

(1997) 03 KAR CK 0021

In the Karnataka High Court

Case No : Writ Petition No's. 3624-3745 of 1997

Vijendra Kamath

APPELLANT

Vs

The State of Karnataka

RESPONDENT

Date of Decision : 31-03-1997

Acts Referred:

Constitution of India, 1950 — Article 12, 14, 226

Citation : (1998) ILR (Kar) 1661

Hon'ble Judges : R.V. Raveendran, J

Bench : Single Bench

Advocate : N.G. Phadke and Meerabai, for the Appellant; H. Kantharaj, AGA, for R-1 and N.K. Patil, for R-2, for the Respondent

Judgement

R.V. Raveendran, J.—The petitioners are allottees of Flats or Row Houses in Nandini Layout. In this batch of Petitions they have challenged the notices issued to them by Bangalore Development Authority ("BDA" for short) demanding increase in the cost of Flats/Houses allotted and delivered to them, in pursuance of its Resolution No. 239/94 dated 3.9.1994 increasing the price of such flats and houses.

2. BDA (Second Respondent) is an Authority constituted under the Bangalore Development Authority Act, 1976 ("Act" for short). Section 15 of the Act enables BDA to draw up and undertake development schemes involving construction of Buildings for the benefit of needy public. The First Respondent (State Government), in exercise of its powers u/s 69 of the Act, made the Bangalore Development Authority (Allotment of Buildings under Self Financing Scheme) Rules 1982 ("Rules" for short) regarding allotment of Houses/Flats constructed under such Schemes.

3. BDA Formulated and declared a self-financing housing Scheme ("Scheme" for short) in the year 1982 under the said Rules for construction of three categories of Houses/Flats, that is, Middle Income Group Units ("MIG" or "B" Type) and Low Income Group Units ("LIG" or "C" Type) at Nandini Layout and at BTM Layout

and High Income Group Units ("HIG" or "A" Type) at RMV II Stage Layout. The Brochure issued in regard to the said Scheme (Annexure "A") reproduced the conditions of allotment contained in the Rules. The Scheme envisaged construction of 1596 MIG Units and 3396 LIG Units at Nandini Layout and gave the approximate cost of different types of Units, making it clear that the cost of units shown in the Brochure were tentative and subject to escalation.

4. BDA commenced construction of the Units (Flats/Houses) at Nandini Layout in the year 1982 and completed the construction in or about 1988-89. The Petitioners were allotted different types of Units at Nandini Layout by BDA between 1982 to 1991. Neither the Petitioners nor BDA have given the dates of allotment or the particulars of allotment. However, from the tabulated statements produced by parties and the impugned notices (Annexure "L" series), I have categorised the Petitioners into the following five groups for convenient disposal of these Petitions (as detailed in the five Schedules to this Order):-

DESCRIPTION Number Listed in

B. Allottees at the rates fixed by BDA as per Resolution dated 24.6.1985

16

Schedule II

C. Allottees (journalists) covered by Government order dated 4.8.87

25

Schedule III (SI.No.1 to 23 being allottees at rates fixed as per" Resolution dated 24.6.1 985 and SI.No.24 & 25 at higher rates).

D. Allottees at the rates notified in the BDA Notification dated 22.12.1987

20

Schedule IV

E. Allottees at the rates applied by BDA in the year 1990 (Resolution dated 13.11.1989)

18

Schedule V

122

5. The cost at which BDA allotted Units from time to time are as follows:-

SI. Description

Initial Approximate Price (1982)

increase Prices (24.6. 1985)

Prices Notified on 22.12. 1987

Allotment Price in 1989 (13.11. 1989)

Impugned Prices (December 1995/ January 1996) (3.9.19)

(1)

(2)

(3)

(4)

(5)

Middle Income Group (MIG)

1. Gr. Floor Flat

148,000

215,000

235,000

310,000

375,000

2. I Floor Flat

135,000

200,000

225,000

295,000

362,500

3. II Floor Flat

122,000

190,000

215,000

280,000

352,500

4. Row House

110,000

190,000

N.A.

N.A.

359,000

Low Income Group (UG)

1. Gr. Floor Flat

69,000

105,000

120,000

138,500

166,500

2. I Floor Flat

63,000

100,000

110,000

N.A.

165,500

3. II Floor Flat

56,600

95,000

100,000

133,500

164,000

4. Row House

63,000

96,000

120,000

N.A.

152,000

6. The facts relating to each group are briefly as follows:-

Group "A" described in Schedule I :

6.1. The 43 Petitioners in this Group were allotted Units at the original tentative rates (1982 rates), between 1982 and 1985, subject to a provision for escalation. On 24.6.1985, BDA passed a Resolution increasing the cost of the Units taking note of several factors which contributed to increase in the cost of construction. BDA issued notices to these 43 Petitioners informing them about the increase in the cost and requiring them to pay difference in the cost. They paid such increased price and took possession of their respective Units in or about 1988-89. Several years thereafter, in December 1995/January 1996, these 43 Petitioners were again served notices (Annexure "L" series) calling upon them to pay the increased prices fixed as per BDA Resolution dated 3.9.1994. The details of such prices are :-

SI. No. of Petitioners in Schedule 1

Description of Unit

Allotment Price (1982)

Increased (1985) Price Paid

Impugned Price (3.9.1994)

1

2

3

4

5

1 to 29

MIG (Row house)

110,000

190,000

359,000

30 to 33

MIG/Gr. Floor

148,000

215,000

375,000

34 & 35

MIG/I Floor

135,000

200,000

362,500

36

MIG/II Floor

122,000

190,000

352,500

37 to 40

LIG/I Floor

63,000

100,000

165,000

41

LIG/II Floor

56,600

95,000

164,000

42 to 43

LIG(Row House)

63,000

96,000

152,000

Group "B" described in Schedule II:

6.2. The 16 Petitioners in this Group were allotted Units at the increased prices fixed by BDA as per its Resolution dated 24.6.1985. They paid the allotment price (1985 price) and took possession of their respective Units in or about 1988-89. They were also called upon to pay the increased prices fixed as per Resolution dated 3.9.1994. The details of such prices are:

Petitioners in II Schedule

Description

Allotment Price (1985)

Impugned Price (3.9.1994)

SI.No.1

MIG/Row House

190,000

359,000

SI.No.2 & 3

MIG/Ground floor

215,000

375,000

SI.No.4 to 9

MIG/First Floor

200,000

362,500

SI.No.10

MIG/Second Floor

190,000

352,500

SI.No.11 & 12

LIG/Ground Floor

105,000

166,500

SI. No. 13

LIG/First Floor

100,000

165,000

SI.No.14 to 16

LIG/Row Houses

96,000

152,000

Group "C" described in Schedule III:

6.3. The State Government is stated to have issued an Order dated 4.8.1987 relating to allotment of houses to Journalists. The 25 Petitioners in Group C (Schedule III) claim to be Journalists who were allotted Units in pursuance of the said Government Order at fixed rates. Petitioners at Sl.No. 1 to 23 of Schedule III were allotted Units in the years 1987-88 at the increased prices (1985 prices) shown in Para 6.2 above. Petitioners at Sl.No. 24 & 25 were allotted MIG Flats (II Floors) much later in 1990-91 at a price of Rs. 2,50,000/ per Unit. It is evident from the letters of allotment issued to these 25 Petitioners that (a) the allotments were made in pursuance of the Government Order dated 4.8.1987; (b) the conditions of the Rules/ Scheme regarding escalation in price were not specifically made applicable; and (c) there was no provision for escalation in price. These Petitioners have also paid the full price and taken possession of their respective Units. They have also been served with notices in December 1995/ January 1996 demanding increases on the basis of the rates fixed as per Resolution dated 3.9.1994 shown in Para 6.2 above.

Groups "D" & "E" described in Schedules IV & V:

6.4. The 20 Petitioners listed in Schedule IV were allotted Units at the second revised rates which were notified in the Notification dated 22.12.1987. The 18 Petitioners listed in Schedule V were allotted Units at the third revised rates made applicable in 1990, on the basis of the Resolution dated 13.11.1989. It is not disclosed as to whether the said rates given effect on 22.12.1987 were approved by any resolution of BDA. These Petitioners have also paid the full allotment price and taken possession of their Units. They have been served with notices in December 1995/January 1996 informing them about the increase in costs as per Resolution dated 3.9.1994 and calling upon them to pay the difference in cost. The particulars of the allotment price and increased price in these cases are as follows:-

Sl. No. of Petitioners

Description of Unit

Allotment Price

Impugned Price

1 to 6 (IV Schedule)

MIG/Gr. Floor

235,000

375,000

7 to 14 (IV Schedule)

MIG/I Floor

225,000
362,500
15 to 19 (IV Schedule)
MIG/II Floor
215,000
352,500
20(IV Schedule)
LIG/I Floor
120,000
165,000
1-2(V Schedule)
MIG/Row House
300,000
359,000
3 (V Schedule)
MIG/Gr. Floor
310,000
375,000
4 (V Schedule)
MIH/I Floor
295,000
362,500
5 to 15 (V Schedule)
MIH/II Floor
280,000
352,500
16 to 17 (V Schedule)
LIG/Gr. Floor
138,500
166,500

18 (V Schedule)

LIG/III Floor

133,500

164,000

7. Feeling aggrieved by the demand for increase in price made in pursuance of the Resolution dated 3.9.1994 (vide notices dated 28.12.1995, 30.12.1995 and 5.1.1996 produced as Annexure "L" series), Petitioners have filed these petitioners praying that the said demand notices (Annexure-L series) be quashed. The Petitioners have also sought a direction to the BDA to register the Lease-cum-Sale Agreements in their favour in respect of the Units handed over to the Petitioners in the year 1988-89 on the sital value only as on the date of handing over of possession.

8. Petitioners have contended that the BDA has no power to demand from them, the increased prices fixed as per Resolution dated 3.9.1994. It is contended that in regard to allotments made at the original 1982 rates (Group "A" referred to above), BDA has increased the price in 1985 and received the escalation. In regard to other allotments made at prices fixed on 24.6.1985, 22.12.1987 and in 1990, (Groups "B" to "E"), it is pointed out that the allotments were at the increased prices and not at the original 1982 prices; and, as the allotment price in such cases, included the escalation in cost, there cannot be any further increases in prices. It is also contended that the increases in cost now demanded, in pursuance of the Resolution dated 3.9.1994 are exorbitant and arbitrary and is not based on the actual cost and, therefore, BDA is not entitled to such increase. It is lastly contended that the allottees having made the full payment and possession of the Units having been delivered to them without reserving any right to claim any further escalation in the price, BDA is not entitled to claim escalation as per Resolution dated 3.9.1994.

9. On the other hand, BDA contends that the allotment of Units at Nandini Layout was subject to the Rules which provided for increase in price; that the increase in prices fixed as per resolution dated 24.6.1985 was also tentative and the revised prices were not finally determined prices and that a demand for a tentative price or an interim increase in price, will not disentitle BDA to seek further increase then the cost of the Units are finally determined. Though BDA admits that ail the Petitioners have paid the allotment price and have been put in possession of the respective Units allotted to them, it is contended that all the Petitioners have not entered into Lease-cum-sale Agreements. It is contended that some of the Petitioners disputed the increases made on 24.6.1985, but wanted possession immediately; and therefore, even without execution of any lease-cum-Sale Agreements, such Petitioners were put in possession of the allotted Units on full payment of the tentative price under provisional Possession Certificates. A distinction is therefore sought to be made in regard to Petitioners who have been issued Possession Certificates on execution of Lease-cum-Sale Agreements and

Petitioners who have been issued only provisional Possession Certificates without execution of any Lease-cum-Sale Agreements. It is next contended that the determination of the cost of the Units is within the exclusive province of BDA and Court cannot sit in judgment over such fixation of price and as the Rules clearly provide that the price is subject to escalation, the power and authority of BDA to increase the price as per Resolution dated 3.9.1994 is not open to challenge. Lastly it is contended that the Petitions relate to a contractual dispute regarding price and therefore Writ Petitions are not maintainable.

10. In view of the aforesaid contentions, the following questions arise for consideration:-

(I) Whether the Petitions under Article 226 are not maintainable.

(II) Whether in the case of Petitioners falling under Group "A", of para 4 above, that is, allottees who were made allotments at the initial tentative rates (1982 rates) with an increase in price as per Resolution dated 24.6.1985, BDA is entitled to make a second or further escalation on the basis of rates fixed on 3.9.1994.

(III) Whether in the case of Petitioners falling under Groups B, C, D & E in Para 4 above, that is, allottees to whom allotments were made at the escalated prices, BDA is entitled to increase in the price on the basis of rates fixed on 3.9.1994 or otherwise?

(IV) Whether the prices fixed by BDA as per its Resolution dated 3.9.1994 or based on a fair and reasonable assessment of the cost or whether they are arbitrary.

RE: QUESTION-I:-

11. BDA contends that allotment of Units is governed by contract, that is, the terms and conditions contained in the scheme; that it (BDA) has performed its obligations under the contract, by constructing and delivering the Units to the allottees; that the increase in price demanded by it under the impugned notices is in accordance with the contractual terms; that what is challenged by the allottees in these petitions, is the demand for payment of balance price (increase in price); that the question whether the allottees are liable to pay such escalation in the price is purely a matter relating to contract, as the rights and obligations, in particular regarding the cost price, are governed by the terms of allotment contained in the scheme. It is contended that no writ can be issued under Article 226 of the Constitution at the instance of a party to a contract, directing the other party to the contract, even though it may be an Authority, not to claim any increase in price; and if the allottees are aggrieved, the only remedy is to approach the civil Court. Reliance is placed on the decisions of the Supreme Court in *Kulchinder Singh and Others Vs. Hardayal Singh Brar and Others*, , *Radhakrishna Agarwal and Others Vs. State of Bihar and Others*, , *Premji Bhai Parmar and Others Vs. Delhi Development Authority and Others*, and *Bareilly*

Development Authority and Another Vs. Ajay Pal Singh and Others, .

12. On the other hand, the petitioners contend that BDA is "State" for the purpose of Article 12 of the Constitution; that the subject matter of the dispute is governed by Statutory Rules and the relevant scheme is in accordance with the Rules; that there is no separate contract or agreement between BDA and the allottees, providing for escalation, dehors the Rules; and that their complaint is that the impugned action of BDA in demanding increase in price is contrary to Rules and arbitrary. The petitioners contended that petitions are maintainable having regard to the principles laid down in the decisions of the Supreme Court in *Dwarkanadas Marfatia and Sons Vs. Board of Trustees of the Port of Bombay*, and *Mahabir Auto Stores and others Vs. Indian Oil Corporation and others*, *SRILEKHA VIDYARTHI v. STATE OF U.P.* AIR 1995 SCW 1613 and *Kumari Shrilekha Vidyarthi and Others Vs. State of U.P. and Others*, .

13. In view of the rival contentions, it is necessary to refer to the decision in some detail.

14. In *KULCHHINDER SINGH*'s case, the Supreme Court held that remedy of Article 226 is not available against the State to enforce contracts. The Supreme Court observed thus:-

"The remedy of Article 226 is unavailable to enforce a contract qua contract. We fail to see how a supplier of chalk to a government school or cheese to a government hospital can ask for a constitutional remedy under Article 226 in the event of a breach of a contract, bypassing the normal channels of civil litigation.....Private law may involve a State, a Statutory Body, or a public body in contractual or tortious actions. But they cannot be siphoned off into the writ jurisdiction."

15. In *RADHAKRISHNA AGGARWAL*'s case, the Supreme Court made a distinction between acts done in executive capacity of the State under the Constitution and acts done in performance of ordinary contracts. It was held that interference was permissible on the ground of violation of Article 14 in regard to acts done in executive capacity, but, there is no question of violation of Article 14 in regard to acts done in contractual field, unless some Statute steps in and confers some special statutory powers/duties or obligations on the State in the contractual field which is apart from the contract. It was further held that where relations of parties were governed by contract and the acts complained or related to breach of contract, and not exercise of any executive power, regulated by the constitution, no writ or order could be issued under Article 226 directing the Authority to remedy the breach.

16. In *PREMJI BHAI*'s case, the Petitioners had registered themselves with DDA for allotment of flats. When the construction of flats in certain localities was completed, DDA issued a Brochure which specified the terms and conditions of allotment, the price of the flats in different floors and the premium payable for the land as also the total price. The petitioners applied for allotment subject to

the terms and conditions contained in the said Brochure. The petitioners were selected for allotment and paid the price mentioned in the Brochure and took possession of the flats and thus the transaction was completed. Thereafter, the petitioners filed petitions before the Supreme Court, challenging a component of the price, that is, the amount claimed as "surcharge" or premium" towards land cost, which formed part of the price mentioned in the Brochure, on the ground that DDA was not authorised to collect the same and on the ground that in regard to some other schemes, DDA had not collected such premium. Petitioners contended that the requirement relating to payment of premium was discriminatory and amounted to receiving a "profit" contrary to the avowed policy of DDA to construct flats on "no profit no loss" basis. The petitioners, therefore, sought refund of the surcharge amount. The Supreme Court negated the contentions of the petitioners holding that the petitioners had contracted to purchase the flats knowing fully the terms of sale, that the allottees having accepted the allotment of flats at prices at which they were offered, subject to the terms and conditions of allotment, were bound to the same and could not challenge the price. The court held that no Writ Petition will lie to avoid the obligations voluntarily incurred under a contract. The court also examined the matter on merits and found that there was no discrimination.

17. In BAREILLY DEVELOPMENT AUTHORITY'S case, the said Authority (Appellant) undertook construction of dwelling houses for members of public under a scheme. The Brochure issued by the Authority specified the estimated cost of the flats and contained the terms of allotment, which, inter alia, provided that the actual cost was subject to variation. The respondents had registered their names with the Authority for allotment. The Authority increased the cost of Houses and issued notices to the respondents informing them about the increase in cost and requesting them to give their acceptance so that their names can be considered for allotment. The Authority made allotments to such of those respondents who had given their consent for such increased cost. After having unconditionally agreed to the revision in price notified by the Authority and obtained allotment, the respondents filed Writ Petitions, contending that the Authority could not increase the price, as such increase amounted to variation of the original terms of allotment. The High Court held that the increase in price of flats was arbitrary and unreasonable and directed the Development Authority to refix the price after hearing their grievances. The Supreme Court allowed the appeal filed by the Authority, holding that the matter related to the field of ordinary contracts and therefore the petitions were not maintainable.

18. In KULCHHINDER SINGH's case, the Supreme Court, while holding that ordinary contractual obligations without any statutory complexion cannot be enforced under Article 226, however clarified that the court may, in extreme cases, which shock its conscience or other extraordinary situations, may exercise its power under Article 226 to correct manifest injustice, even in matters relating to contract. The decision in RADHAKRISHNA AGGARWAL did not consider the question of arbitrariness or violation of Article 14. In BAREILLY's case, what was

challenged was the increases in price made before the allotment. PREMJI's case did not relate to any increase in price, as what was challenged in that case was a part of the notified sale price. In BAREILLY's case, the petitioners specifically agreed for the increase in price and thereafter obtained allotment. In Premji's case, the court found that petitioner had agreed to pay the entire price and obtained allotment and possession by paying the entire price. Thus in both in PREMJI and BAREILLY, the challenge was in respect of a part of the price, which was specifically accepted by the allottees before obtaining allotment; and the Supreme Court found that the matters purely related to performance of non-statutory contracts and therefore held that the Writ Petitions were not maintainable. The question whether a Writ Petition would lie to challenge an increase in price, as being arbitrary and contrary to Rules did not arise in those cases.

19. In SHRILEKHA VIDYARTHI's case, the Supreme Court considered the question whether the action of the State in contractual matters could be examined on the touch stone of Article 14. The Supreme Court, following the decision in DWARAKADAS MARFATIA and MAHABIR AUTO STORES's held as follows:-

"22. There is an obvious difference in the contracts between private parties and contracts to which the State is a party. Private parties are concerned only with their personal interest whereas the State while exercising its powers and discharging its functions, acts indubitably, as is expected of it, for public good and in public interest. The impact of every State action is also on public interest. This factor alone is sufficient to import at least the minima! requirements of public law obligations and impress with this character the contracts made by the State or its instrumentality. It is a different matter that the scope of judicial review in respect of disputes falling within the domain of contractual obligations may be more limited and in doubtful cases the parties may be relegated to adjudication of their rights by resort to remedies provided for adjudication of purely contractual disputes. However, to the extent, challenge is made on the ground of violation of Article 14 by alleging that the impugned act is arbitrary, unfair or unreasonable, the fact that the dispute also falls within the domain of contractual obligations would not relieve the State of its obligation to comply with the basic requirements of Article 14. To this extent, the obligation is of a public character invariably in every case irrespective of there being any other right or obligation in addition thereto. An additional contractual obligation cannot divest the claimant of the guarantee under Article 14 of no arbitrariness at the hands of the State in any of its actions."

"24. The State cannot be attributed the split personality of Dr. Jekyll and Mr. Hyde in the contractual field so as to impress on it all the characteristics of the State at the threshold while making a contract requiring it to fulfill the obligation of Article 14 of the Constitution and thereafter permitting it to cast off its garb of State to adorn the new robe of a private body during the subsistence of the

contract enabling it to act arbitrarily subject only to the contractual obligations and remedies flowing from it. It is really the nature of its personality as State which is significant and must characterize all its actions, in whatever field, and not the nature of function, contractual or otherwise, which is decisive of the nature of scrutiny permitted for examining the validity of its act. The requirement of Article 14 being the duty to act fairly, justly and reasonably, there is nothing which militates against the concept of requiring the State always to so act, even in contractual matters. There is a basic difference between the acts of the State which must invariably be in public interest and those of a private individual, engaged in similar activities, being primarily for personal gain, which may or may not promote public interest. Viewed in this manner, in which we find no conceptual difficulty or anachronism, we find nor reason why the requirement of Article 14 should not extend even in the sphere of contractual matters for regulating the conduct of the State activity."

(emphasis supplied)

20. In *INDORE DEVELOPMENT AUTHORITY*, the Supreme Court was concerned with a case of escalation in price of MIG/LIG Flats, by a Development Authority. Explaining the earlier decisions in the matter, Supreme Court held:-

"Although this Court has from time to time taking the special facts and circumstances of the cases in question has upheld the excess charged by the development authorities, over the cost initially announced as estimated cost, but it should not be understood that this Court has held that such development authorities have absolute right to hike the cost of flats, initially announced as approximate or estimate cost for such flats. It is well known that persons belonging to Middle and Lower Income Groups, before registering themselves for such flats, have to take their financial capacity into consideration and in some case, it results into great hardship when the development authorities announce and estimated or approximate cost and deliver the same at twice or thrice of the said amount. The final cost should be proportionate to the approximate or estimated cost mentioned in the offers or agreements. With the high rate of inflation, escalation of the prices of construction, materials and labour charges, if the scheme is not ready within the time frame, then it is not possible to deliver the flats or houses in question at the cost so announced. It will be advisable that before offering the flats to the public such development authorities should fix the estimated cost of the flats taking into consideration the escalation of the cost during the period the scheme is to be completed. In the instant case, the estimated cost for the LIG flat was given out at Rs. 45,000/- But by the impugned communication, the appellant informed the respondents that the actual cost of the flat shall be Rs. 1,16,000/- i.e., the escalation is more than 100%. The High Court was justified in saying that in such circumstances, the Authority owed a duty to explain and to satisfy the Court, the reasons for such high escalation. We may add that this does not mean that the High Court in such disputes, while exercising the Writ jurisdiction, has to examine every detail of the construction

with reference to the cost incurred. The High Court has to be satisfied on the materials on record that the Authority has not acted in an arbitrary or erratic manner." (emphasis supplied).

21. The metamorphosis in the law relating to Article 14, in particular the added dimension of non-arbitrariness in State action, has now left its indelible imprint on the contractual field. In *SHRILEKHA VIDYARTHI*, Supreme Court observed:-

"It is not as if the requirements of Article 14 and contractual obligations are alien concepts, which cannot co-exist....With the diversification of State activity in a welfare State requiring the State discharge its wide ranging functions even through its several instrumentalities, which requires entering into contracts also, it would be unreal and not pragmatic, apart from being unjustified to exclude contractual matters from the sphere of State actions required to be non-arbitrary and justified on the touch stone of Article 14....We therefore find it difficult and unrealistic to exclude the State action in contractual matters, after the contract has been made, from the purview of judicial review to test its validity on the anvil of Article 14".

22. But the Supreme Court however proceeded indicate that the scope of interference in contractual matters is limited. While holding that wherever there is arbitrariness in State action, even in regard to matters relating to contract, such action can be struck down in exercise of powers under Article 226, the Supreme Court cautioned that the scope of judicial review in respect of disputes falling within the domain of contractual obligations may be more limited and in doubtful cases, the parties may be relegated to adjudication of their rights by resorting to remedies provided for adjudication of purely contractual disputes. The Supreme Court also observed:-

"In our opinion, it would be alien to the constitutional scheme to accept the argument of exclusion of Article 14 in contractual matters. The scope and permissible grounds of judicial review in such matters and the relief, which may be available are different matters, but that does not justify the view of its total exclusion."

In *INDORE DEVELOPMENT AUTHORITY'S* case, the Supreme Court made it clear that unless there is satisfactory material to show that the Authority has acted in an arbitrary and erratic manner, there cannot be any interference.

23. The decision in *KULCHHINDER SINGH, RADHAKRISHNA AGGARWAL, PREMJI BHAI and BAREILLY DEVELOPMENT AUTHORITY*, lay down the principle that there shall be no interference under Article 226, in matters relating to performance or breach of contract. The basis for this principle are: (i) Article 14 applies only where there is a public element or where the matter is governed by statute, (ii) A contract between two parties being in the realm of private law, any breach of contractual obligations will give rise to a liability enforceable under private law and therefore the parties should be relegated to civil courts; and (iii) Questions relating to performance and breach of contracts involve construction and scope

of contracts and taking of detailed oral and documentary evidence involving examination and cross-examination of witnesses in regard to a disputed question as to whether the impugned action amounted to breach or not; and in such matters normally, the High Court will not exercise its writ jurisdiction, which is summery in nature, but direct the aggrieved party to approach the Civil Court. The Principle stated in RADHAKRISHNA AGGARWAL's case is:-

"At the very threshold or at the time of entry into the filed of consideration of persons with whom the Government could contract at all, the State, no doubt, acts purely in its executive capacity and is bound by the obligations which dealings of the State with the individual citizens import into every transaction entered into in exercise of its constitutional powers. But, after the State or its agents have entered into the filed of ordinary contract, the relations are no longer governed by the constitutional provisions but by the legally valid contract which determines rights and obligations of the parties inter se. No question arises of violation of Article 14 or of other constitutional provision when the State or its agents, purporting to act within this filed, perform any act. In this sphere, they can only claim rights conferred upon them by contract and are bound by the terms of the contract only, unless some statute steps in and confers some special statutory powers or obligation on the State in the contractual filed which is apart from contract."

24. Long strides have since been taken in regard to the applicability of Article 14. Applicability of Article 14 is no longer restricted to only executive action of the State or actions having a public element. It is no longer possible to contend that Article 14 is applicable only at the threshold to the making of a contract in exercise of the executive power. Article 14 will strike wherever there is arbitrariness in State action, even if such action in the contractual filed.

25. There is, however, distinction between acts which are arbitrary under Article 14 and acts which amount to breach of contract, under law of contracts. Any action which is whimsical, capricious or uninformed by reason, or not based on relevant principles applicable alike to all similarly situate, or guided by any extraneous or irrelevant considerations would be arbitrary. Where there is any discernible principle emerging from the impugned act which satisfies the test of reasonableness, then the action is not arbitrary. A breach of contract, on the other hand, is a failure or refusal to perform, without any legal excuse, any promise or obligation which forms whole or part of a contract. An act or decision or an Authority amounting to breach of contract, need not necessarily be an arbitrary acts; an action informed by reason, can nevertheless be in breach of contractual terms. Per contra, an act which is arbitrary need not necessarily be an act in breach of contract.

26. Thus, where the cause of action is merely a breach of a contract, the remedy lies in a civil suit. But, where the aggrieved party alleges and makes out that an impugned action of the State is arbitrary, uninformed by reason, failing to disclose any discernible principle on which it is based, or unreasonable, and the

State thereafter failed to show that the decision is non-arbitrary and reasonable, the court will strike down such action as being violative of Article 14, in exercise of the powers under Article 226, irrespective of the fact that the impugned action is in regard to matter which is also governed by a contract. But, the scope of judicial review in such matters is limited. The court will only consider whether the impugned action is violative of Article 14 or not. The Court will not embark upon an enquiry to decide disputed questions on fact relating to performance or non-performance or breach of contract and consequence thereof. If the action is found to be in violation of Article 14, that action will be struck down. The Court, while dealing with such a matter under Article 226, will not grant either the relief of specific performance of contract, or damages or any other relief that may be granted in a dispute relating to contracts.

27. In this case, as noticed above, the entire matter is governed by statutory Rules. The allotment of Units and fixation of price is governed and regulated by statutory rules, not by any contract dehors the Rules. Any agreement or contract between BDA and allottees is also in pursuance of and in accordance with the Rules. The impugned notices issued by BDA, which are based on resolution dated 3.9.1994 increasing the price, are not challenged on the ground that BDA has committed breach of contract, but on the ground that the Resolution dated 3.9.1994 and the demands for increase in cost, are arbitrary and violative of Article 14. If the Petitioners are able to make out that the action is ex facie arbitrary or violative of Article 14, such action will have to be struck down, unless the Authority makes out that its decision is non-arbitrary and reasonable. In these circumstances, the contention of BDA that the Petitions are not maintainable and they should be rejected at the threshold without examining the matter on merits, is liable to be rejected.

RE: QUESTIONS II & III:

28. A brief reference to the Rules and details of the Scheme is necessary to deal with questions II & III.

28.1. Rule-3 of the Rules provides for offer of Buildings for allotment and provides that whenever the Authority proposes to construct buildings in pursuance of any Scheme, it may, subject to the general or specific orders of the Government, offer all or any of the Buildings for allotment to persons eligible for allotment of buildings under the Rules. Sub-rule (2) of Rule 3 provides that in the offer published in the newspapers, while giving the particulars of the proposed houses, BDA should specify the approximate cost of each house, which would be subject to escalation. Rule-4 deals with the eligibility of the applicants. Rule-5 deals with registration and registration fee. Rule-6 deals with applications for allotment. Rule-7 deals with the mode of allotment and provides that the cost of the building indicated in the offer shall be tentative and subject to escalation. Rule-8 deals with principles of allotment. Rule-9 deals with mode of payment of the cost of building, that is 25% of the notified cost of the Building as initial deposit, 25% within 90 days from the date of allotment, 25% within 90 days

thereafter and the balance of 25% together with any amount payable on account of escalation before executing the lease-cum-sale agreement.

28.2. Rule 10 stipulates the conditions of allotment. Clause (i) requires BDA to call upon the allottees to execute lease-cum-sale agreement (in Form III) after payment of the notified cost and the amount of escalation. Rule-11 deals with Delivery of possession and issue of Sale Deed. Clause (i) of Rule 11 lays down that the Allottee is entitled to delivery of possession only after construction of the Building, the observation of all formalities, payment of all dues and furnishing or execution of all documents as required in the allotment-cum-Demand letter. Clause(iii) of Rule 11 provides for execution of Sale Deed after the expiry of lease period of 10 years. Form No. III containing the format of Lease-cum-Sale Agreement does not contain any provision for further escalation after execution of the said Agreement. The scheme merely reiterates the aforesaid terms and conditions.

29. The said Rules and the scheme contemplates the following steps and procedure for allotment and sale of flats/houses:-

- a) An applicant gets his name registered with BDA by submitting Form No. 1 with the prescribed registration fee;
- b) BDA notifies the Scheme proposing construction of houses flats in specified areas, indicating the number of houses/flats to be constructed, the approximate cost of construction and other details and commences the work in accordance with the Scheme;
- c) The applicant applies for allotment giving the order of preference and pays 25% of the notified cost (excluding registration fees) as initial deposit;
- d) BDA makes allotment of Houses/Flats by selecting the allottees in the manner specified and intimates the allottees about the allotment and the mode of payment;
- e) The allottee pays another 25% of the notified price within 90 days from the date of allotment and 25% within 90 days thereafter (thus completing payment of 75% of the price);
- f) BDA completes the construction of Houses/Flats and determines the actual cost of the Houses/Flats and arrives at the escalation payable.
- g) BDA intimates the allottee that the house/Flat are completed and ready for occupation and calls upon the allottee to pay the last installment of 25% of the notified cost PLUS the amount due on account of escalation;
- h) The allottee pays the fourth and final installment of 25% of the notified cost PLUS the amount of escalation to BDA and thereafter enters into a lease-cum-sale agreement with BDA and registers such Agreement;
- i) On completion of construction, payment of all amounts due including

escalation by the Allottee to BDA and execution of lease-cum-sale agreement and observation of all formalities, BDA delivers the house/Flat to the allottee on as is where is condition and issues possession certificate confirming such delivery; and

j) On completion of lease period of ten years, the Deed of Sale is executed by BDA in favour of the allottee conveying the House/ Flat.

30. In so far as the escalation in cost is concerned, the Rules and the Scheme made it clear that:

a) the price notified in the Notification inviting applications for allotment is only a tentative and approximate cost and BDA has the power to increase the price after finalising the cost and the allottee is bound to pay the escalation price as determined by BDA.

b) The escalation in price should be determined by BDA on completion of the building and only on payment of such escalated price, the lease-cum-sale agreement should be executed and possession of the Units should be delivered to the allottee.

c) The escalation in notified price is contemplated only once, that is, the increase is to be determined by the BDA on completion of the Units before execution of the lease-cum-sale Agreements. This presupposes that if for any reason the increase in price determined by BDA prior to the execution of lease-cum-sale agreement and delivery of possession, is not final, then BDA should specifically reserve the right for further escalation before delivery of possession. The above position is in respect of applicants to whom allotments were made at initially notified tentative prices, before the completion of the buildings. In respect of allotments made either at revised cost or/and after completion of construction, suitable changes had to be made in the procedure.

31. The original tentative prices fixed in the year 1982 were increased tentatively on 24.6.1985 (first Revised price). There was a second revision in 1987, as is evident from the BDA notification dated 22.12.1987. A third revision was made by BDA in the year 1989 as per Resolution dated 13.11.1989 (Note : Copy of the Resolution produced by BDA bears the date as 13.11.1992, but the Learned Counsel for BDA stated that the correct date is 13.11.1989). The fourth revision was made by Resolution dated 3.9.1994. The initial tentative prices, the first revised tentative prices effected on 24.6.1985, the second revised prices notified on 22.12.1987, the third revised prices effected on 13.11.1989 and the fourth revised prices effected on 3.9.1994 are given in columns 1, 2, 3, 4 & 5 of the Table in Para 5 above.

32. In the case of 43 Petitioners listed in Schedule-I, the allotments were at the initial tentative prices mentioned in the Scheme (Column 1 prices). On 24.6.1985, BDA passed a resolution tentatively increasing the prices taking note of escalation in the cost of cement and steel, escalation paid to the contractor,

cost of providing water supply, underground drainage and other development charges, as also increase in land cost. The letters communicating the increase in prices, in pursuance of Resolution dated 24.6.1985 did not reserve any right to further increase the price, but merely stated that the prices had to be revised on account of escalation in essential components and called upon the allottees to pay the increased price. The said 43 petitioners paid such increased prices. (Column 2 prices)

32.1 The Agenda Note (subject No. 666) and BDA Resolution dated 24.6.1985 however show that the revision in prices made on 24.6.1985 was also tentative, thereby implying that the prices were not finally determined. Subsequently, the construction was completed. BDA did not follow the procedure prescribed by the Rules (that is determination of final price and execution of lease-cum-sale agreement before delivering possession) as it was not able to finalise the price, on account of pendency of the claim for escalation by the contractor and other factors. In these circumstances, BDA provisionally delivered possession of the Units to the allottees, pending decision on final price. Only where the final price is fixed and the same is paid and thereafter the possession is delivered to the allottees, on execution of the lease-cum-sale agreement, the price would be final; but where the final cost was not fixed and the possession was delivered only provisionally, without following the prescribed procedure, the price received continues to be tentative and it has the right to further increase the price and recover it from the allottees.

32.2 Unless the Petitioners prove that the final prices were fixed and that they paid such final prices and thereafter entered into lease-cum-sale agreements with BDA and obtained possession as per Rules, they cannot contend that the provisional price paid by them is the final price and they are not liable to pay any further increase in price. The amount paid in pursuance of Resolution dated 24.6.1985 has to be considered as a tentative and provisional price and BDA is therefore entitled to demand a final escalation. The final escalation claimed should be on the basis of actual cost and cannot be arbitrary.

33. The 16 petitioners listed in Schedule II were allotted Units at the revised tentative prices fixed by BDA as per Resolution dated 24.6.1985 (Column 2 prices). The Petitioners listed in Sl.Nos. 1 to 23 in Schedule III are stated to be Journalists to whom allotments were made at the revised tentative prices fixed on 24.6.1985 (Column 2 prices), in pursuance of the Government Order dated 4.8.1987. The letters of allotment issued to the said Petitioners did not specify that the allotment prices were tentative, nor reserve any liberty to BDA to increase the prices. But, the Resolution dated 24.6.1985 makes it clear that revision in prices was only tentative. The Units allotted to these petitioners are constructed under a Scheme formulated under the Rules and the Rules apply to all allotments made under the said scheme. The Rules and the Scheme reserve a right in BDA to increase the price, where the offer price is tentative. These Petitioners have paid the allotment price (Column 2 prices) which is a tentative

price and taken possession of their Units. They have not paid any escalation. Hence, even though the prices at which the allotments were made to these 39 petitioners (Sl.No.1 to 16 in Schedule II and Sl.No. 1 to 23 in Schedule III) were at prices higher than the tentative prices originally fixed, as such allotment prices were also tentative prices, BDA is entitled to claim escalation on the basis of actuals.

34. The 20 petitioners listed in Schedule IV have been allotted houses after completion of construction, at the second revised prices specified in the Notification dated 22.12.1987 (Column 3 prices). They paid the allotment price and took possession. The Notification dated 22.12.1987 (Annexure "H") clearly stated that the prices mentioned are provisional. Thus, under the Rules, BDA has the right to increase the price on the basis of actuals for the reasons stated in Para 33, even though the allotments were at prices higher than the two sets of earlier allotment prices.

35. The position is however different in regard to the 18 petitioners listed in Schedule-V and the two Petitioners listed as Sl.Nos. 24 & 25 in Schedule III, who were allotted Units long after completion of construction. The Petitioners listed in Schedule V were allotted Units as per third revised prices (Column 4 prices) and Petitioners listed as Sl.No. 24 & 25 in Schedule III were allotted Units at a price of Rs. 2,50,000/-. The allotments to all these 20 Petitioners were made at fixed prices without reserving any liberty to further increase the price. The possession has been delivered after receiving the full price. Provision for increasing the price contained in the Rules and the Scheme is obviously inapplicable to these Petitioners, as the allotment to these Petitioners were not at the original tentative price or revised tentative prices but at fixed prices determined in 1989 as allotment prices. Having regard to the fact that allotments were made to these Petitioners several years after the Scheme was framed and long after the completion of construction, at fixed prices which were far higher than the original prices, without reserving any right to increase in prices in their cases. The prices at which the allotments have been made to these Petitioners are more than double the original tentative prices mentioned in the Scheme. The Rules do not permit escalation where the allotment is made at fixed prices and not at tentative prices. In the absence of express reservation of power to increase the prices and in the absence of any statutory provision or contract enabling BDA to increase the prices, BDA cannot increase the prices arbitrarily several years after the allotment, payment of price and delivery of possession.

36. The escalation in price is therefore permissible only in the case of Petitioners shown as 1 to 43 in Schedule-I, (1) to (16) in Schedule-II, (1) to (23) in Schedule III and 1 to 20 in Schedule IV. No escalation is permissible in the case of Petitioners listed as Sl.No. 24 and 25 in Schedule III and Sl.No. 1 to 18 in Schedule V. But the question whether BDA is in fact entitled to increase in prices as determined by its Resolution dated 3.9.1994 is dealt separately.

Re: Question No. IV :

37. Petitioners listed in Schedule-I contend that they have paid the initial tentative prices as also the increased prices demanded as per Resolution dated 24.6.1985 and therefore they are not liable to pay any further escalation. The petitioners listed in Schedule-II and III (except 24 and 25) contend that the allotments to them have been made at increased prices determined on 24.6.1985 (first revised prices) and not at initial tentative price and therefore they are not liable to pay any escalation. The Petitioners listed in Schedule III also contend that they were allotted Units as per Government Order dated 4.8.1987 and therefore their allotment should be treated as having been made at fixed prices and on that ground also, they are not liable to pay any increase in prices. The petitioners listed in Schedule IV contend that the allotments to them have been made at increased prices notified on 22.12.1987 (second revised prices) and therefore they are not liable to pay any escalation. These petitioners contend that the prices paid by them is much more than the actual cost incurred by BDA and BDA is not therefore entitled to further increase. They also contend that the final price fixed and demanded even if due, is exorbitant, excessive and arbitrary.

38. All the petitioners have paid prices, which are more than the tentative prices notified in the scheme. BDA has demanded increases on the basis of the "final cost" nearly 8 to 9 years after completion and delivery of the Units. BDA has not informed the Petitioners, the details or calculations for the final costs determined on 3.9.1994. The amount demanded is not marginal or small. The final cost demanded is 250% of the original tentative price and the increases in the prices now demanded are as much as or more than 150% over and above the initial tentative prices. The Petitioners belong to middle and low income groups. These circumstances are sufficient to hold that the increases demanded as per Resolution dated 3.9.1994 is prima facie unreasonable and arbitrary. Therefore, BDA has to satisfy the Court that its action in demanding increased prices as per its Resolution dated 3.9.1994 is reasonable and not arbitrary. 39. The scope of judicial review in such matters is well defined. A brief reference to some of the decisions laying down the principles in this behalf, will be relevant.

39.1 In PREMJI" BHAI"s case (supra), the Supreme Court, while rejecting a contention that all allottees in the same income group should be charged the same price for the Flats, even though the flats may be in different areas and constructed during different periods, observed as follows :

"What are price determinants? - Price of land, building material, labour charges, cost of transport, quality and availability of land, supervision and construction charges are variable factors which enter into price fixation. This cost varies time-wise, place-wise, availability-wise. All these uncertain factors cannot be overlooked for the purpose of classification. Therefore, it is not possible to hold that allottees of flats in MIG schemes at any place and executed at any time will form one class for the purpose of pricing and policy. The only valid basis for classification would be income-wise, area-wise, time-wise, scheme-wise,

meaning, all flats constructed at or about same time, in same area, in one project for a particular income group, will form a class and there is no discrimination amongst them."

39.2 In the case of *INDORE DEVELOPMENT AUTHORITY* (supra), the Supreme Court held that though the High Court has to be satisfied on the materials on record that the Authority has not acted in an arbitrary or erratic manner in increasing the cost of flats, it need not however examine every detail of construction with reference to the cost incurred. The Supreme Court also took note of the following aspects :

"8. During the last decade, it has become a common feature not only with the private builders, but with the builders, including Development Authorities which can be held to be a State within the meaning of Article 12 of the Constitution : (1) to escalate the price of the flats booked (2) not to deliver such flats according to the schedule mentioned in the advertisement inviting applications. In this process certainly the victims are the citizens who have booked such flats for shelter. The people belonging to the Lower Income Group, having estimated the total amount, which they may have to pay for the flats in question are on many occasions put to great strain and stress because of the revision and escalation of the cost of such flats. But the development authorities who construct such flats have their own story. According to them, under the existing circumstances it is very difficult, if not impossible, to keep to the time schedule because of several intervening factors, including litigations pending in courts from time to time. Then the escalating price of the construction materials, labour charges, etc. are the other contributory factors."

39.3 In *MANCHAI AH v. BDA*, W.A. 553/96 DD10.1.97 a Division Bench of this Court held :

".... While exercising power under Article 226 of the Constitution, the High Court does not sit as the Court of appeal and cannot substitute its opinion for opinion of the concerned authorities. Exercise of jurisdiction under Article 226 of the Constitution is limited to the extent of only determining the fairness and reasonableness of the action taken by the authority. The High Court is not expected to examine the disputed facts and would not normally go into the complicated process of computation of the sital value. The court would decline to interfere by the use of magnifying glasses to look or ascertain the action of the respondent in determining the prices. If the process of fixation of the prices is not unfair, unreasonable or arbitrary, the Court would not interfere. But where the position is otherwise, appropriate directions shall be issued."

39.4 The Court's examination of the impugned increased price is to find out whether there is any arbitrariness in fixing the final price and not to work out or substitute a different price.

40. Before such examination, it is necessary to note how and in what manner the prices were increased. The actual price increases are given in the Table at Para 5.

First increase (Column 2 Prices) :

40.1 The Agenda Note No. 666 and the Resolution dated 24.6.1985 show the prices were increased in regard to the eight types of flats/houses by 45% to 70% taking into consideration : (a) the rates at which the work has been entrusted to the contractor and escalations payable to contractor; (b) Increase in price of steel and cement; and (c) Increase in sital value on account of increase in cost of land and development charges for providing water supply, underground drainage, etc., and for formation of layout. It is significant to note that for calculating the initial tentative cost, the land cost and development charges were taken as Rs. 25/- per Sq.M. (that is, Rs. 1800/- per acre or Rs. 4.50 per Sq.M. for land and Rs. 20/- per Sq.M. as development charges). For calculating the revised tentative cost in 1985, the land cost and development charges were merged and increased by ten times, that is Rs. 250/- per Sq.M.

Second Increase (Column 3 prices) :

40.2 In regard to the increase in prices as per Notification dated 22.12.1987 (Annexure "H"), no material is placed.

Third Increase (Column 4 Prices) :

40.3 The Resolution dated 13.11.1989 (A copy of which is produced by BDA as Document No. 2 with Memo dated 25.3.1997, bearing the date as 13.11.1992 due to a typographical error) relates to allotment of houses/flats under the Scheme against 1989-90 notification. It notes that 108 flats/houses were available for allotment and there were only 45 eligible applicants. It was resolved to allot 45 flats to them and re-advertise the remaining vacant Units after getting the revised costing approved by its finance Member. It was further resolved as follows :

- (a) Economically Weaker Section Houses to be disposed off at actual cost;
- (b) to increase the cost of Building by 10% and the cost of land by 50%, in case of LIG Houses;
- (c) to increase the cost of Building by 20% and the cost of land by 75%, in case of MIG Houses;
- (d) to increase the cost of Building by 30% and to increase the cost of land by 100% in case of HIG houses.

The Resolution is clear that the addition to be made towards land and building cost and consequential revised prices were to apply only to Units to be allotted and disposed off after 13.11.1989. The reference to actual cost with reference to EWS Houses and percentage increases in the actual cost in other cases, shows that such increases were intended to make good the general trend of increase in prices, The said increases were not made applicable to earlier allotments (allotments made prior to 13.11.1989) obviously as the increases were not on account of increase in actual cost, but on account of increase in market prices.

Fourth Increase (Column 5 prices, impugned in these Petitions).

40.4 A Note (Subject No. 239/94) was placed before the Authority for fixing the final prices in regard to the Units at Nandini Layout. The said Note (Annexure R1) is extracted below in entirety :

"Sub : Construction of Multi storied Flats/Row Houses MIG, LIG, at Nandini Layouts under S.F.H.S. by the B.D.A.

* * *

The BDA notified for the allotment under S.F.H.S. Scheme for 1,406 M.S. Flat/Houses of various categories. These SFHS Houses are constructed in 3 floors each floor is having 4 Houses, So each Block will have $3 \times 4 = 12$.

1. M.I.G. (M.S. Flats) - $50 \times 12 = 600$ Nos. at Rs. 3.00 lakhs. 2. L.I.G. (M.S. Flats) - $59 \times 12 = 708$ Nos. at Rs. 1.355 lakhs. 3. M.I.G. (Row Houses) - 58 Nos. at Rs. Three lakhs 4. L.I.G. (Row Houses) - 40 Nos. at Rs. 1.52 lakhs

2. Tenders were called for construction of these SFHS Houses for Rs. 921 lakhs, these works were entrusted to M/s Rashmi Construction Private Ltd., at 37% above the S.R. of 1982-83. Amount of entrustment works out to Rs. 1261 lakhs. Work order were issued and requested the Contractor to commence the work in May 1983, as a package deal.

3. To facilitate the contractor to commence work a mobilisation advance was given to the contractor, to the tune of Rs. 138 lakhs in 3 instalments. To push through the works as per the agreement, escalation clause was introduced if there is a delay in completion of the works in the stipulated time. The escalation was to be given as per agreed formula on the rising prices of labour and materials. The total escalation including the pending payments is about Rs. 80 lakhs.

4. While executing the construction of these Buildings, it was found to be necessary certain items of work to be carried out to complete these works. The following items of works which are not in the original estimate and the tender that is extra item rate list are executed.

1. Hand railings for the stair-case

2. Grill at the sit-out

3. Inspection Chamber covers

4. Elevated Water Tank

5. Further there is an increase in the land acquisition cost also i.e., the provision made in the original Estimate is meagre when compared to the land acquisition paid.

6. During formation of the Layout, the amount was paid for the K.E.B.,

B.W.S.S.B., which are also more when compared to the sanctioned Estimate.

7. Further the B.D.A. has also incurred extra expenditure in issuing Cement and Steel, at agreed rates. The total expenditure of Rs. 128.41 lakhs was incurred in this regard.

8. As this Nandini S.F.H.S. Housing Complex is situated in rolling terrain and as it is designed in a circular system, the cost of Layout formation of roads, drainage, sewerage, etc., has also increased substantially.

9. Many allottees have approached Consumer Forums and Courts regarding escalated cost of these S.F.H.S. Buildings. However, the allottees have failed to obtain favourable orders from Courts in this regard of escalations.

10. Owing to the above mentioned causes of increase in the cost of land acquisition, formation of Layouts, K.E.B., B.W.S.S.B., etc., the cost of these Multi-storied Flats has increased as enclosed in the statement below. Even this escalated cost of the buildings charged by the B.D.A. i.e. 3.75 lakhs for a Medium Income Group Ground Floor Flat is substantially less than the Market Value of similar Flat.

I. M.I.G. - M.S. Flat : Ground Floor - Rs. 3.75 lakhs First Floor - Rs. 3,62,500/- Second Floor - Rs. 3,52,500/-

II. LIG - M.S. Flat : Ground Floor - Rs. 1,66,500/- First Floor - Rs. 1,65,000/- Second Floor - Rs. 1,64,000/-

III. LI.G. - Row Houses - Rs. 1,52,500/-

IV. MIG - Row Houses Rs. 3,59,000/-

Sd/- Sd/- Town Planner Member Executive Engineer Sd/- (S.F.H.S.) Finance Member Engineer Officer-II Sd/- Engineer Member." Commissioner

Having considered the said Note, the Authority passed a resolution on 3.9.1994 fixing the final cost of Units as proposed in the said note. BDA has produced the four final costing sheets signed by the Executive Engineer (S.F.H.S. Division), relating to MIG Flats, MIG Row Houses, LIG Flats and LIG Row Houses as Annexure R2. The impugned notices claiming increase in prices were issued to Petitioners in December 1995/January 1996 on the basis of the final prices fixed on 3.9.1994.

41. Let me now consider whether the increased final prices fixed by BDA on 3.9.1994, are valid. An examination of the four calculation sheets shows that the costing, to say the least, is arbitrary, absurd, discriminatory and unreasonable.

42. Illustratively, I will deal with the costing of MIG Flats. The following is the abstract of the final cost relating to 600 MIG Flats (50 Blocks with ground, first and second floors, each block consisting of 12 Units):

"Final cost of the MIG MS Flats (12 Tenements) constructed by M/s Rashmi

Construction Private Ltd., Nandini Layout, under SFHS BDA Bangalore.

1. Total amount as per Final bill prepared including extra Rs. 6,65,00,000/- item rate list

2. Total escalation of Rs. 55,00,000/- paid for all (MIG, LIG, LR. MR) @ 70% Rs. 38,00,000/-

3. Electrical Works like KEB Deposits, internal and external wiring, panel board, etc. Rs. 1,05,50,000/-

4. a) BWSSB Deposits - Rs. 1,83,19,346/- @ 61% MIG, LIG, LR, MR = proportionating as per original cost Rs. 1,11,59,653/-

b) Water supply materials @ Rs. 27- lakhs for each unit i.e. 50 blocks Units Rs. 1,00,00,000/-

5)	Add:	Developmental	charges	@	76%	Rs.	3,77,91,135/-
			(A)	Total		Rs.	13,97,50,788/-

6. Land Cost : 351 + 263.25 x 614.257m² (Add 75% extra land cost as per Board resolution authority No. 1700 dated 13.11.1992) copy enclosed. 25m x 25m = 625m² x 614.25 x 50 blocks 1,91,95,313/-

7. Add 20% for the building as per Board Resolution(A) 2,79,50,158/-

8. Establishment tools and plants charges at 17.5% of Item No. (A) 2,44,56,388/-

9. Add difference in cost of cement and steel @ 40% 51,36,476/-

10. Add : Escalation charges to be paid 9,00,000/-

11. Add : Rs. 4107- per unit as water meter and 374" bore connection charges i.e. 600 units x 410 per unit 2,46,000/-

12.	Miscellaneous	and	rounding	off	L.S.	3,64,877/-
			Total		Rs.	21,80,00,000/-

----- Total number of Tenements : 21,80,00,0007-
= ----- = 3,63,333,33 600 units for each tenement say 3,64,000/-
or cost of each Tenement Ground Floor - Rs. 3,75,000 x 200 First Floor - Rs. 3,62,500 x 200 Second Floor - Rs. 3,52,500 x 200"

42.1 Item (7) in the cost sheet refers to addition of Rs. 2,79,50,158/- as 20% of cost of Building (taken at Rs. 13,97,50,788) as per Board Resolution dated 13.11.1989. The total final bill amount of contractor including the cost of extra items is shown as Item(1). The cost of escalation is added as Items (2) & (10). The extra cost of cement and steel is added as Item (7). The Cost of services (electricity and water) is included as Items (3), (4) & (11). The establishment and other charges are shown as Item (8). there is no basis for adding Rs.

2,79,50,158/-. The Resolution dated 13.11.1989 (referred to in Para 40.3. above) makes it clear that it applies only to allotments to be made after 13.11.1989 and not to allotments already made. The said resolution directs addition of 20% towards building cost and 75% towards land cost in respect of allotments to be made after 13.11.1989 not because of any increase in actual cost, but because BDA did not want the applicants who applied for allotment in 1989-90 to have the benefit of the earlier prices. The addition of 20% and 75% in building and land cost is only a premium to be paid by new allottees and has nothing to do with actual cost of construction or land. BDA calculated in the year 1994, the final cost of Units constructed between 1982-87 and delivered in the years 1988-89, after receiving the allotment price. While so doing, it can only take the actual cost incurred and cannot add 20% which was the addition proposed for future allotments in view of general rise in prices. Hence adding of 20% to the Building cost is arbitrary and unauthorised. It is liable to be deleted.

42.2. Let me now turn to land cost of Rs. 1,91,95,313/- (Item 6). In this context, the following three sets of figures are relevant: (a) while calculating the initial tentative price, BDA took Rs. 18,000/- per acre as land cost (which works out to about Rs. 4/50 per Sq.M.) and Rs. 20/- per Sq.M. as Development charges in all Rs. 24/50 per Sq.m. being land cost and development charges, (b) While calculating the revised price on 24.6.1985, the actual site cost and development charges including water supply, underground drainage etc., was merged and referred to as "land cost" which was fixed as Rs. 250/- per Sq.M. instead of Rs. 24/50 per Sq.M. (c) In the final cost sheet relating to 3.9.1994 prices, the land cost is shown "as Rs. 614/25 per Sq.M. (as against Rs. 250/- per Sq.M. taken as land cost while working the revised cost on 24.6.1985). This is arrived at by showing Rs. 351/- per sq.M. as land cost and by adding 75% of Rs. 351/- that is, Rs. 263/25, as per resolution dated 13.11.1989. In para 42.1 above, it is already held that the additions of percentage towards Building cost/land cost, directed by resolution dated 13.11.1989, do not apply to earlier allotments. The increase in land cost by adding 75% is not on account of actual increase in land cost. BDA has periodically increased the land value to keep up with the prevalent market value. It is not the case of BDA that after determination of Rs. 250/- per Sq.M. as the cost of land and development charges in 1985, the acquisition cost of land or cost of development charges went up. BDA cannot arbitrarily increase the cost of land and development charges from Rs. 250/- per Sq.M. to Rs. 614/25 per Sq.M. In fact, for the very same land, the value has been taken as Rs. 301/- per Sq.M. instead of Rs. 351/- in the cost sheet relating to LIG Homes. In regard to land in the very same layout while working the final cost of certain other Blocks constructed and allotted subsequently, BDA has taken the cost as Rs. 301/- (as is evident from the Judgment dated 13.2.1997 in W.A. 859-896/1995 filed by subsequent allottees). Hence the land cost cannot exceed Rs. 250/- per Sq.M. or at all events Rs. 301/- per Sq.M. The cost of land at Rs. 301/- per Sq.M. will be Rs. 94,06,250/-. Thus, the sum of Rs. 1,91,95,313/- included as land cost is excessive by Rs. 97,89,063/-.

42.3. The next objectionable item is inclusion of Rs. 3,77,91,135/- as development charges. BDA has submitted a note dated 26.3.1997 prepared by the Finance Member wherein inclusion of this amount is explained as follows:-

"This item represents the proportionate expenditure on the formation of the layout including formation of roads, construction of culverts, bridges, storm water drains, retaining walls, etc. The total expenditure on such works in the Nandini Layout as a whole amounted to Rs. 601/- lakhs. Out of this, Rs. 377.91 lakhs has been apportioned as appurtenant to the MIG Flats. The balance amount has been apportioned among the LIG Flats, MIG Row Houses and LIG Row Houses."

But the development charges has already been included in the land cost. In the calculation sheet relating to price increase made on 24.6.1985, it is made clear that the "SITAL COST" (now termed as "Land Cost") includes not only the cost of land, but also development charges. The relevant portion of Agenda Note No. 666 relating to the Resolution dated 24.6.1985 is extracted below:-

"Sital Cost of Buildings:

The apportionment of sital cost to individual tenements in the notified cost of houses works out to about. Rs. 20/- per Sq.M. which is very meager.

The actual sital cost has now been worked out based on the detailed estimates prepared for formation of the layout and the actual cost of estimates for other services like water supply, underground drainage etc., as furnished by BWSSB and the same works out to about Rs. 250/- per Sq.M."

In view of the above, the sital cost which was originally taken as Rs. 4/50 for land, Rs. 20/- for development charges (total:Rs.24/50) was increased to Rs. 250/- per Sq.M. The sital cost including development charges which was taken as Rs. 250/- per Sq.m. was again increased to Rs. 301/- per Sq.M. subsequently. BDA cannot claim the Development charges twice-once as a part of sital value or land cost and again separately as development charges. As the component of "land cost" includes development charges, BDA cannot once again add it. Hence the addition of Rs. 377,91,135/- has to be deleted in entirety, as being arbitrary.

There is yet another fallacy in regard to inclusion of development charges, even assuming that BDA can claim Development Charges separately. In the Note dated 26.3.1997, it is stated that the total expenditure for formation of Nandini Layout is Rs. 601 Lakhs and Rs. 3,77,91,135/- has been apportioned towards MIG Flats (600. Flats) and the balance has been apportioned to MIG Row Houses (Rs. 47,00,000/-) for 58 Houses, LIG Flats (Rs.1,75,00,000/- for 708 Flats) and LIG Row Houses (Rs. 1,00,000/- for 40 Houses). This is also borne out by the four final cost sheets produced as Annexure R2. The entire cost of Rs. 601 lakhs has therefore been distributed among 1406 Units referred to in Annexure R2. But, the total houses/ flats proposed in Nandini Layout is 4992. It is ununderstandable how the expenditure for the entire layout could be distributed

to only a part of the layout consisting of 1406 Units, even if addition of development charges is permitted.

42.4. The next objectionable item is inclusion of Rs. 2,44,56,388/ as Establishment, tools and plant charges (that is, 171/2% of Building cost taken as Rs. 13,97,50,788/-). The inclusion of this item is explained as follows in the Note dated 26.3.1997 of BDA:-

"The 171/2% added for the purpose of establishment etc, is to cover the overhead expenditures of BDA in the implementation of the scheme. The actual overhead expenses of BDA in the implementation of the various schemes could be even more than 171/2%. However, it is limited to 171/2% taking the PWD rate as the basis. It may be noted that the Authority can have the discretion to add a higher percentage for overhead expenses, if considered necessary."

It is stated that 171/2% has been arrived at on the basis of Karnataka Public Works Accounts code which contains the Rules for transactions relating to public works entrusted to PWD for execution by other departments. According to BDA's Memo dated 25.3.1997, 171/2% is made up of establishment charges (131/2%), Tools and Plant charges (1.5%), Audit and Account Charges (1%), Pensionary charges (1%), Preparation & scrutiny charges (1/2%). The applicability of the said charges, which Public Works Department may claim under its Rules, in regard to construction by BDA under the Self-financing Scheme, that too at 171/2%, is open to question. But let us assume that the said percentage is payable. Even then, the said percentage can be claimed only on the cost of construction (Items 1, 2 & 10 of cost sheet aggregating to Rs. 7,12,00,000/-) and not on Rs. 13,97,50,788/-. It is significant to note that in other Blocks in Nandini Layout (considered in W.A.859-896/1995), ETP charges has been claimed only on the cost of Building and not on other items. If so, the amount that could be added in this behalf would be only Rs. 1,24,60,000/- and not Rs. 2,44,56,388/- (that is 17.5% of Rs. 7,12,00,000/-). The claim is excessive by Rs. 1,19,96,388/-).

42.5 It would therefore be seen that the total cost arrived at in the cost sheet has to be reduced by Rs. 8,75,26,744/- (which is the aggregate of the arbitrary additions of Rs. 2,79,50,158/- + Rs. 9,789,063/- + Rs. 3,77,91,135/- + Rs. 1,19,96,388/-). Consequently, the cost of each MIG Flat is reduced by about Rs. 1,46,000/- (rounded off). If the said excess claim is deleted, the Allottees will be liable to pay hardly any amount. The final cost has been increased enormously not on account of the actual cost going up beyond the price determined on 24.6.1985, but because of the addition of several unauthorised and imaginary amounts in an arbitrary manner.

43. In regard to the final cost sheets for MIG Row Houses, LIG Flats and LIG Row Houses also, similar arbitrary additions have been made on account of (a) percentage of Building cost and land value as per resolution dated 13.11.1989; (b) Development charges and (c) ETP charges. Only the quantum varies. It is not

necessary to extract the cost statements or give details of the arbitrary additions except to say that they are similar to the arbitrary additions pointed out in the case of MIG Flats. If such arbitrary additions are deleted, there will be virtually nothing due even in the case of allottees of MIG Row Houses, LIG Flats and LIG Row Houses.

44. Certain other anomalies also require to be noticed.

44.1. Water supply materials. This is shown as Item 4(b) in the four final cost statements. Instead of including the actual cost of water supply materials, BDA has added lumpsum amounts, without any uniform basis. The amount added as cost of water supply materials is Rs. 16,666/- per MIG Flat, Rs. 50,000/- per MIG Row House, Rs. 8,333/- per LIG Flat and Rs. 5,000/- per LIG Row House. The difference is disproportionate as to lead to a conclusion that the amounts have been determined arbitrarily. For example, the cost of water supply materials shown as Rs. 50,000/- for each MIG Row House, is 1/4 of the total cost of the Row House itself. Further, while the cost of water supply materials is about 15% of the cost of civil works in other cases, the cost of such materials in the case of MIG Row Houses is more than the cost of civil works.

44.2. B.W.S.S.B. Deposit : It is stated that Rs. 1,83,19,346/- has been paid as deposit to BWSSB. The said amount has been distributed among the 1406 Flats/Houses in the four final cost sheets. It is not made clear as to how it could be distributed only to 1406 Unit holders, when the payment relates to the entire layout with 4992 proposed Units.

44.3. Claim for Lumpsum Amounts : It is seen that in regard to several items, that is (i) Electrical works in all four types of constructions and (ii) Difference in cost of cement and steel in regard to LIG Row Houses, lump sums have been added instead of taking note of actual cost.

44.4. If these anomalies are rectified, the cost of Units will be reduced further, t have merely examined BDA's right to add certain amounts (Items 5,6,7 and 8). I have deliberately restrained myself from examine the correctness of the several amounts claimed in the cost sheet.

45. The construction of Houses/Flats is undertaken by BDA to solve the housing problems of citizens of Bangalore. The construction by BDA is not by way of a commercial venture, but in discharge of a statutory duty to solve and ease the problems of shelter. The allottees are persons belonging to lower and middle income groups trying to achieve their life time ambition of having a roof over their heads. Housing, in their cases, is an absolute necessity and not a luxury. It is unfortunate that instead of dealing with such allottees with the fairness expected from it, BDA has tried to use the sleight of hand method in arriving at the final cost. With anguish and reluctance, I am constrained to observe that BDA, a Statutory Body entrusted with the task of fulfilling the aspirations of people in regard to shelter, has tried to short-change the allottees by making an excessive claim, that too nearly a decade after the first increase, under the guise

of fixing the final cost. The right to seek escalation by fixing final cost does not entitle BDA to claim anything more than the actual cost, much less entitle BDA to claim market prices. That BDA was obsessed with the market price prevailing in 1994 rather than the actual cost, is evident from the use of the following words in the Agenda Note prepared by BDA (Annexure R1) in support of the final cost worked out:

"Even this escalated cost of the Building charged by BDA i.e., Rs. 3,75,000/- for MIG Ground Floor Flat is substantially less than the market value of similar flat."

The allottees are not concerned with the market price prevailing in 1989 or in 1994. They obtained allotment under the Scheme and paid the allotment price. Where escalation is permissible, the allottees are liable to pay the escalation based on actual cost and BDA is not entitled to introduce the elements of market price by adding percentages over actual cost or by otherwise bloating the cost. Hence the increased final prices fixed on 3.9.1994 are liable to be struck down as arbitrary.

46. The Petitioners are not entitled to the second relief. Under the Scheme, BDA constructs Houses/Flats in its land and allots the Flats/Houses to needy applicants and on fulfillment of conditions, conveys the Flats with undivided share in the land or the Houses and corresponding land to the allottees. The scheme does not contemplate allotment and conveyance of only the land to the allottees nor contemplate entrustment of construction work by the allottee to BDA. The relationship between BDA and the allottee is Lessor and Lessee and later Vendor and Vendee; there is no relationship of contractor and owner. Hence it is not possible to direct registration of lease-cum-sale agreement only in regard to sital value.

47. In view of the above, the Petitions are allowed in part as follows:-

(a) Annexure "1" series (1 to 122) which are demand notices dated 28.12.1995, 30.12.1995 and 5.1.1996 issued by BDA to Petitioners demanding increased price on the basis of Resolution No. 239/1994 dated 3.9.1994 are quashed.

(b) The Second Respondent (BDA) is at liberty to re-work and fix the final price based on actual cost, in accordance with law, keeping in view the observations made above, if it still feels that it is entitled to any increase over and above the prices collected from the Petitioners. This liberty is reserved only in respect of Petitioners listed in Schedules I, II, III (1 to 23) and IV. Such demand, if any, shall be made within four months from the date of receipt of this order.

(c) BDA shall not be entitled to claim or recover any escalation from the Petitioners listed in Schedule-III (Sl.Nos. 24 & 25) and V.

(d) Parties to bear their respective costs.