of the officers of the Food and Civil Supplies Department is that from the very beginning ad hoc quota of cement was distributed from the Mantralaya to those who were willing to arrange for their own road transport and lift the cement from the factories immediately. The said Government Resolution dated September 12, 1978 was passed when the question of distribution of cement received against ad hoc allotment had not arisen. The officers felt surprised and agitated at the petitioners' "suddenly" producing in Court Government Circulars dated March 2, 1981 and March 31, 1981 and they have come forward with a plea that the said Government Circular dated March 31, 1981 was issued under mistake and misunderstanding and it was by reason of the wrong interpretation of the said Government Circular dated March 31, 1981 that the notice to the effect that no application for cement would be entertained at the Mantralaya was put up on the Notice board at the Yumiuldy; so also the letter dated April 6, 1981 issued by Shri Tipnis to all Collectors to the same effect was issued by reason of the wrong interpretation; the previous Government also allocated ad hoc quota of cement from the Mantralaya to needy persons. The second appellant has taken the plea that he did not allocate cement. He only made comments or suggestions on the basis of what appeared to him to be fit and proper. According to him, there was no regular statutory cement distribution scheme in the matter of ad hoc allotments or regular quarterly allotments made by the Central Government in favour of the State Government. In regard to the creation of the trusts, the second appellant has stated that he did not create the trusts in his capacity as Chief Minister nor could he do so as a Chief Minister under the Constitution or Rules of the business of the State Government. In regard to the donations, he has stated that the donations were voluntary and he has denied that he allocated cement quid pro quo for the donations. The three builders have not denied the allocation of cement made to them as also the

donations given by them to the two trusts, but they felt dismayed at the allegation that the allocations of cement were made to them in consideration of the donations given by them. The petitioners filed affidavit in rejoinder affirmed in December 1981. In rejoinder the petitioners have alleged that the modus operandi adopted by the second appellant was to directly allot ad hoc quota of cement himself under his own initials or on his orders and in an arbitrary manner to large builders quid pro quo for large donations made by them to the said private trusts of the second appellant. On an assumption that the Resolution dated September 12, 1978 did not apply to the ad hoc quota, the petitioners have submitted that persons similarly placed have been discriminated against and that it is only those amongst them who were in a position and did in fact give donations- to the said private trusts were allotted cement, while those others who did not pay but were in a position to lift the cement by road and do so immediately have not been allotted cement. In regard to the regular quarterly quota and ad hoc quota of cement allotted by the Central Government to the State Government, it is the petitioners' case that different names purportedly used to describe cement are part and parcel of the cement normally allotted by the Government of India to the first appellant as quarterly allotments. In regard to the criteria adopted by the first appellant in allocating cement, it is the petitioners' case that main criteria adopted was that the appellants devised a procedure so as to enable the second appellant while distributing cement to get the maximum financial benefit by extorting huge amounts of money from persons. The petitioners have further stated that if the appellants had desired to distribute cement in a fair and equitable manner, they could have lifted the ad hoc allotment by road and see that it is properly distributed throughout the State in accordance with the procedure laid down in the Cement Control Order and the said Government Resolution dated September 12, 1978. The petitioners have stated that the entire effort was to trade in essential commodity as though it were private property.

99. The learned single Judge passed order as stated above, which is the order under appeal. The learned Judge held:

- (a) Read by itself and as a whole, Government Resolution dated September 12, 1978 pertains to regular quarterly allotments only and not to ad hoc allotments received from the Central Government;
- (b) Government Circular dated March 31, 1981 is valid and binding;
- (c) The hypothesis of mistake and misunderstanding advanced by the State Government in issuing the Government Circular dated March 31, 1981 is rejected;
- (d) The criticism levelled by the State Government against the learned Advocate General is unwarranted and the attempt to mulct him cannot but be deplored;
- (e) As long as Government Circular dated March 11, 1981 is in force, it must be acted upon and unless any allotment is earmarked for a particular purpose by the Central Government or any condition is attached thereto by the Central

Government, distribution of ad hoc allotments must be in accordance with the law and in the light of Government Circular dated March 31, 1981 read with Government Circular dated March 2, 1981 on the guidelines laid down in Government Resolution dated September 12, 1978;

(f) The version of the appellants that no allocations were made by the second appellant is rejected;

(g) The petitioner's charge of arbitrariness against the second appellant in making allocations is justified;

(h) Nexus and quid pro quo between allotments made by the second appellant in favour of certain builders and donations made by them directly or indirectly, is established;

(i) Once nexus and quid pro quo are manifest, mala fides on the part of the second appellant must be the natural sequitor;

(j) The challenge to the petitioner's locus is repelled.

100. Shri Sen, learned Counsel on behalf of the second appellant, has contended that in the petition no distinction has been made between regular quarterly quota and ad hoc quota allotted by the Central Government to the State Government and that out of the four parties mentioned in the petition, the second appellant has not made any recommendations for allocating cement to three parties, viz., Rizvi Builders, Yusuf Patel and Bombay Builders. He has further contended that the learned Single Judge considered the cases of 24 builders to whom "cement was allotted and this has been done in violation of the golden principle of natural justice that nobody should be condemned unheard and without cogent evidence properly tested. In regard to ad hoc quota of cement, Shri Sen has contended that the ad hoc quota was never distributed in accordance with the scheme envisaged by the said Government Resolution dated September 12, 1978 and the principles followed in the distribution of ad hoc quota was that it was to be transported by road and within a short time and, therefore, the ad hoc quota was given to bulk consumers who were needy in the opinion of the Government and who were able to transport the cement quickly by road. The principles of allotment, according to him, were also ad hoc but they were the guiding principles. He has referred to formation of State Level Committee and High Level Committee on the new Government headed by the second appellant coming in June 1980 and to the meetings held by the High Level Committee and he has contended that the circular dated March 31, 1981 was issued under a mistake and misconception but left it to Dr. Chitale to advance arguments in that behalf. Shri Sen then contended that what the Court will have to consider is what role the second appellant has played in the allocation of cement and whether he acted under the procedure or de hors it and whether some allotments at least were quid pro quo the donations. He then proceeded to demonstrate with reference to the builders mentioned in the appendix to the judgment of the trial Court that the donations were not. quid pro quo. His submission is that there was

no nexus proved between allocation of cement and giving of donations. The only factor taken by the learned "Judge, according to him, is the proximity of allocation and donation and this single factor is not sufficient to hold quid pro quo. He has submitted that the case rests on circumstantial evidence and the proceedings being of civil nature, the case will have to be decided on preponderance of probabilities. But the charge being of a serious nature, the degree of probability must be commensurate with the charge levelled. In support of this proposition, Shri Sen has relied upon a passage from Denning L.J. in *Bater v. Bater* (1950) 2 All. E.R. 458 quoted with approval in *Hornal v. Neuberger Products Ltd.* (1957) 1 Q.B. 247 *Dellow's Will Trusts* (1964) 1 All. E.R. 771, *Ch. Razik Ram Vs. Ch. Jaswant Singh Chouhan and Others*, *E.P. Royappa Vs. State of Tamil Nadu and Another*, He has further contended that there is always a presumption that Governmental action is reasonable and in public interest and it is for the petitioners to show that it is wanting in reasonableness or that it is not in public interest. He has relied upon the decision of the Supreme Court in the case of *Kasturi Lal Lakshmi Reddy, Represented by its Partner Shri Kasturi Lal, Jammu and Others Vs. State of Jammu and Kashmir and Another*, As to when can the Court be said to be satisfied. Shri Sen has relied upon the decision in the case of *Blyth v. Blyth* (1966) A.C. 643. He has contended that this is a borderline case between civil and criminal nature and the onus lay heavily upon the petitioners to show that the second appellant extracted donations to the said trusts against allocation of cement and the petitioners have failed to discharge this heavy burden. He has submitted that the giving of donations could be explained on other hypothesis like relief in Income Tax. Consequently, the learned "Judge erred in holding that the second appellant allocated cement quid pro quo the donations.

101. Dr. Chitale has restricted his argument to three points, viz., whether the Government Circular dated March 31, 1981 was issued under mistake and misunderstanding; whether the said circular was valid and binding; whether so long as the said circular is in force distribution of ad hoc allotments must be made on the guidelines laid down in Government Circular dated September 12, 1978. He has contended that the State would be entitled to show that the said Government Circular dated March 31, 1981 was issued by mistake and misconception for the reason that it cannot be that even if the said Circular was found to have been issued by mistake, it must prevail over the actual order. In respect of this proposition Dr. Chitale relied upon the decision of the Supreme Court in *Kevappa's* case (supra). Dr. Chitale referred to the minutes of the meetings of the High Level Committee held on March 1, 1981, March 2, 1981 and March 4, 1981 and to the agenda of the meeting and of the minutes of the Meeting held on March 31, 1981 and he has contended that it was decided in the meeting held on March 4, 1981 that cases of builders should be decided by the Taluka/ Regional Committees. According to him, the decision taken in the meeting held on March 4, 1981 overrules the decision taken on March 2, 1981 and this assumes inconsistency and hence it must be held that the said circular

dated March 31, 1981 was issued by mistake and consequently no mandamus can issue. In regard to the interpolations in the minutes of the meeting held on March 31, 1981, Dr. Chitale has contended that they have no bearing. According to him, the portions are correctly scored out and cannot be said to be interpolations. He has then contended that the said circular dated March 31, 1981 cannot be called in question except on the ground provided in Article 16\$ (2) of the Constitution of India.

102. Shri Desai posed questions (1) What was the method of distribution of cement after March 31, 1981? Whether the Government Resolution dated September 12, 1978 applied to, ad hoc quota of cement? Ad hoc, according to him, is a misnomer, as ad hoc means "for a special purpose" and allotment of cement was not made by the Central Government for any special purpose and whenever it was so made it was specifically so provided in the allotment order and hence what is called ad hoc is really additional. (3) Whether the Government Circular dated March 31, 1981 is valid and binding? and (4) Whether the second appellant made any allotments and whether the allotments were arbitrary without any methodology and favouring builders? (5) Whether the allotments were quid pro quo the donation".! to the two trusts? He then proceeded to demonstrate that the hypothesis of mistake and misunderstanding put forth by the appellants is a myth. In regard to the nature of the evidence and the standard of proof, Shri Desai submitted that the evidence in this case is direct evidence consisting of documents. According to him, the matter has to be decided on preponderance of probabilities. He has referred to the decisions of the Supreme Court and English Courts to substantiate this submission. On an assumption that the evidence is circumstantial, Shri Desai has submitted that the chain of circumstances established is so far complete that there is no other hypothesis except the one and one only that the second appellant has made allotments of cement to builders as consideration for the donations. He has proceeded to demonstrate with reference to exhibits E-1 to E-9 to the petition and other documents this submission. He has submitted that cement from the regular quarterly quota was transferred to ad hoc quota to meet the allocations of cement made by the second appellant. He wanted adverse inference to be drawn for not giving inspection of documents to the petitioners and for not fully and completely disclosing documents in the possession and control of the appellants.

103. Since 1962 cement has been an essential commodity under the Essential Commodities Act, 1955, and in the State of Maharashtra the sale and distribution of cement were controlled and regulated by the Maharashtra Cement (Licencing and Control) Order, 1973. In order to ensure a fair and equitable distribution of cement at fixed prices and to prevent black-marketing of cement, the State Government by its Food and Civil .Supplies Department issued Resolution dated September 12, 1978. The prominent features of this Resolution are that with effect from October 1, 1978: (a) The entire control over the distribution of cement was taken over by the State Government, (b) after the cement Co-

ordination Committee ascertained the needs of the R.C. PARTIES, i.e. Rate Contract parties, viz. Government Departments, Public Sector Undertakings, Municipal Corporations, Zilla Parishads, other local bodies, small scale industries, etc., and O.R.C. parties, i.e., other than Rate Contract parties, the balance was made available to meet public demand, (c) The State Government fixed the extent of stocks that should be supplied to the stockists and sales of public stocks of cement by the stockists to consumers was regulated by permits, (d) The pattern of distribution of stockists was reorganised so that the stockists would be within convenient reach of the consumer and one of the criteria for selection of stockists was their reputation for honesty, (e) District Level Committees were formed for distribution of quarterly public quota of cement amongst the Taluka/Rationing Regions. In Bombay and Bombay Suburban District, the Committee was required to allocate cement to the four Rationing Regions "A", "O", "D" and "E". (f) Regional Level/Taluka Level Committees were formed for sanctioning quota of cement to consumers who had to apply to the Deputy Controller of Rationing/Tahsildars for permits to be issued by them. (g) Registers were prescribed for entering all applications and an acknowledgement was required to be issued to each applicant, (h) Government expressed its keenness that it did not so happen that the requirements of cement of only a few categories are met while applicants from other categories do not get any cement at all and, therefore, prescribed guidelines in para 10 of the said Resolution enumerating the nine categories of consumers who would be applying for cement. They are:

- (1) Agriculturists requiring cement for agricultural purposes.
- (2) Educational Institutions.
- (3) Hospitals.
- (4) Other public institutions and charitable trusts.
- (5) Co-operative Housing Societies.
- (6) Individuals.
- (7) Builders and Developers.
- (8) Others.
- (9) All categories of consumers for repairs and maintenance.

The guidelines prescribed are briefly:

- (i) No cement is to be issued to the parties eligible to get cement from the Central quota and R.C./O.R.C. parties or the contractors for executing their works since they would be allotted quarterly quota of cement.
- (ii) The allocation of cement was to be done by the Committee amongst different categories of consumers and that too in chronological order of the applications in category.

- (iii) Quantity of cement sanctioned was to depend on its merits.
- (iv) Large requirements of cement were to be sanctioned by suitable instalments.
- (v) In respect of big projects, utilisation of earlier sanctions should be got verified.
- (vi) Applications for minor repairs where the requirement of cement is 10 bags (5 bags in urban areas) should be sanctioned without prior verification and without insisting on Architect's/Engineer's certificate.
- (vii) In other cases, Architect's/Engineer's certificate should be insisted upon.
- (viii) The Committee should sanction cement to sufficient number of applicants in advance so that stocks of cement do not remain unutilised.
- (ix) The Secretary of the Committee is required to prepare a list of cases sanctioned and quantity of cement sanctioned.
- (i) Forms of permits and register of permits were prescribed, (j) The validity ? of permits was restricted to ten days from the date of issue, (k) In order to keep a watch over the implementation of the scheme bimonthly returns were prescribed.

104. On or about August 16, 1980, the Department of Food and Civil Supplies set up a small committee at the State Level with the Minister of State for Civil Supplies as the Chairman and the Secretary and Joint Secretary as members in order to systematise the allotment of ad hoc quota of cement received from the Central Government. The recommendations made by the State Level Committee were to be submitted to the Minister of Food and Civil Supplies for his final approval.

105. When the new Government, headed by second appellant, was formed in or about June, 1980, the first change to the said Resolution is to be found in the Press Note issued on September 20, 1980 by the Public Relations Officer, Food and Civil Supplies Department. It inter aim states:

Consumers desirous of applying for allotment of cement directly from Government from such ad hoc stocks are informed that henceforth their applications made to Government directly will not be entertained unless they are supported by a certificate from the Dy. Controllers of Rationing / food Grain Distribution officers/ Tahsildar, as the case may be, as indicated therein....

106. On the same day viz., September 20, 1980, a letter was addressed by Shri Syed Yakoob, Assistant Secretary to Government, Food and Civil Supplies Department, to all Collectors/Controllers of Rationing, Bombay, enclosing therewith a copy of the said press note and requesting them to bring the said position to the notice of the concerned officers for necessary action on their part.

107. The State Level Committee functioned upto February 28, 1981. On that day a High Level Committee consisting of Minister of Food and Civil Supplies as Chairman, and six other Ministers, Minister of State for Food and Civil Supplies,

Chief Secretary and others was formed in order to monitor and review the distribution of cement. The constitution of this Committee was circulated by Circular dated March 18, 1981 to nine Ministers, Chief Secretary, three Secretaries, Controller of Rationing, Director of Civil Supplies, all Deputy Secretaries and Desk Officers in Food and Civil Supplies Department.

108. The High Level Committee held its first meeting on March 1, 1981 whereat the Minister of Food and Civil Supplies stated that:

In respect of ad hoc allotments it has been found advantageous to issue allotment orders from the Department.

109. The Second meeting of the High Level Committee was held on March 2, 1981. At this meeting the procedure to be adopted for making allotments from Mantralaya against ad hoc quota received from Government of India was settled as follows:

(1) Normally no application for cement should be entertained in Mantralaya. The applications received earlier and pending in Mantralaya should be sent to the respective Collectors/Controllers of Rationing, Bombay, for necessary action.

(2) The Collectors should be asked to submit to Government their recommendations for allotment of cement from ad hoc quota to the extent of 1000 Metric Tonnes. The Controller of Rationing, Bombay, may, however, recommend applications for allotment of cement from ad hoc quota to the extent of 4000 Metric Tonnes.

110. On March 2, 1981, Shri U.B. Tipnis, Deputy Secretary to Government, Food and Civil Supplies Department, issued circular No. CDC-118t/ 1 58-D-CMT authenticated in the name of the Governor of Maharashtra reiterating the guidelines set out in the said Government Resolution dated September 12, 1978 for sanctioning cement by Tahsil/City/Regional Level Cement Distribution Committee.

111. On March 4, 1981, the High Level Committee held its third meeting. The Committee confirmed the decision taken on March 2, 1981 that the allotments made by State Level Committee should stand. It was decided that cases of individuals/institutions/builders shall not be placed before the Committee for consideration and that such cases should be decided by the Taluka Committees and in Bombay by the Regional Committees.

112. On the same day, i.e. on March 31, 1981, Shri Syed Yakoob, Under Secretary to Government, Food and Civil Supplies Department, issued a Circular to all Divisional Commissioners, Collectors, Controller of Rationing, Bombay, all Tahsildars, all District Supply Officers, etc., stating that:

It is now decided that no applications for cement should be entertained directly by Government. All applications for cement should be considered by the local Regional level /City Level/ Cement Distribution Committees in accordance with

the guidelines issued by Government vide its Circular No. CDC 1181/158-D-CMI dated 2nd March, 1981. The Controller of Rationing, Bombay, and Collectors of District are requested to bring this to the notice of the Deputy Controllers of Rationing /Foody rains Distribution Officers/ Tahsildari and to instruct these Officers not to issue any no objection certificates or to recommend any application for cement to Government henceforth. In accordance with the decision of Government mentioned above, any application that would be received directly by Government in future will be referred to the concerned Collector/ Controller of Rationing, Bombay, for suitable action. Applications which have been received earlier by Government and still pending in this Department will also be sent back to the respective Collectors and Controller of Rationing, Bombay, for further necessary action....

113. During the hearing of this appeal, Dr. Chitale produced in Court a two line Circular dated April 21, 1982 issued by Shri M.M. Shete, Deputy Secretary to the Government of Maharashtra, Food and Civil Supplies Department that the said Circular dated March 31, 1981 is withdrawn.

114. The effect of withdrawal of the said Circular dated March 31, 1981 is that the order of Lentin 3, which provides that "as long as Government Circular dated 31st March 1981 is in force" the State Government shall distribute cement in accordance with the guidelines laid down in Government Resolution dated September 12, 1978 will cease to operate. But that is not the end of the matter. The question still arises for consideration is whether during the interregnum the allocations of ad hoc quota of cement were required to be done in accordance with the guidelines laid down in Government Resolution dated September 12, 1978, and whether the said Government Circular dated March 31, 1981 was issued under a mistake or misunderstanding.

115. Shri Sen has contended that the guidelines adopted for distribution of the ad hoc quota of cement was that it should be transported by road and that too within a short time. The ad hoc quota of cement was, therefore, allocated to bulk consumers whose demands were registered and who were able to transport quickly by road and who, in the opinion of the Government, were in need of cement. These principles of allotment, according to him were ad hoc but they were the guiding principles and he further contended that ad hoc quota of cement was never distributed according to the guidelines laid down in the said Government Resolution dated September 12, 1978. Shri Sen then referred to the reason why the Government did not lift the ad hoc quota itself and distribute it. He was at pains to explain that he stated to the learned Single Judge the experience gathered by the Government in the distribution of foodgrains which were to an appreciable extent eaten by rats and rodents. It appears that Shri Sen's reference to rats and rodents qua cement was not the rodents of the eminal type.

116. The said Government Resolution dated September 12, 1978 applied only to the regular quarterly quota as is evident from the system of distribution through

stockists envisaged therein and the infrastructure of the said Resolution. But then the said guidelines laid down in the said Government Resolution were reiterated in the said Government Circular dated March 2, 1981 for distribution for ad hoc quota of cement and the said Government Circular dated March 31, 1981 stated that all applications for cement should be considered by the Local Regional/City/Cement Distribution Committees in accordance with the guidelines issued by Government Circular dated March 2, 1981. Found with this situation, Dr. Chitale endeavoured to convince the Court that the said Government Circular dated March 31, 1981 was issued through mistake and misconception. He has referred to the agenda of the meeting fixed for March 31, 1981 and to the minutes of the said meeting held on March 31, 1981 and he has contended that the said minutes do not contain any interpolations and the corrections made in minutes were rightly made.

117. The agenda of the said meeting contains five subjects. Items 3, 4 and 5 of the said agenda are as under:

(3) To inform to the Committee the allotments of cement made in some emergent cases after the last meeting of the Committee (Note appended).

(4) To place before the Committee the list of emergent cases received after 1st March 1981 (Note appended).

(5) Distribution of cement quota of II quarter of 1981 (Note appended).

The note on the said Item 3 makes interesting reading. It states:

In response to the Instructions received from Chief Minister, cement was required to be allotted immediately in certain cases. The total quantity required for issue of cement in these cases worked out to 3370 M.T. It was considered advisable to allot cement to concerned parties in suitable instalments. Hence orders allotting the first instalment have been issued. The quantity involved in such allotment is 132Q.M.T.... Since no stocks from the current quarter's quota was available, the Regional Cement Controller have been asked to treat the quantity of 1320 M.T. as an advance allotment against our allotment for the second quarter of 1981.

118. The relevant portion of the note of Item 4 of the said agenda refers to the decisions of the High Level Committee taken in its meetings held on March 2, 1981 and March 4, 1981 and it was felt that it would be necessary for the Committee to decide whether the decision taken earlier should be revised.

119. Then follows the decision taken by the High Level Committee in its meeting held on March 31, 1981. The relevant portions of the minutes of the said meeting are to be found in paras 9 and 10. They are reproduced below. The portions alleged to be interpolated are shown in brackets.

9. (In regard to item 3 of the agenda) the committee reiterated its earlier decision that no applications should, normally, be entertained in Mantralaya and that any application for cement received in Mantralaya including those received

earlier and pending in the Department should be sent to the respective Collectors and Controller of Rationing, Bombay, for necessary action. (This disposed of item 4 of the agenda). 10. for want of time the Committee could not consider item Nos. 1, 2 and (4) the agenda.

120. It is not disputed that these minutes were prepared by Shri Chari, Member Secretary of the Committee. It is also not disputed that the bracketed portions were inserted/deleted by Shri Chari. The words "in regard to item 3 of the agenda" were written in ink by Shri Chari. The words "this disposed of item 4 of the agenda" were scored out by Shri Chari. In para 10, the original figure was "3". Over this figure Shri Chari wrote the figure "4" thus showing that item 4 of the agenda was not considered by the Committee.

121. Shri Chari has filed three affidavits-, two in reply and one in sur-rejoinder. Shri Chari has made reference in his lengthy affidavit dated November 21, 1981 .to the recommendations made by the committee in its meeting held on March 31, 1981 but he has assumed discreet silence in regard to the said addition and deletion. No explanation is forthcoming as to when they were made and the reason therefor.

122. Dr. Chitale, however, has submitted that no sinister significance should be attached to them. He has also assailed the finding of Lent in 3. that the minutes are not exactly calculated to inspire any confidence as unjustified as the learned Judge has given the finding without first finding that there was sinister significance. It is difficult to accept this submission of Dr. Chitale.

123. Item 3 of the said agenda did not require the committee to take any decision. It is clearly in regard to the list of pending cases referred to in item 4 of the said agenda that the Committee took the decision. The minutes of the said meeting read with the agenda and the note appended to items 3 and 4 of the agenda leave no manner of doubt that Shri Chari made interpolations in the Minutes of the said meeting held on March 31, 1981. When and why was it done would become apparent when the hypothesis of mistake and misunderstanding put forth by the appellants is considered. There is a synartesis between the interpolations and the hypothesis of mistake and misunderstanding. Suffice it to state here that the said Minutes contain interpolations.

124. This leads to the consideration of the hypothesis of mistake and misconception and misunderstanding. But before that, it is necessary to deal with the criticism levelled against the then Advocate General and to the observations of Lentin 3. that "the attempt on the part of the State Government to mulct the learned Advocate General cannot but be deplored". Dr. Chitale has sought to bail down the criticism by submitting that what the learned Advocate General stated to Pratap 3. was the position in law as he understood it to be. That it was the correct position in law is found by the learned single Judge. It would have been very much better if the State Government has paused to think twice before levelling such thoughtless and unjustified criticism against the then

Advocate General.

125. Reverting to the question of mistake and misunderstanding, Dr. Chitale has contended that the word "decided" in the Minutes of the meeting of the High Level Committee held on March 4, 1981 overrules the decision taken by the Committee in its meeting held on March 2, 1981 and that "overrules" assumes inconsistency. He has further contended that the said Circular is not consistent with either the Minutes of the meetings of the High Level Committee held on 2nd and 4th March, 1981 or with the press note issued on September 20, 1980 and hence the said Circular is violative of the decision taken. Therefore, it must be held that the said Circular dated March 31, 1981 was issued through mistake and misunderstanding, such a Circular, even though authenticated, therefore, cannot prevail over the actual decision. Dr. Chitale has relied upon the decision of the Supreme Court in the case of *E.P. Revappa v. The State of Tamil Nadu* (supra), in support of this proposition.

126. Two questions arise for determination in this connection. One, whether in fact the said Circular was issued through mistake and misconception? Two, whether the said Circular is binding upon the State Government even though it is not withdrawn?.

127. I shall consider the second question first. In *Revappa's* case (Supra) the petitioner contended that he was substantively appointed to the post of Chief Secretary while in the authenticated order the words used were "promoted and posted to act as Chief Secretary". It was the petitioner's contention that the authenticated order did not correctly embody the real decision of the State Government contained in the draft order and the words "to act" were introduced in the authenticated order by mistake and, therefore, they should be ignored. In considering this question, the Supreme Court held: (at p. 577):

It is now well settled law that when an order is authenticated, the only challenge that is excluded by the authentication is that it is not an order made by the Governor. The validity of such an order can be questioned on other grounds.

It was further held: (at p. 577):

The formal expression of the order cannot be given such sanctity that even if found to be mistaken, it must prevail over the actual order.

128. In the present case, I am of the opinion that the State Government cannot challenge its own authenticated Circular on the ground that it was issued through mistake and misunderstanding and take it as a defence. Nothing could have been easier than to withdraw the said Circular if that was the case more so when opportunity was given by Pratap J. by order dated September 24, 1981 "to modify the scheme, system and method contemplated by the aforesaid orders, resolutions and circulars..." I am further of the opinion that so long as the said Circular is either not withdrawn or not rectified, it is binding upon the State Government. The observations of the Supreme Court in *Revappa's* case in this

context become material. This is what the learned Judges of the Supreme Court have observed: (at p. 577):

But there may conceivably be cases where the Government may also find that there is a mistake in the authenticated order and it requires to be rectified." (underlining mine) [herein indicated in Italics-Ed.]

It must, therefore, be held that the State Government was bound by the said authenticated Government Circular dated March 31, 1981 until it was withdrawn by the said authenticated Government Circular dated April 21, 1982.

129. In this view of the matter, it would not have become necessary for me to consider the first question. But this question is closely knitted to the main question involved in this case and hence I now proceed to consider factually the hypothesis of mistake and misunderstanding put forth by the appellants. The hypothesis is a fable a tergiversation. Reference has been made in this respect in the affidavits filed by Shri Chari, Shri Tipnis, Shri Syed Yakoob and Shri Kamle, the then Minister of State. Shri Chari states in his affidavit dated November 21, 1981:

I never understood the recommendations of the Committeess meaning that the distribution of ad hoc allotments should be done in the same manner as provided for in the Government Resolution dated 12th September 1978 in respect of regular quarterly allotment. I have been informed by Shri Yakoob that he understood in this way. If, however, the said Circular dated 31st March, 1981, conveys the impression as if the distribution of allotment of cement should be made in the manner as provided for by the Government Resolution dated 12th September 1970 then the language of the said Circular is inappropriate and clearly wrong.

Shri Chari does not specify when, where and why did Shri Syed Yakoob informed him. Furthermore, what other impression could the said Circular dated March 31, 1981 carry except the one and the only one which it meant to convey? Shri Chari, the highest in the bureaucracy, does not state what other impression the said Circular conveyed to him.

130. Light dawned on Shri Syed Yakoob for the first time when he made his affidavit dated November 21, 1981.

I thought that the said committee had possibly given directions that the allocation of cement to consumers against ad hoc allotment made by the Central Government from time to time should also be carried out under the same procedure and in the same manner as has been enjoined by the Resolution of the State Government dated 12th September 1978. I did not at that time apply my mind fully into the matter as I should have done. "...I now realise that the circular issued by me dated 31st March 1981, a copy of which has been annexed to the affidavit of Shri Chari filed herein and after perusal of the minutes of the said Committee, copies of which have been annexed with the affidavit of Shri

Chari filed herein, the interpretation put by me on the said Circular dated 31st March 1978 was not correct and. In fact, misconceived.

It is manifestly clear that Shri Syed Yakoob made his affidavit after he read the affidavit of Shri Chari. The light which dawned on him was the reflected light which he got from Shri Chad's affidavit.

131. Shri Tipnis, Deputy Secretary, says;

Neither Shri Yakoob, Under Secretary, who issued the Circular, nor myself understood the recommendations of the Committee set up by the State Government contained in the Minutes of the meeting held on 2nd March 1981 and 4th March 1981 and 31st March 1981 to mean that ad hoc allotments of Central Government should also be allocated in the same manner by going through three stages as mentioned in the affidavit of Shri Chari and as enjoined by the State Government in its Resolution dated 12th September 1978. Both of us interpreted the recommendations of the Committee as meaning that applications for ad hoc allotments should be sent to Taluka Level Committees for the Districts and the Regional Level Committee ? for Bombay Region for them to advise in the same manner as they were doing for allocating to consumers in the third stage of regular quarterly allotments.

Shri Tipnis verbatimly reproduces the para in Shri Chari's affidavit that if the impression created by the said circular etc.

132. Shri D.S. Kamble has merely expressed his opinion as to what Shri Syed Yakoob thought.

133. The hypothesis of mistake, misconception and misunderstanding is put forth for the first time about two months after the petition was admitted by Pratap 3. which was on September 23, 1981. Shri Tipnis had filed his affidavit dated September 15, 1981 opposing admission of the petition. While admitting, as alleged in the petition, that a notice to the effect that parties should apply to the Tahsildar or the Deputy Controller of Rationing for getting their quota of all cement was displayed at the Mantralaya, the affidavit is silent about the issuance of the said Circular dated March 31, 1981 through mistake and misunderstanding. In his further affidavit dated November 23, 1981, however, he has annexed a copy of letter dated April 6, 1981 addressed to all Collectors of Districts and the Controller of Rationing, Bombay, referring to the said Government Circular dated March 31, 1981 and sending therewith a bunch of applications for allocating ad hoc quota of cement to each District Collector with a direction to distribute all the applications to the Deputy Collectors of Rationing/ Tahsildar/Foodgrains Distribution Officers concerned and with a further direction that the said authorities should inform the applicants concerned that their applications have since been received back from Government and will be examined by the respective Cement Distribution Committee,

134. Dr. Chitale has conceded that Shri Chari had seen and approved the draft

Circular prepared by Shri Syed Yakoob. Averments have been made in the said affidavits that the three stage distribution system envisaged by the said Government Resolution dated September 12, 1978 could not apply to the one stage distribution of ad hoc allotment of cement. The language of the Minutes of the said Meetings held on 2nd and 4th March, 1981 is unequivocal and there could be no mistake or misunderstanding arising out of the decisions taken at the said meetings. The Circular dated March 31, 1981 was acted upon by the issuance of the directions by Shri Tipnis to the Collectors/Controller of Rationing, Bombay, by his letter dated April 6, 1981 and by the displaying of the notice on the notice board at Mantralaya at least upto June 1981. The conclusion is inevitable that the hypothesis of mistake and misunderstanding is a feeble and belated attempt made by the State Government to extricate itself from its own Circular dated March 31, 1981 after being confronted with it during the course of arguments at the admission stage. The attempt has failed miserably.

135. The interpolations in the minutes of the meeting held on March 31, 1981 had to be made as otherwise, the minutes, as they originally stood, would have torpedoed the hypothesis of mistake and misunderstanding.

136. The question is why was this exercise necessary? In my opinion, the hypothesis of mistake and misunderstanding was advanced by the State only to justify the allotments made after the said Circular dated March 31, 1981 between April and July 1981 and as a cover up operation. Between April 1981 and July 1981 allotments were made irregularly directly from Mantralaya without following the guidelines laid down in the said Government Resolution dated September 12, 1978 as shown in Exhibits E-1 to E-9 to the petition which allotments have not been denied by the appellants (first and second respondents). The allotments made during this period are as under:

Exhibit	Allotment Order No.	Date of	No. of	Total	-----	-----
-----	-----	-----	Allotment	Allottees	quantity	-----
-----	-----	-----	allotted.	-----	-----	-----

E-1	ACM-1681/7402-CMT	18-4-1981	11	2500	M.T.	E-2 (a)	ACA-1481/CMT	24-6-1981	2	200	M.T.
							(b)	ACA-1281/CMT	24-6-1981	4	610
							(c)	ACA-1181/CMT	20-6-1981	12	400
						E-3	ACA-1181/CMT	24-6-1981	16	1980	M.T.
						E-3A	ACA-1181/CMT	24-6-1981	8	1510	M.T.
						E-4	ACA-1681/7202-CMT	25-6-1981	3	130	M.T.*
						E-5	ACA-1181/CMT	1-7-1981	16	1500	M.T.
						E-6	ACA-1181/CMT	1-7-1981	21	3150	M.T.
						E-7	ACA-1281/CMT	1-7-1981	10	2200	M.T.
						E-8	ACA-14S1/CMT	2-7-1981	23	3950	M.T.
						E-9	ACA-1181/CMT	8-7-1981	21	1650	M.T.
									147	19780	M.T.

* This allotment is made in lieu of the previous allotment made on 18th June, 1981, which was cancelled.

137. The petitioners have stated that the first petitioner met Shri Tipnis, Deputy Secretary, in June 1981 and he was told that cement was not being allotted directly from Mantralaya. This is not denied by Shri Tipnis. He merely states that he does not remember having met the first petitioner. There is no reason to

disbelieve the petitioners in this regard and (believe them. So also it is admitted that a notice was put up on the notice board that no allotment of cement will be made from Mantralaya. The Circular dated March 31, 1981 came in handy for being displayed before those unfortunate applicants who were not to be allotted cement from Mantralaya, while at the same time the Circular became non est when big builders approached for cement. There is at least one case on record to show that an applicant was denied cement on the ground that no application for cement was entertained in the Mantralaya. The R.C.C. Grill Association made an application dated March 17, to Shri Khattal, Minister, Food and Civil Supplies Department with a copy to the second appellant requesting for allotment of 570 Metric Tonnes per month for the 32 members of the Association in Greater Bombay. This letter was replied on behalf of the second appellant by the Superintendent, Food and Civil Supplies Department by letter dated 25th August/3rd September 1981:

...Government has since decided that henceforth no application (or allotment of cement should be entertained in Mantralaya and that all the applicants desirous of applying for cement should approach the local cement Distribution Committee through the concerned Deputy Controller of Rationing for their requirement of cement as per normal procedure.

this clearly shows that the appellants made use of the Said Circular dated March 31, 1981 whenever it was found convenient by them.

138. The unfortunate thousands were starved of cement required for their leaking roofs, while big builders were glutted with cement for putting up sky scrapers. Who was responsible for this situation? With this arises the main issue in this petition, viz., whether the appellants allocated ad hoc quota of cement arbitrarily, capriciously in violation of the statutory scheme of distribution of cement and whether the second appellant allocated cement to big builder sided pro quo for the donations to the two trusts established by him. I shall first consider the question as to what is the standard of proof required to prove the said allegations levelled by the petitioners. The case is purely of a civil nature and contains serious allegations though not necessarily of a criminal nature. The allegation is that the second appellant allot allocated cement to builders in consideration of the builders giving donations to the two trusts. Such an allegation, though serious, is not necessarily criminal in nature. The allegations are purely of civil nature but containing a veiled suggestion of corrupt practice. The petitioners have come to Court with this pro bono publico petition with such information as they could gather. They do not seek to punish the wrong door but they seek to redeem the future. What then should be the standard of proof required to prove the allegations made by the petitioners? The case being of a civil nature, the standard of proof required would be the same as in any other civil matter and the case will have to be proved on preponderance of probabilities. Even though there is a veiled suggestion of corrupt practice, it would not be necessary to prove the allegations to the hilt. It would suffice, if the

petitioners prove on preponderance of probabilities. Within this standard a higher degree of probability would be required in view of the serious allegations: but not so high a degree as is required in a criminal case. The circumstances established will have to be taken into consideration in their totality in order to hold the allegations of quid pro quo and mala fides proved on preponderance of probabilities.

139. In *Seth Gulabchand Vs. Seth Kudilal and Others*, counsel contended that as bribery was alleged in civil proceedings, the question of bribery should be gone into as it was a criminal case and he relied upon the observations of Woodroffe J. in *Weston v. Peary Mohan Dass* ILR(1913) Cal. 898, that where, whatever be the form of proceedings charges of fraudulent or criminal character are made against a party there to, it is right to insist that such charges be proved clearly and beyond reasonable doubt, though the nature and extent of such proof must necessarily vary according to the circumstances of each case. These observations of Woodroffe J. did not find favour with the Supreme Court. It was observed (at p. 1738):

Woodroffe J. was wrong in insisting that such charges must be proved clearly and beyond reasonable doubt.

The Supreme Court considered the meanings of the words "proved", "div proved" and "not proved" in Section 3 of the Indian Evidence Act and it was observed (at p. 1738):

It is apparent from the above definitions that the Indian Evidence Act applies the same standard of proof in all civil cases. It makes no difference between cases in which charges of a fraudulent or criminal character are made and cases in which such charges are not made.

In English law also the standard of proof required in civil cases is generally expressed as proof on the balance of probabilities. Thus, Denning L.J. in *Hater v. Wafer*, (supra) has said:

the difference of opinion which has been evoked about the standard of proof in recent cases may well turn out to be more a matter of words than anything else. It is of course true that by our law a higher standard of proof is required in criminal cases than in civil cases. But this is subject to the qualification that there is no absolute standard in either case. In criminal cases the charge must be proved beyond reasonable doubt, but there may be a degree of proof within that standard. As Lord C.J. and many other great judges have said "In proportion as the crime is enormous, so ought the proof to be clear. So also in civil cases, the case may be proved by a preponderance of probability within that standard. The degree depends on the subject matter. A civil court, when considering a charge of fraud, will naturally require for itself a higher degree of probability than that which it would require when asking if negligence is established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature; but it still does require a degree of

probability which is commensurate with the occasion.

This passage was quoted with approval in *Hornal v. Neuberger Products Ltd.* (supra).

140. In *Re Dellow's Will Trusts*, (supra), the husband and wife died on the same occasion and in considering devolution of property the question arose whether the wife had feloniously killed the husband. It was observed:

In civil cases it is not so much that a different standard of proof is required in different circumstances varying according to the gravity of the issue.... The gravity of the issue becomes part of the circumstances which the court has to take into consideration in deciding whether or not the burden of proof has been discharged. The more serious the allegation the more cogent is the evidence required to overcome the unlikelihood of what is alleged and thus to prove it.

In *Blyth v. Blyth*, (supra), in considering the alleged offence of adultery by the wife in divorce proceedings Bucknill L.J. observed:

I do not understand how a Court can be satisfied that the charge has been proved.... If at the end of the case, it has a reasonable doubt in its mind whether the case has been proved.

141. In considering the allegations of mala fides, what should be the approach of the court was considered by the Supreme Court in the case of *State of Haryana and Others Vs. Rajindra Sareen*, . It was observed in para 47 (at p. 1016):

The proper approach should have been to consider all the allegations together and find out whether those allegations have been made out and whether those allegations when established are sufficient to prove malice or ill-will. We are emphasising this aspect because in certain cases even a single allegation, if established; will be so serious as to lead to an inference of mala fides. But in certain cases each individual allegation, treated separately, may not lead to an inference of mala fides, but when all the allegations are taken together and found to be established, then the inference to be drawn from those established facts may lead to the conclusion that an order has been passed mala fide, out of personal ill-will or malice.

(underlining mine) [herein indicated in italics -- Ed.]

In *Pannalal Binraj Vs. Union of India (UOI)*, , in considering whether the order of transfer u/s 5(7-A) of the Income Tax Act was mala fide or discriminatory, it was observed in para 31 (at p. 409):

Though the burden of proving that there is an abuse of power lies on the assessee who challenges the order as discriminatory such burden is not by way of proof to the hilt.

The decision in *Pannalal's* case was quoted with approval by the Supreme Court in a later decision in *The Barium Chemicals Ltd. and Another Vs. The Company*

Law Board and Others, , observing at page 320:

It is true as observed in *Pannalal Binjra v. Union of India*...that in a case where want of bona fides in the authority passing the impugned order is alleged the burden of proof, though on the party alleging it, is to the extent of its being shown as reasonably probable.

Governmental action is presumed to be reasonable and in public interest and the Court cannot lightly assume that the action taken by the Government is unreasonable and without public interest. This principle was enunciated in a recent decision of the Supreme Court in the case of *Kasturilal v. State of Jammu & Kashmir*, (supra). Bhagwati J. speaking for the Bench observed (at p. 200):

...there is always a presumption that the governmental action is reasonable and in public interest and it is for the party challenging its validity to show that it is wanting in reasonableness or is not informed with public interest. This burden is a heavy one and it has to be discharged to the satisfaction of the Court by proper and adequate material. The Court cannot lightly assume that the action taken by the Government is unreasonable or without public interest.... But where it is so satisfied, it would be the plainest duty of the Court under the Constitution to invalidate the governmental action....

142. I now proceed to consider the evidence in this case in the light of the above principles. Shri Sen has contended that the evidence in this case is circumstantial and the totality of established circumstances must be explained on only one hypothesis in order to hold the allegations levelled against the second appellant proved. According to him, if the allegations could be explained on any other hypothesis, the allegations must be held to be not proved. He has contended that the giving of donations could be explained on the hypothesis that they were given for claiming Income Tax exemption and that, therefore, it cannot be said that allotments of cement to builders were made in consideration of the donations given by them. He has drawn a sort of a mathematical formula and he has contended firstly that the pattern of allotment was such that only a very small percentage of cement allotted by the Central Government was allocated to a large number of builders and that the total number of donors form an insignificant minority, a speck in the ocean, and, therefore, this is not sufficient to hold *modus operandi* and consequently *quid pro quo* cannot be said to have been established. He has referred to the *ad hoc* allotment of cement for the quarter commencing July 1980 in the statement exhibit 6 and has proceeded to demonstrate that out of 2,63,000 Metric Tonnes allotted, only 73,270 Metric-Tonnes were allocated among 189 builders. Taking tables A and C tabulated by Lent in 3. from the random selection of some applications made by builders, Shri Sen has contended that out of 17 applicants (which, according to Shri Sen, really are 16 applicants at S. Nos. 7 and 8 being one and the same) the applicants at S. Nos. 1 to 6 in Table A are not donors and except applicant at S. No. 4 in Table C, the remaining eight applicants are not donors. Shri Sen has contended that this shows that no distinction is made between donors and non-donors. In the

same strain, Shri Sen has Contended that in Tables A and C out of 17 applicants only three applicants are donors and it cannot follow that there was any modus operandi and consequently any quid pro quo. He then proceeded to demonstrate with reference to Exhibits E-1 and E-9 and with reference to each builder in Annexure to the Judgment of Lentin 3. that the proximity of donations to the allotment of cement, which, according to him, is the only factor taken into consideration by Lentin 3., is not sufficient to hold quid pro quo.

143. Shri Desai on the other hand has submitted that the learned Single judge ought to have held that both Tables A and C, and not merely Table C constituted allocations by the second appellant. In regard to the allocations made by Shri Lulla, officer on special duty, Shri Desai has submitted that Shri Lulla has not made any affidavit nor is it suggested anywhere that he acted on his own. Consequently, allotments made by Shri Lulla must be held to be allotments made on behalf of the second appellant. He has proceeded to demonstrate with reference to exhibits E-1 to E-9 and other material on record that a sizeable number of builders are donors; that there is clear evidence of severing the link between the donors and the allottees. He has then submitted that not merely that the second appellant did not give reply at the earliest opportunity to the petitioner's allegation of mala fides but in the affidavit which the second appellant filed no explanation has been offered as to what factors weighed with him in making the recommendations. He has then referred to some allegations made by the petitioners and he submitted that the said allegations have not been traversed and, therefore, they must be taken as proved. He has relied upon the decision of the Supreme Court in the case of Badat and Co. Vs. East India Trading Co., , followed by a Single Judge of this Court in the case of M. Gordhandas and Co. v. D. Arvind Mills (1971) 76 Bom. L.R. 119, and to the passage from Bullen and Leake's Precedents and Pleadings quoted therein to substantiate these submissions. He has also referred to some statements in the affidavit filed by the second appellant and submitted that the statements are false. He has submitted that the appellants did not give inspection nor did they produce the files, correspondence, registers and documents asked for and hence adverse inference should be drawn. He has submitted that proximity of donations to allotment is not the only factor present in this case, but there are various other circumstances which would unmistakably point only in one direction and that is that the second appellant made recommendations for allocation of cement to big builders quid pro quo for the donations to the said two trusts.

144. Undoubtedly the second appellant has made allocations of cement to builders. "This is not challenged. Table A prepared by Lentin 3. out of random selection of applications by builders shows an aggregate quantity of 3160 Metric Tonnes of ad hoc quota of cement allocated to eight builders. Lentin 3. did not find it possible to come to a positive finding that they were orders or directions given by the second appellant for allocation of cement. They are, according to him, at best second respondent's (second appellant's) opinions or recommendations. With respect, I cannot persuade myself to take the same

benign view taken by Lentin J. In all these eight cases of builders in Table A the endorsements are made by the second appellant on their applications. The endorsements are couched in polite language like "We may give them", "Please do help", "Can we not help them". But polite words used would not make the recommendation less a command. The learned Single Judge has failed to take into consideration that there is no explanation forthcoming as to how they were dealt with in the Department. Further, identical quantities of cement were allocated to the said applicants. The appellants have submitted a table of allotments of cement from ad hoc quota to builders which is at pages 240 to 286 of the 11 Paper Book. The following table will show the allotment orders issued to the said applicants:

Table No. 1 -----					
-----	Name of Builder	Date of application	Quantity applied	second appellant	Endorsement of Quantity allotted.
-----	1. Daryani	Undo			
5-1-1981	500 M.T.	We should	150 M.T.	Saigaon)	sanction on 20-3-81
Constructions	them the	350 M.T.	Private Limited.	required quota.	on 20-4-81
-----	500 M.T.	-----			
2. Indo Saigaon	5-1-1981	500 M.T.	We may	150 M.T.	Agency. accept this on 20-3-81 request, 350 M.T. on 20-4-81. ----- 500 -----
Estate Private Limited.	12-1-1981	1000 M.T.	We may	300 M.T.	give them. on 20-3-81 700 M.T. on 20-4-81 ----- 1000 M.T. -----
4. Kedy Co-operative Housing Society.	19-3-1981	40000 bags	He may be	100 M.T.	allotted in on 10-4-81 suitable 2000 bags. reasonable instalments.
5. Navin Construction,	13-4-1981	310 M.T.	We may	160 M.T.	give them. on 11-5-81 150 M.T. on 20-6-81 ----- 310 -----
6. Nahar Enterprises.	23-4-1981	250 M.T.	I think	125 M.T.	they deserve on 13-5-81 help. 125 M.T. on 20-6-81 ----- 250 -----
7. Hira Nagar Developers.	28-4-1981	250 M.T.	Please	100 M.T.	do help. on 13-5-81 100 M.T. on 20-6-81 ----- 200 M.T. -----
8. Hira Nagar Constructions.	28-4-1981	250 M.T.	Can we	100 M.T.	not help on 13-5-81 them. 100 M.T. on 20-6-81 ----- 200 M.T. -----
Total	3060	M.T.	i.e.	61,200	bags.

145. The Table No. 1 shows that the builders were allocated identical quantities of cement except in the two cases at 5. Nos. 7 and 8. So also the builders at S. No. 4, viz., Kedy Co-operative Housing Society was given an instalment of 2000 bags as recommended by the second appellant. The recommendations of the second appellant, though clothed in polite language, were taken by the officers concerned as dictates from the second appellant and allotment orders were

issued accordingly. Servility is writ large on the face of the record. I have, therefore, no hesitation in holding that the allocations of cement to the eight builders in Table A were made by the second appellant or in any case under orders of the second appellant.

146. In regard to the recommendations made by Shri Lulla, Officer on Special Duty as shown in Table B by Lentin 3., the recommendations at S. Nos. 1, 4, 9, 11, 12, 13 and 14 contained further endorsement that "The C.M. has approved". They, therefore, clearly reflect the orders of the second appellant. In regard to the endorsements, the learned single Judge has observed that the endorsements are a "mixed bag". He has construed the endorsements at S. Nos. 3 and 8 in the same manner as in Table A, viz., as reflecting the second appellant's opinion or recommendation. With regard to the remaining endorsements, viz., 1, 2, 4 to 7 and 10 to 16, the learned Single Judge has held that

(they) unmistakably reflect orders and directions emanating from the second Respondent (second appellant) for making the allotments

(Bracketed portion mine). The endorsements at S. Nos. 2, 3, 5, 6, 7, 8, 10, 15 and 16 are of similar nature, viz., " . . . tons on Kesoram or Manoharlal". Here also in case of S. Nos. 3 and 8, the learned Judge has taken a charitable view. These two endorsements also should have been treated as reflecting the orders of the second appellant. Shri Lulla has not filed any affidavit nor it is suggested anywhere that he acted on his own. All the endorsements in Table B must be held to be emanating from the second appellant and are orders and directions of the second appellant. Shri Lulla merely acted as a scribe. The total quantity allotted in Table B is 2850 M.T., i.e. 57,000 bags.

147. The file of Makers Development Services Private Limited was one of the five files inspected by Pratap J. at the admission stage. On June 22, 1981 an endorsement was made on their application by Shri Lulla

Discussed with C.M. today. No action called for unless specific instructions are received.

On the same day, viz., on June 22, 1981, another letter was addressed by Makers to the second appellant. In the said letter reference has been made to letter dated April 13, 1981 of the Joint Cement Controller, New Delhi, to the Secretary, Food and Civil Supplies Department, Government of Maharashtra, and it is stated that the State Government allocated to them 500 metric tonnes of cement. On this letter Shri Lulla made the endorsement on June 23, 1981, "...C.M. has agreed that 400 tonnes be allotted from Kessoram". It does not appear that this allocation was made under instructions, from the Joint Chief Controller of Cement. However, two days later, Makers have given donation to the two Trusts.

148. The applications of nine builders mentioned in Table C contain endorsements by the second appellant himself. The endorsements are positive

directions that the allotment should be "out of Bombay quota".

149. The second appellant has in his affidavit at several places denied that he allocated cement in large or any quantity. Surely, when the petitioners alleged in the petition that the second appellant allocated cement to big builders, they did not mean the menial act of preparing allotment orders. If the second appellant wants to convey that he did not pass any orders for allotment of cement, the same is incorrect as could be seen from the several cases mentioned in Tables A and C in the Judgment of Lentin 1. He has further stated:

I reiterate that allocations of cement were made by the State Government in the Food and Civil Supplies Department. I, therefore, say that there is no question of arbitrary allocating huge or any quantities of cement in violation of any statutory or other scheme or that the said Government Resolution was the statutory scheme.

According to the second appellant he was merely forwarding the applications received by him with his comments, observations and suggestions to the Food and Civil Supplies Department and that apart from this he had nothing to do with the distribution of ad hoc allotments of cement from the Central Government. As already stated above, the "suggestions" were taken even by the officers of the Food and Civil Supplies Department as orders or peremptory directions of the second appellant and were dealt with as such. The statement in the affidavit of the second appellant that all the allocations of cement were made by the State Government in the Food and Civil Supplies Department is also incorrect.

150. From among the builders mentioned in the annexure to the Judgment of Lentin 3., some applications contain the recommendations of Shri Kamble, the then Minister of State. They are as under:

Table No. 2 -----
----- Name of Builder Date of Quantity Date of Quantity Date of Quantity
application applied recommen- recom- allot- allocation. mented. -----
----- 1.

Raheja Group: (a) Pearl 20-6-81 4500 bags 24-6-81 100 M.T. 2-7-81 100 M.I. Corporation 225 M.T. (b) Orchids 20-6-81 1500 bags 24-6-81 1500 bags 2-7-81 75 M.I. Corporation 75 M.T. (75 M.T.) (c) Cool Breeze 20-6-81 1500 bags 24-6-81 1500 bags 2-7-81 75 M.I. Corporation 75 M.T. (75 M.T.) (d) D.S. Raheia 20-6-81 1500 bags 24-6-81 1500 bags 2-7-81 75 M.I. and Co. 75 M.T. (75 M.T.) (e) M/s. Bhagwan --- 75 M.T. --- --- 2-7-81 75 M.I. das Sawabaw "Sailesh"

2. Evetshine Builders 23-6-81 8000 bags 26-6-81 600 bags 2-7-81 30 M.T. Pvt. Ltd. 400 M.T. 30 M.T.

3. Prithvi Construe- 23-6-81 250 M.T. 26-6-81 200 M.T. 2-7-81 200 M.I. tions Pvt. Ltd.

4. Ansa Builders 23-6-81 250 M.T. 26-6-81 200 M.I. 2-7-81 200 M.T.

5. Navketan Builders 23-6-81 200 M.T. 26-6-81 200 M.T. 2-7-81 200 M.I. Pvt. Ltd.

151. Dr. Chitale was requested to produce the Inward Register showing the inwarding of the above applications as rubber stamp of the office of the Minister of State showing the inward numbers appeared on the applications. Dr. Chitale took time to produce the Register and he produced one Register of the Department which did not contain the inwarding of these applications. He then stated that the inward register of the office of the Minister of State is not traceable. No further information was conveyed by him.

152. Shri Kamle has in his affidavit dated November 23, 1981 stated that:

All applications for allocation against ad hoc allotments made by the Central Government received in Mantralaya in the Department of Food and Civil Supplies were forwarded invariably to the Food and Civil Supplies Department for necessary action with or without comment. In most cases, the applications for allocations against the ad hoc allotments of the Central Government were placed before the Ministers before actual issuance of orders. The Department of Food and Civil Supplies dealt with the applications whether received directly from the Department or sent by other Departments or the Chief Minister or his Secretariat with due care and consideration on the principles mentioned above.... I state firmly that, the Chief Minister never brought any pressures on the Department for allocation of cement in favour of any party. In some cases, even the Chief Minister's recommendations could not be accepted.

The affidavit is supremely silent in regard to the allocations made by him. All the said applications are addressed to the second appellant and they were sent directly to the then Minister of State, Shri Kamle. There appears to be some understanding between the second appellant and the then Minister of State. Shri Kamle does not state that he had an independent authority to allocate cement himself. The conclusion is inevitable that the allocations were made by the second appellant, or under orders and directions of the second appellant, though purported to be made by the Minister of State.

153. The said allocations are made arbitrarily in violation of the guidelines laid down in Government Resolution dated September 12, 19X8 reiterated in Government Circular dated March 31, 1981 read with Government Circular dated March 2, 1981 and which Government Circular dated March 31, 1981 was acted upon by the issuance of the said letter dated April 6, 1981 by Shri Tipnis to all Collectors and putting up of the said notice on the board in Mantralaya that no application for cement would be entertained at the Mantralaya.

154. On the one hand thousands of people, gating at the gaps in their roofs gaping forlorn, were shown the door, while the builders were welcomed in the Mantralaya. The appellants did not show any compassion whatsoever to the miseries suffered by the people for want of cement, but their hearts bled for the

builders because their constructions were incomplete and they would have suffered losses, and it may be added, in their huge profits. This manner of distribution of even the ad hoc quota of cement is deplorable. The people in general were kept in the dark about the ad hoc quota being allocated from the Mantralaya.

155. The question then is whether the allocations were made by the second appellant as quid pro quo for the donations to the two trusts., viz., Pratibha Praushothan and Konkan Unnati Mitra Mandal.

156. The Pratibha Pratishtan was founded on October 18, 1980. There is some force in the contention of Shri Desai that the Trust is almost entirely controlled by the second appellant, though we cannot agree with Shri Desai that the trust is the private trust of the second appellant. Some of the clauses in the Trust Deed speak in unmistakable terms about the entire control of the second appellant over the trust. The second appellant is the settlor of the trust with a sum of Rs. 501/- settled upon trust. He is the Chairman of the trust. Clause 6(b) of the Trust Deed empowers the second appellant to decide what shall be the total number of Trustees. The powers and the duties of the Trustees enumerated in clause 7 are made subject to the control of the Chairman. Clause 8(i) provides that any vacancy arising in the Board of Trustees shall be filled in by the person nominated by the Chairman. Clause 9(a) declares that the Chairman shall be the head of the Pratishtan and in that capacity he will direct, supervise and control all activities of the Trust. Clause 9(d) makes the decision of the Chairman in matters of disputes of any nature final and binding. Clause 9(e) authorises the Chairman to appoint additional members on the Board of Trustees.

157. The second appellant says that he has not created the Trust in his capacity as Chief Minister nor could he do so as the Chief Minister under the Constitution or the Rules of business of the State Government. The Government of Maharashtra has nothing to do with the Trust and yet in October/November 1980 issue of "Maharashtra Shasanache Nirnaya", the State Government's monthly, it is stated "The Government of Maharashtra has decided to establish a trust called I.G.P.P." (Indira Gandhi Pratibha Pratishtan). Again, in the book "Maharashtra Marches Ahead" published by the Director General of Information and Publicity in December 1980 it is stated, "The Government of Maharashtra has set up a foundation called I.G.P.P. (Maharashtra)". No attempt has been made by the appellants to correct this mis-statement and to inform the public of the correct position in regard to this Trust. Shri Chari has filed affidavit in sur-rejoinder, but he has chosen to adopt a stoic silence in this regard. The second appellant has not filed affidavit in sur-rejoinder to traverse these statements specifically reproduced in the affidavit in rejoinder by the petitioners although time was taken and given by the learned Single Judge to do so. The hearing of the Petition commenced before the learned Judge on December 7, 1981. On December 10, 1981, the appellants desired to file affidavit in sur-rejoinder. The hearing was, therefore, adjourned to December 16, 1981. Even so, these statements have

remained unchallenged.

158. Shri R.R. Bhole, a Trustee of Pratibha Pratishthan has stated in his affidavit that cheques were received by way of donations by the Trust and the names were widely published and were televised. This is mere ipse dixit as regards the builders. He has not stated when and where the names of the builders-donors were publicised nor has he given the name of a single builder who was televised while giving donation to the trust.

159. Shri Bhise is one of the Trustees of Konkan Unnati Mitra Mandal, registered as a Public Trust on April 13, 1981. He says that out of 142 allottees of cement in Exhibits E-1 to E-9 only ten allottees have given donations to the said Mandal. So also Shri Bhole states that from the record it appears that there are only two donors-builders, viz., Makers Development Services Private Limited and Hiranandani Constructions Private Limited who gave donations. Shri Bhole states that there is one more donor-builder, who is undisclosed, who has not received cement. Both Shri Bhole and Shri Bhise state that the donors have paid contributions voluntarily and they have received donations with no strings attached. Both of them have not stated that they received the donations from any one of the numerous builders. These statements carry no weight.

160. The second appellant denies that the allocations of cement in favour of the allottees were in consideration of the donations given by them or as quid pro QUO. He has specifically mentioned three donors, viz., Bharatiya Vidya Bhavan of Nagpur, Bharatiya Vidya Bhavan of Bombay and Royal Western Indk: Turf Club Ltd., who gave donations voluntarily without any request from him and the quantities of cement allotted to them is so meagre that it is entirely disproportionate to the donation.

161. The statement, showing the names of the builders, the dates on which and the quantities of cement allocated to them and the amounts of donations and the dates on which they were given, annexed to the impugned judgment is admitted. It is, therefore, unnecessary for me to refer to the averments in this regard in the affidavits.

162. The table given below gives at a glance the allotments and the donations.

Table No. 3 -----									
----- Name of Builder Date of Total Date of Total amount allotment									
quantity Donation of donation allotted in M.T. Rs. -----									
----- 1. Raheja Group 2-7-81 400									
4-7-81	2,47,500	(8000 bags)	18-7-81	2,80,000	25-7-81	1,60,000	-----		
6,87,500 -----									
2. Amrut Builders 24-6-81 100 3-7-81 1,00,000 (Shreemal Builders) 3-7-81									
81,000	1-7-81	100	3-7-81	19,000	-----	-----	200	2,00,000	400 bags

3. Hiranandani 13-5-81 350* 2-6-81 30,000 Group 20-6-81 250 4-7-81									

1,20,000 ----- N.L. Hiranandani 24-6-81 50 1,50,000 1-7-81 50
 ----- 2-7-81 310 ----- 760 (15,200 bags) * The first allotment
 made on 13-5-81 did not materialise and hence the allotment is made on
 20-6-81 in lieu thereof.

4. Makers Deve- 23-4-81 500 25-6-81 4,00,000 lopment 4-5-81 20 1-7-81
 2,00,000 ----- Services Pvt. Ltd. 24-6-81 400 6,00,000 -----
 ----- 920 (18,400 bags)

5. Bombay 24-6-81 100 23-6-81 1,50,000 Builders 1-7-81 100 25-6-81
 25,000 ----- 200 1,75,000 (4,000 bags) -----

6. Eversnine 2-7-81 300 13-7-81 2,40,000 Builders Pvt. Ltd. (6,000 bags)

7. Prithvi 2-7-81 200 13-7-81 1,60,000 Constructions Pvt. Ltd. (4,000 bags)

8. Ansa Builders 2-7-81 200 25-7-81 1,10,000 (4,000 bags)

9. Olympic 24-6-81 200 25-6-81 1,00,000 Enterprises 25-6-81 250 ----- 450
 (9,000 bags)

10. Satguru 20-5-81 50 30-6-81 25,000 Enterprises 24-6-81 100 ----- 150
 (3,000 bags)

11. Nuvketan 4-5-81 10 13-7-81 30,000 Builders 29-6-81 50 2-7-81 200
 ----- 260 (5,200 bags)

12. M.R. Asso- 2-5-81 40 25-6-81 1,00,000 ciates 24-6-81 150 ----- 190
 (3,800 bags) ----- Grand Total 4,230 M.T. 25,77,000 (84,600 hags)
 ----- [Figures of allotment prior to May 1981 are not included in this
 Statement]

163. Shri Sen has referred to the statement of distribution of ad hoc allotment of cement Exhibit 6 and he has contended that out of 2,63,000 M.T. only a small quantity of 73,270 M.T. of cement was allotted to 1894 builders and the pattern of allotment was such that only a very small percentage of cement was allotted to a large number of builders and out of them only ? a small speck have given donations and, therefore, it does not establish modus operandi. I do not agree with Shri Sen. It is not necessary that to establish modus operandi there must be an appreciable high percentage of cases established. The term "modus operandi" is more often used in police investigation and in criminal trials. If an accused person commits an offence adopting a particular manner or mode, and the accused is arrested and tried and after his acquittal or release from jail similar offence is committed in a similar manner, it serves as modus operandi to the police for the purpose of the investigation of the crime and apprehending the accused. It is, therefore, not necessary that there should be a substantial number of cases to infer modus operandi. Shri Sen is also not right in his contention that a small percentage of cement was allotted among large number of builders, the said statement Exhibit 6 shows that 46,350 M.T. were allotted to Districts and Bombay City for distribution among consumers; 71,500 M.T. were

allotted to Semi-Government and Government Department; 48,819 M.T, were allotted to 1385 Co-operative Housing Societies and 73,270 M.T. to 1894 builders. A quantity of 13061 M.T. is unaccounted. 10,000 M.T. were not received from the factory. This shows that the largest quantity was allotted to builders. Furthermore, 69 builders out of the builders mentioned in Exhibits E-1 to E-9 of the Petition were allocated 12,000 M.T. of cement as stated in para 18 of the affidavit in rejoinder which stands unrefuted. Shri Chari in his affidavit in Sur-rejoinder does not deny the figures. In the affidavit in rejoinder para 116 it is stated that 28,000 applications for repairs were pending in the seven Ration Offices of "D1 Region, Bombay. The stock of cement in hand as on July 24, 1981 was 2389 bags, out of which 900 bags were allotted to builders. This is from the regular quarterly quota. But this is mentioned here only to show the manner of distribution of cement.

164. I cannot also accept the argument of Shri Sen that the builders were allotted cement from the ad hoc quota also by the previous Government advanced in justification of the allotments of cement made by the appellants. This may be so. But not a single case has been shown that any builder has made application directly to the Chief Minister. It may perhaps be that the allotment was made by the Food and Civil Supplies Department. Furthermore, there is not even an allegation that the previous Government made allocations quid pro quo.

165. The donation of Rs. 2,47,500/- is given by the relatives and firms of the Raheja Group and the donations of Rs. 2,80,000 and Rs. 1,60,000 are given by Sewaram Raheja Foundation. Shri Desai has submitted that allotment of cement has been made to Gangabhavan Co-operative Housing Society Ltd. and Bhadra Co-operative Housing Society Ltd. of 2,000 bags and 4,000 bags respectively. He has further submitted that the builders for the construction of houses for the said two Co-operative Housing Societies is one of the Rehejas and he produced two photographs to substantiate this averment of the petitioners. He has further submitted that if this allotment of 6,000 bags is added to the 8,000 bags shown in the annexure to the impugned Judgment, the total quantity allotted would be 14,000 bags. If the first two figures of donation made on July 4, 1981 and July 18, 1981 is taken into account, the donations total Rs. 5,60,000/-, Shri Rajan B. Raheja having made a donation of Rs. 10,000/- and not Rs. 7,500/- as shown in the statement. This, according to him, exactly works out to Rs. 40/- per bag. There may be some truth in this contention. Shri Chari in his affidavit in sur-rejoinder has, while admitting the allotment to the two societies, stated that none of the Rahejas is a member of any of the two Societies. But he has slurred over the factum of Rahejas being builders for the said Societies. I cannot, however, accept this calculation for the reason that the last donation of Rs. 1,60,000/- made on July 25, 1981 has not been taken into consideration. However, the proximity of donation to allotment is clearly established. The proximity between the allotments and donations establishes the nexus between the two. The Sewaram Raheja Foundation being itself a Charitable Foundation cannot have given donations for claiming Income Tax relief.

166. In regard to Amrut Builders, it is stated in the affidavit in rejoinder that it is the sister concern of Shree Shreemal Builders. The address of both the firms is the same and that four out of five partners in Amrut Builders are the partners of Shree Shreemal Builders. The partners of both the firms belong to Jain family group. The donation of Rs. 1,00,000/- was given by Shree Shreemal Builders. Rs. 81,000/- was shown to be made up of amounts of Rs. 9,000/- each contributed by nine persons and and Rs. 19,000/- were shown to be contributed by two persons paying Rs. 9,500/-each. The amounts were paid in Dena Bank (Goregaon West) and demand drafts obtained in chronological order Nos. 904847 to 904857 on the same day, viz., July 3, 1981. The names of these nine persons are worth noting. They are (1) M.G. Shah, (2) L. Ramrao, (3) K.P. Kothari, (4) Devrarn Malavi, (5) R.R. Barve, (6) M.C. Pendse, (7) Suresh Karriat, (8) J.M. Abdul Kanha, (9) Akbar, (10) Ismail, and (11) S.K. Talathi. These persons appear to be benamis for Shree Shreemal Builders. The second appellant felt least concerned from which source he received the donations. He has not chosen to file affidavit in sur-rejoinder although opportunity was taken from and given by the learned Judge. Shri Chari has in his sur-rejoinder merely stated that Shree Shreemal Builders has five partners while Amrut Builders has eight partners. They are all members of Jain family. Shri Amrutlal Tejmal Jain is the Karta of one branch and Shri Jukamraj Tejmal Jain is the Karta of another branch of the Hindu Undivided Family. The names of these partners are not material. Shri Chari, however, has slurred over the allegations in regard to the payments in Dena Bank and the giving of donations. Neither Amrut Builders nor Shree Shreemal Builders nor any of their partners have filed any affidavit. These donations are given within a few days of the allotment of 200 M.T. of cement to Amrut Builders. The proximity between allocations of cement and the donations establishes the nexus between the two.

167. Shri N.L. Hiranandani, a partner of Hiranandani Builders, admits the donations to Pratibha Pratishthan, but he states that they were purely voluntary without the second appellant or any one on his behalf asking them to do so. He felt appalled at the averment in the petition that the donations were given as quid pro quo for the allotment of cement. Here again the allotments of 175 M.T. and 300 M.T. were made on July 2, 1981 and the large donation of Rs. 1,20,000/- was given two days later on July 4, 1981. The first allotment of 350 M.T. was made on May 13, 1981 and the donation of Rs. 30,000/- was given on June 2, 1981. The proximity between allotment of cement and the donations establishes nexus.

168. Shri R.B. Maker is a director in Makers Development Services Private Limited. His affidavit is almost similar to the one made by Hiranandani. It is to be noted that his affidavit is prepared by the Government Pleader. Here also the donation is within two days of the allotment. The manner in which the allotment was made to them discussed above may be recalled here. The proximity between allotment and donations establishes nexus.

169. Shri Zakaria Haji Latit Agliudi admits that he is a partner of Bombay Builders in his first affidavit dated November 24, 1981. He denies that Rs. 3,00,000/- or any other sum was donated by Bombay Builders to any of the Trusts. He has further denied that the second appellant asked them to make any donation. However, in all probability knowing that there is proof of donation of Rs. 1,50,000/- to Pratibha Pratishtan, he admits in his second affidavit "Contribution to Pratibha Pratishtan". But he has, while admitting the donation of Rs. 25,000/- made on June 19, 1981 (there appears to be some discrepancy in date, viz., whether June 19, 1981 or June 24, 1981) to Konkari Unnati Mitra Mandal, omitted to state what amount and on what date the donation to Pratibha Pratishtan was made. The first affidavit was prepared by the Government Pleader while the second affidavit was prepared by Shri P. Shankarnarayan, advocate. Shri Aghadi states the Hanjar Education Society, a Trust of which he is the Chairman, made the following donation:

- (a) Rs. 3,000/- on April 14, 1979 to Massomia Urdu Educational Society, Malkapur.
- (b) Rs. 1.5,000/- on August 22, 1979 to Suit. Noorjuhan Begum Akatba Trust.
- (c) Rs. 8,000/- on August 23, 1979 to Shetkari Mazdoor Panchayat of Pune.
- (d) Rs. 51,000/- on January 18, 1981 to Anjuman-e-Islam High School.
- (e) Rs. . 5,000/- on May 12, 1981 to Firebrigade Associations, Bombay.

He has the effrontery to categorically deny that any donation was made by him or by Hanjar Trust to Pratibha Pratishtan. This is what he states:

I strongly refute any suggestion and allegation that either myself or the said Hanjar Trust has paid any donation to Pratibha Pratishtan and it is conditioned with any motive or ulterior purpose of getting cement.

But Shri C.J. Sawant, the learned Assistant Government Pleader, stated to Lentin J. and before us also that Hanjar Society made a donation of Rs. 1,50,000/- to Pratibha Pratishtan. Shri Aghadi appears to have scant regard for truth. The Society has not made any such large donation as in the present case. Taking into consideration the proximity between allotment and donation, I have no hesitation in inferring nexus in this case.

170. The remaining builders, viz., (1) Raheja Group, (2) Amrut Builders, (3) Evershine Builders Pvt. Ltd., (4) Prithvi Constructions Pvt. Ltd., (5) Ansa Builders, (6) Olympic Enterprises, (7) Satguru Enterprises, (8) Navketan Builders, and (9) M.R. Associates, have not filed affidavits.

171. The super haste in which allotments are made by the second appellant, in some of these cases on the very day of the application or on the next day and the sudden spurt of philanthropic spirit shown by these builders of giving donations to the two Trusts within a few days before or after allotment shows that in all probability the allotments were made in consideration of the donations.

The allotments were quid pro quo the donations.

172. The circumstances of the proximity between allotments and donations is not the only circumstance in this case to infer quid pro quo. There are also other glaring circumstances which would in their totality lead to no other conclusion except the one that the allotments were made quid pro quo the donations. They are:

(1) All the applications are addressed to the second appellant. Even though the Bombay R.C.C. Grill Association addressed their application for cement to Shri Khattal, the then Minister for Food and Civil Supplies, the reply was given by the second appellant. This shows that the entire control over distribution of cement was taken over by the second appellant.

(2) None of the applications were inwarded in the Office of the Chief Minister. They, in all probability, were handed over to the second appellant.

(3) The second appellant made allotments with extraordinary haste in some cases on the same day or on the next day. He exhibited exceptional exuberance of enthusiasm in allocating cement to builders.

(4) The general public was informed by notice put up on the notice board in the Mantralaya and by letter dated April 6, 1981 of Shri Tipnis addressed to all Collectors that no application for cement .will be entertained at the Mantralaya, the applications of builders were, however, entertained by the back door by the second appellant. A veil of secrecy was adopted in allocating cement to builders.

(5) The large scale allocation of cement to builders by the second appellant appears to have created an impression in the minds of some of them that the Chief Minister has his quota of cement. Bombay Builders have in their letter dated June 23, 1981 referred to it as "the Chief Minister's Quota".

(6) The second appellant's proclivity to allot cement was to such an extent that he had no hesitaion in transferring cement from the regular quarterly quota to ad hoc quota and allocating it to builders. Thus, 1320 M.T. were allotted as first instalment out of 3570 M.T. total allotment under instructions from the second appellant. The Regional Controller was asked to treat the quantity of 1320 M.T. as advance allotment against allotment for the second quarter of 1981. (See Note. III on the agenda of the meeting of High Level Committee of March 31, 1981). The State was allotted 4,83,400 M.T. in the first quarter of 1981 out of which 26,000 M.T. was earmarked leaving a balance of 4,57,000 M.T. regular quarterly quota. Out of this an aggregate quantity of 2r 13,000 was earmarked for irrigation and power projects leaving a balance of 2,44,000 M.T. for distribution. Out of this 2,250 M.T. were kept separate for fulfilling the commitments of 3570 M.T. made by the second appellant. (See note V on the agenda of the Meeting of March 31, 1981). This shows the utter arbitrary manner in which the second appellant appropriated to himself the said quantity of 3750 M.T. for being allocated by him.

(7) In the affidavit in rejoinder para 12(h) the relevant portion of E-I to the first affidavit of Shri Tipnis is reproduced. The regular quarterly quota is shown as under:

----- Quarter							
Quota allotted	Actual dispatch	Ad-hoc	Total	1981	M.T.	M.T.	quota receipts
received							M.T.
----- I							
5,45,400	5,04,200	40,000	5,44,200	II	5,45,900	4,04,200	55,000
4,77,900		1,19,504		Not		known	4,59,400
							III
							1,19,504

The quarterly quota itself remaining unfulfilled, obviously the ad hoc quota shown in the statement is a transfer from the regular quarterly quota to accommodate the second appellant. Significantly Shri Chari has slurred over this in his affidavit in sur-rejoinder. As shown above, the second appellant appears to have assumed charge of allotment of the ad hoc quota of cement. This is totally illegal, arbitrary and mala fide.

(8) The statement Exhibit 7 of allotment of cement to builders referred to in the Writ Petition shows that an aggregate quantity of 8585 M.T. of ad hoc quota of cement was allotted from the Mantralaya to nine builders out of which 3250 M.T. was allocated to four builders who have given donations, viz., Makers Development Services Pvt. Ltd., Hiranandani Group, Raheja Group and Bombay Builders. Nearly one-third quantity was allocated to the four builders-donors. The Table Ex. 6 shows that 37270 M.T. were allotted among 1894 builders i.e. about 38 M.T. to each builder, while Table Ex. 7 shows that on an average 954 M.T. were allotted to each of the nine builders and the average of allotment of cement to the four builders works out to 812 M.T.

(9) The table submitted by the appellants on December 18, 1981 shows that between June 18, 1981 and July 15, 1981 a large quantity of 14785 M.T, was allotted by the second appellant to 82 builders.

(10) The second appellant should have been candid with the Court. Far from it, he has made deliberately Incorrect statement repeatedly that he did not make allocations of cement.

(11) The applications for cement are not inwarded. The register maintained in the office of Shri Kamle, Minister of State is not produced. No explanation is given by the second appellant or by Shri Kamle or by Shri Lulla as to what weighed with them in allocating cement. There is a total lack of any system or regularity of procedures and hence the presumption of regularity stands rebutted.

(12) The allocation of cement is in violation of the statutory system of distribution of cement envisaged by the said Government Circular dated March 31, 1981 read with Government Circular dated March 2, 1981 read with Government Resolution dated September 12, 1981.

(13) Trusts were created by the second appellant. Moneys had to be found for the Trusts. Allocating of cement against donations was one of the convenient modes adopted by the second appellant for obtaining the moneys.

(14) The second appellant exploited his position as the Chief Minister in obtaining donations for his private trusts with which admittedly the State was not concerned.

(15) The specific allegation in rejoinder that the order of allocation to Vikas Developers of M/s. N.L. Gupta in Ex. E-4 was cancelled because the said party did not give donation is unchallenged.

(16) The builders reaped a double benefit. They got cement and also Income Tax relief.

(17) The Trustees of the two Trusts had no knowledge of the allocation of cement to the builders and the Officers in the Food and Civil Supplies Department had no knowledge of the donations to the two Trusts, The only common link between the two is the second appellant.

(18) The excuse put forth that cement was to be transported by road and that too quickly and therefore it was allocated to bulk consumers is imaginary. The communication dated February 23, 1981 from the Regional Cement Controller, Bombay, to Shri Chari states

Regarding additional allocation of 15,000 tonnes from Koner factory despatches will be made by rail/road.

(See page 196 of second paper book). So also an endorsement is made by the Under Secretary, Food and Civil Supplies Department on letter dated April 9, 1981 from the Assistant Cement Controller to the Secretary, Food and Civil Supplies Department, Government of Maharashtra, that

It should be made clear to them (the allottees) that they should lift the stock by road if rail transport is not readily available.

This shows that the excuse put forth that cement was to be transported only by road is a myth. (Underlining [here indicated in italics] and bracketed portion mine).

(19) The second appellant showed an uncommon zeal to allot cement to builders. There was a sudden outburst of philanthropic spirit in the builders to give donations to the two private trusts and that too in odd figures, which shows some sort of calculation.

173. The above circumstances coupled with the fact of proximity of allotments to donations taken together lead to only one conclusion and one only that the second appellant allocated cement to a number of builders in consideration for the donations obtained from them. Quid pro quo is conclusively established. Mala fides must necessarily be inferred as a natural sequitor. It was within the special

knowledge of the appellants as to what went on behind the closed doors of the Mantralaya and it would be casting an intolerable burden upon the petitioners to prove by positive evidence the misuse of authority. (See *State of Punjab Vs. Ramjilal and Others*, . There is, however, sufficient material on record of this petition to infer mala fides.

174. Shri Sen's argument that the number of builders who were allocated cement and who gave donations to the two Trusts form an insignificant minority, a speck in the ocean and the further argument that not all who gave donations were allotted cement highlighted by him by referring to the case of Indian Hotels Ltd. who gave a donation of Rs. . 26,00,000/- and the quantity of cement allocated to them was only 100 M.T. and therefore, there the modus operandi is not established and consequently quid pro quo cannot be held proved is fallacious. A hundred righteous acts cannot be put forth as justification for ten wrongful acts, nay, a single wrongful act.

175. I do not agree with Dr. Chitale that the learned Single Judge should have first given a finding that there was sinister significance in the hypothesis of mistake and misunderstanding and the interpolations. They were put forth as justification for the wrongful act of allocation of cement.

176. I also do not agree with Shri Sen that the guiding factor in allocating cement was to subserve public interest. The allocations of cement are wholly arbitrary, capricious and mala fide. The salutary principles laid down by the Supreme Court in *Kasturia (Reddy's case)* (supra) have no application to the facts of this case.

177. Shri Sen's argument that the basic principle of natural justice that no person should be condemned unheard has been violated inasmuch as the builders whose cases have been taken into consideration have not been given an opportunity of being heard is stated only to be dismissed. In this pro bono publico petition directed against the appellants the allotments of cement to builders and the names, dates and amounts of donation given by them are admitted by the appellants. The petition is directed only against the appellants. The builders-donors named in the petition have filed their affidavits. The other builders-donors were picked up by the Court on a random survey taken from admitted documents.

178. I do not also accept the argument of Shri Sen, based on statements in affidavits, that the donations were voluntary and, therefore, they were not given as consideration for the allotments of cement. The statements in the affidavits are ipse dixit.

179. Shri Desai has argued that the second appellant had the motive to collect donations and the acute scarcity of cement provided him with the requisite opportunity to allocate cement against donation. There is some force in this argument. The statements made by the second appellant published in the book "Antariche Bol" on page 18 and reproduced in the affidavit in rejoinder where the

second appellant is stated to have said that

We have now started this hobby (of collecting moneys (or the Trusts).... I make this demand on anybody who comes to me.

These statements quoted in the affidavit in rejoinder stand unchallenged. These statements to some extent show that the second appellant was wanting moneys for the Trusts. The acute scarcity of cement gave the requisite opportunity to the second appellant to allocate cement to the builders against donations to the two Trusts.

180. I do not agree with Shri Desai that the giving of donations by the family members, the firms and Foundations of Raheja Group, by the nine benamidars of Amrut and Shreernal Builders, by Hanjar Educations Trust on behalf of Bombay Builders demonstrate a clear attempt to sever the link between the donors and the allottees. There is no denial about the giving of donations by the different persons. But that would not lead to the only inference that it was done to sever the link and that too by the second appellant.

181. Shri Desai urged that adverse inference should be drawn for non-production of all the tiles, correspondence, registers and documents in regard to allocation of cement and in regard to the receipt of donations as these facts were within the special knowledge of the appellants. He has relied upon the decision of the Supreme Court in Hiralal and Others Vs. Badkulal and Others, where Their Lordships have quoted with approval the rule laid down by the Privy Council in T.S. Murugesam Pillai Vs. Manickavasaka Desika,

A practice has grown up in Indian procedure of those in possession of important documents or information lying by, trusting to the abstract doctrine of the onus of proof) and failing, accordingly, to furnish to the Courts the best material for its decision. With regard to third parties this may be right enough - they have no responsibility for the conduct of the suit} but with regard to the parties to the suit it is in their Lordships' opinion, an inversion of sound practice for those desiring to reply upon a certain state of facts to withhold from the Court the written evidence in their possession which would throw light upon the proposition.

182. In the present case, though an adverse inference can be drawn, I do not think it necessary to do so, as this would be only adding to the multitude of circumstances.

183. To sum up:

(1) The guidelines laid down in the Government Resolution dated September 12, 1978 read with Circular dated March 31, 1981 read with Government Circular dated March 2, 1981 are binding upon the appellants so long as it was not withdrawn by the Government Circular dated April 21, 1982.

(2) The allocations of cement made by the appellants are in violation of the guidelines laid down in the said Government Resolution dated September 12,

1978 and are arbitrary.

(3) The hypothesis of mistake and misunderstanding is a fable, a tergiversation. The same is rejected.

(4) The repeated averment of the second appellant that he did not make any allocations of cement is incorrect. The same is rejected.

(5) The proximity between allotments made by the second appellant to builders and the donations received by him from them establishes nexus between the two.

(6) The proximity coupled with the other circumstances conclusively prove that the second appellant made allocations of cement to builders quid pro quo for the donations received by him from them.

(7) It follows as a natural sequitor that the second appellant acted mala fide.

184. In the result, the appeal deserves to be dismissed.

PER COURT:

185. In the result, the appeal will stand dismissed. There is no question of awarding costs limited to those indicated in the rules bearing in mind the nature of the proceedings in appeal and complexity of the matter. Costs will have to be quantified.

186. Mr. Desai states on behalf of the respondents that no advocates' fees are being charged. We have been informed that the respondents had suffered out of pocket expenses at the trial Court stage in the amount of Rs. 14,376/- but the learned Single Judge made an award in their favour of only Rs. 7,500/-. In this Court out of pocket expenses figures given to us, which we accept, are in the sum of Rs. 3789.25 p. It is surprising that even the truncated costs awarded in the trial Court have not been paid.

187. In our opinion, there is no warrant for the petitioners being out of pocket in such litigation in which they have succeeded against almost insurmountable odds. Even after being appraised that out of pocket expenses for the appeal come to Rs. 3789.25 p. as per the statement handed over to us, we direct the payment of costs for the appeal quantified at Rs. 7,300/- in the aggregate for all purposes.