
(2005) 05 AHC CK 0073

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 40812 of 2005

Vishal Properties (P) Ltd.

APPELLANT

Vs

The State of U.P. and Others

RESPONDENT

Date of Decision : 19-05-2005

Acts Referred:

Constitution of India, 1950 — Article 14, 226

Uttar Pradesh Industrial Area Development Act, 1976 — Section 10, 10(1), 3, 6, 8

Citation : (2005) 6 AWC 5643 : (2005) 3 ESC 1690

Hon'ble Judges : Dilip Gupta, J; B.S. Chauhan, J

Bench : Division Bench

Advocate : L.P. Singh and V.B. Shukla, for the Appellant; Sudhir Agarwal, Addl. A.G. and Anurag Khanna and S.C., for the Respondent

Final Decision : Dismissed

Judgement

1. This Writ Petition has been filed for quashing the orders dated 27th October, 2004 and 31st March, 2005 issued by the Officers of the New Okhla Industrial Development Authority (hereinafter referred to as "NOIDA") and for a direction upon the respondents not to interfere with the possession of the petitioner in Plot No. P-1, Sector 18, NOIDA.

2. The petitioner company claims that it is registered under the provisions of the Companies Act, 1956 and the main objectives are to carry on the business of Builders, Colonizers, Construction Engineers, Estate Agents and to deal in construction, sale and purchase of all types of commercial and residential buildings and flats. In furtherance of its objectives, the petitioner participated in a public auction held by NOIDA on 22nd March, 1990 and by a letter dated 9th April, 1990, the petitioner was intimated that Plot No. P-I, Sector, 18, NOIDA had been allotted to it on leasehold basis for a period of 90 years. In the said letter it was specifically stated that the allotment of the said plot was as per the terms and conditions contained in the brochure enclosed with the application form. The relevant terms and conditions contained in the brochure which are the subject

matter of this petition are reproduced below:-

6. "Approval of drawings

(a) The successful bidder will start the construction after obtaining due approval of building plans by competent authority.

(b) The architectural control drawings for the plot shall be exhibited at the time of auction. The Successful bidder shall have to purchase the architectural control drawings from New Okhla Industrial Development Authority on payment. Thereafter the allottee shall get the plans prepared from the architects on the basis of the architectural control drawings received from New Okhla Industrial Development Authority and obtain sanction of the same from New Okhla Industrial Development Authority as per Building Regulations and Directions and procedures laid down by the Authority. The allottee will then carry on the construction of the building strictly in accordance with the sanctioned plans obtained from New Okhla Industrial Development Authority. On completion of the building, the allottee shall obtain completion certificate from New Okhla Industrial Development Authority as per the procedure laid down by the Authority before occupying the building. The notes, specifications and other stipulations mentioned in the architectural control drawings shall be strictly adhered to. No addition/alteration shall be carried out by the allottee or the purchasers of floor area after obtaining completion certificate, without getting necessary permission and sanction from the Authority.

6. (c)(i) The ground floor (of the building constructed on the allotted commercial office plot) will be exclusively used for parking and no temporary or permanent construction of any sort would be allowed in any circumstances.

6. (c)(ii) Construction of basement is optional and if constructed shall be as per architectural control drawings and building plans approved by the Authority. The basement shall be strictly used for services and storage purpose.

6. (c)(iii) No barricade or boundary wall will be permitted on any side on the plot and there will be free access from one plot to another on the ground floor.

6. (c)(iv) The first floor of the building constructed on the allotted plot will be used for showroom-cum-office only.

6. (c)(v) The remaining upper floor's constructed will be exclusively used for offices only and for no other purpose.

6. (c)(vi) The area on each floor includes area of balcony also. No projection on any side will be allowed beyond proposed plot line. " (Emphasis Supplied)

3. Subsequently the lease deed dated 8th August, 1990 was executed between the petitioner and NOIDA. The terms and conditions contained in the brochure were repeated in the lease deed. The relevant clauses of the lease deed are quoted below:-

X(A). The ground floor (of the building constructed on the allotted office plot) will be exclusively used for parking and no temporary or permanent construction of any sort would be allowed in any circumstances.

x(B). Construction of basement is optional and if constructed, shall be as per architectural control drawing and building plans approved by the lessor.

X(C). No barricade or boundary "wall" will be permitted on any side of the plot and there will be free access from one plot to another on the ground floor.

X(D). The first and above floors of the building constructed on the allotted plot will be exclusively used for showroom-cum- office only. The above floors of the building constructed on the allotted plot will be exclusively used for office only and for no other purpose.

XI. That the lessee shall obey and submit the rules, building regulations and directions of the lessor, and proper municipal or other authority now existing or hereinafter to exist, so far as the same relate : to the immovable property in the said area so far as they affect the health, safety and convenience of the other inhabitants of the place.

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XIV.(A) The plot or building thereon shall not be used for a purpose other than that specified in the lease deed and architectural control drawings prescribed by the lessor. The architectural control drawings will be supplied by the lessor on payment of the prescribed fee by the allottee who shall carry out construction of the plot strictly in accordance with the same after the approval from the lessor.

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XXI If the lessee does not abide by the terms and conditions and building rules or any other rules framed by the Authority, the lease may be cancelled by the lessor and possession may be taken over by the lessor and the lessee in such an event will not be entitled to claim any compensation in respect thereof." (Emphasis Supplied)

4. The petitioner completed the construction of the commercial building on 9th October, 1992 and a completion certificate was also issued by NOIDA on 19th April, 1993. Soon thereafter the petitioner sent letters dated 11th May 1993, and 5th July, 1993 to NOIDA regarding certain problems on commercial complexes of Sector, 18 and in particular requested for changing the usage of ground floor as shopping/showrooms in place of parking. By the communication dated 9th September, 1993 the petitioner was clearly intimated by NOIDA that the change in use of ground floor was a policy matter and could be examined in future at the time of revision of building bye-laws. It is, therefore, clear that no permission

whatsoever was granted to the petitioner to change the user of the ground floor.

5. A notice dated 21 st April, 2004 was issued by NOIDA u/s 10(1) of The Uttar Pradesh Industrial Area Development Act, 1976 (hereinafter referred to as the "Act"). The petitioner was intimated that on art inspection having been made on 21st April, 2004 it was found that the petitioner, had violated the building bye-laws and directions and the terms and conditions set out in the lease deed which act was prejudicially affecting the proper planning and the amenities of the industrial development area. This was against the interests of the general public and, therefore, the petitioner was required to remove the unauthorized constructions within a period of 15 days and bring the constructions in conformity with the sanctioned plan so that the proper planning of the industrial development area and the interes of the general public was not adversely affected. It was pointed out to the petitioner that the ground floor was not being used as per the rules and the conditions imposed by NOIDA. It was also specifically mentioned that in the event the petitioner failed to do so, NOIDA would be constrained to get the illegal constructions removed at the cost of the petitioner. The petitioner, however, did not comply with the directions issued in the aforesaid notice and, therefore, another notice dated 23 rd August, 2004 was sent to the petitioner. The petitioner was reminded to comply with the directions contained in the notice since the ground floor and the services floor were not being used as per the conditions of the lease deed.

6. A reply dated 23 rd September, 2004 was submitted by the petitioner to the aforesaid two notices pointing out that the petitioner had completed the constructions on 9th October, 1992 and the completion certificate was also issued by NOIDA on 19th April, 1993 and after that the petitioner had not made any constructions and so the allegations contained in the notice were incorrect. It was also stated that the statement made in the notices that the ground floor and the services floor were not being used according to the rules/conditions of NOIDA was incorrect. This reply was followed by another letter dated 7th October, 2004 in which a request for change in the use of ground floor and upper ground floor was made by the petitioner. This request of the petitioner was rejected by NOIDA by means of the communication dated 27th October, 2004 since it was against the terms and conditions of the allotment and also against the terms of the lease deed. The petitioner was also clearly intimated that the ground floor was required to be exclusively used for parking but it was not being used as such and even the basement was not being utilized for the purposes of storage and services but was being used as an office. The first floor could have been utilized only as office and showrooms but it was being utilized as a restaurant. In such circumstances, the petitioner had clearly violated the terms of the lease deed and, therefore, he was called upon to show cause why the unauthorized use should not be stopped and the premises sealed and the allotment cancelled.

Feeling aggrieved by the said order dated 27th October, 2004, the petitioner filed a writ petition in this Court being Writ Petition No. 47296 of 2004 which was

disposed of by this Court on 23rd December, 2004 with a direction that since the petitioner had already filed a reply on 8th December, 2004 to the notice dated 27th October, 2004. NOIDA may itself decide the case if it had not already done so by a speaking order after considering the reply of the petitioner and till the decision was taken, the parties were directed to maintain status quo prevailing as on 8th November, 2004. After the aforesaid decision of this Court, the petitioner submitted another representation dated 20th January, 2005. By a detailed order dated. 31st March, 2005, the reply filed by the petitioner was rejected after considering the various contentions raised by the petitioner. The contention of the petitioner that he should be permitted to use these floors in the same manner as the lessees of Plot Nos. P-2 and P-3 and comparison with Plot Nos. P-5 and P-6 were found to be without any basis. A finding was also specifically recorded that the petitioner was using the basement, ground floor and the first floor according to his convenience contrary to the terms and conditions of the lease deed.

7. We have heard Sri L.P. Singh learned counsel for the petitioner, Sri Sudhir Aggarwal learned Additional Advocate General appearing for respondent nos. 1 and 4 and Sri Anurag Khanna learned counsel appearing for respondent nos. 2 and 3 and have perused the materials available on record.

8. NOIDA was constituted u/s 3 of the Act. Section 6 of the Act provides for functions of the Authority and amongst others the functions are to allocate and transfer either by way of sale or lease or otherwise plots of land for commercial, industrial or residential purposes; to regulate the erection of buildings and setting up of industries and to lay down the purpose for which a particular site or plot of land shall be used, namely for industrial or commercial or residential purpose or any other specified purpose in such area. u/s 8 of the Act, power has been given to NOIDA to issue directions in respect of erection of building. It has been provided that for the purposes of proper planning and development of the industrial development area, the Authority may issue such directions, as it may consider necessary regarding the architectural features of the elevation or frontage of any building, the alignment of buildings on any site, the restrictions and conditions in regard to open spaces to be maintained in and around buildings and height and character of buildings, regulation of building, and maintenance of amenities and restriction of use of any site for the purpose other than that for which it had been allocated. Section 10 gives power to the Authority to require proper maintenance of site or building and is quoted below:-

"Power to require proper maintenance of site or building- if appears to the Authority that the condition or use of any site or building is prejudicially affecting or is likely to affect the proper planning of, or the amenities in any part of the industrial development area or the interests of the general public there, it may serve on the transferee or occupier of that site or building a notice requiring him to take such steps and within such period as may be specified in the notice and thereafter to maintain it in such manner as may be specified therein and in case

such transferee or occupier fails to take such steps or to maintain it thereafter the Authority may itself take such steps or maintain it, and realize the cost incurred on it from such transferee or occupier."

9. Learned counsel for the petitioner submitted that the orders dated 31st March, 2005 and 27th October, 2004 were arbitrary and illegal and against the provisions of Article 14 of the Constitution of India. In this connection learned counsel for the petitioner submitted, that the petitioner had been discriminated viz-a-viz Plot Nos. P-2, P-3, P-5 and P-6. He further submitted that the terms and conditions set out in the brochure issued in the year 1995-96 were different from the terms and conditions contained in the brochure issued in the year 1990 against which the petitioner had been allotted Plot No. P-1 and, therefore, the Authority should have suitably amended the conditions of the lease deed of the year 1990 by bringing it in conformity with the terms and conditions set out in the brochure issued in the year 1995-96.

10. The learned Additional Advocate General for the State of U.P. and Sri Anurag Khanna learned counsel appearing for NOIDA justified the decisions taken on 31st March, 2005 and 27th October, 2004 and submitted that no interference was called for by this Court in exercise of its writ jurisdiction.

11. We have carefully considered the submissions advanced by the learned Counsel for the parties.

12. The primary question that arises for consideration is regarding the scope of judicial interference in matters of administrative decisions. Administrative action is stated to referable to the broad area of governmental activities in which the repositories of power may exercise executive, quasi-legislative and quasi-judicial functions.

13. The parameters of the Court's power have been analyzed by the Supreme Court in Commissioner of Income Tax, Bombay and Others Vs. Mahindra and Mahindra Limited and Others, We reproduce paragraph-11 of the said judgment:-

"By now, the parameters of the Court's power of judicial review of administrative or executive action or decision and the grounds on which the Court can interfere with the same are well settled and it would be redundant to recapitulate the whole catena of decisions of this Court commencing from The Barium Chemicals Ltd. and Another Vs. The Company Law Board and Others, case on the point. Indisputably, it is a settled position that if the action or decision is perverse or is such that no reasonable body of persons, properly informed, could come to, or has been arrived at by the authority misdirecting itself by adopting a wrong approach, or has been influenced by irrelevant or extraneous matters >. the Court would be justified in interfering with the same. This Court in one of its later decisions in Smt. Shalini Soni v. Union of India (1981) 1 SCR 962 : AIR 1981 SCJ 43 has observed thus: "It is tin unwritten rule of the law, constitutional and administrative, that whenever a decision-making function is entrusted to the subjective satisfaction of a statutory functionary, there is an. implicit obligation

to apply his mind to pertinent and proximate matters ;only, eschewing the irrelevant and the remote". Suffice it to say that the following passage appearing at pages 285-8\$ in Prof. de Smith's treatise "Judicial Review of Administrative Action" (4th Edn.) succinctly summarises the several principles formulated by the Courts in that behalf thus: "The authority in which a discretion is vested can be compelled to exercise that discretion, but not to exercise it in any particular manner. In general, a discretion must be exercised only by the authority to which it is committed. That authority must genuinely address itself to the matter before it: it must not act under the dictation of another body or disable itself from exercising a discretion in each individual case. In the purported exercise of its discretion it must not do what it has been forbidden to do, nor must it do what it has not been authorised to do. It must act in good faith, must have regard to all relevant considerations, must not be swayed by irrelevant considerations, must not seek to promote purposes alien to the letter or to the spirit of the legislation that gives it power to act, and must not act arbitrarily or capriciously. Nor where a judgment must be "made that certain facts exist can a discretion be validly exercised on the basis of an erroneous assumption about those facts. These several principles can conveniently be grouped in two main categories; failure to exercise a discretion, and excess or abuse of discretionary power. The two classes are not, however, mutually exclusive. Thus, discretion may be improperly fettered because irrelevant considerations have been taken into account; and where an authority hands over its discretion to another body it acts ultra vires. Nor, is it possible to differentiate with precision the grounds of invalidly contained within each category".

14. In *State of U.P. and Others Vs. Renusagar Power Co. and Others*, it was held that exercise of administrative power will be set aside if there is a manifest error in the exercise of such power or the exercise of the power is manifestly arbitrary.

15. The famous "Wednesbury Case" *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* (1947) 2 All ER 680 (CA) is considered to be the landmark in so far as the basic principles relating to judicial review of administrative or statutory direction are concerned. We quote a passage from the judgment of Lord Greene which is as follows:-

"It is true that discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology used in relation to exercise of statutory discretions often use this word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the" matters, which he is bound to consider. He must exclude from his consideration matters, which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably". Similarly, there may be something so absurd that no sensible person could even dream that it lay within the powers of the

authority. In another, it is taking into consideration extraneous matters. It is unreasonable that it might almost be described as being done in bad faith; and in fact, all these things run into one another."

16. The principles of judicial review of administrative action were further summarized in 1985 by Lord Diplock in *Council of Civil Service Unions v. Minister for the Civil Service* 1984 (3) All. ER. 935 (commonly known as CCSU case) as illegality, procedural impropriety and irrationality. He said more grounds could in future become available, including the doctrine of proportionality which was a principle followed by certain other members of the European Economic Community, Lord Diplock observed in this case as follows:-

"..... Judicial review has I think, developed to a stage today when, without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground I would call "illegality" the second "irrationality" and the third "procedural impropriety". That, is not to say that further development on a case-by-case basis may not in course of time add further grounds, I have in mind particularly the possible adoption in the future of the principle of "proportionality" which is recognized in the administrative law of several of our fellow members of the European Economic Community. "

Lord Diplock explained "irrationality" as follows:

"By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness". It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. "

17. In *Union of India and another Vs. G. Ganayutham (Dead) by LRs.*, the Supreme Court after referring to the aforesaid two cases namely *Wednesbury* case and *CCSU* case held as follows:-

"We are of the view that even in our country-in cases not involving fundamental freedoms-the role of our courts/tribunals in administrative law is purely secondary and while applying *Wednesbury* and *CCSU* principles to test the validity of executive action or of administrative action taken in exercise of statutory powers, the courts and tribunals in our country can only go into the matter, as a secondary reviewing court to find out if the executive or the administrator in their primary roles have arrived at a reasonable decision on the material before them in the light of *Wednesbury* and *CCSU* tests. The choice of the options available is for the authority; the court/tribunal, cannot substitute its view as to what is reasonable. "

18. In *Indian Railway Construction Co. Ltd. v. Ajay Kumar* (2003) 4 SCC 451 the Supreme Court held as follows-

"It is trite law that exercise of power, whether legislative or administrative, will

be set aside if there is manifest error in the exercise of such power or the exercise of the power is manifestly arbitrary. ???If a power (whether legislative or administrative) is exercised on the basis of facts which do not exist and which are patently erroneous, such exercise of power will stand vitiated. "

19. In People's Union for Civil Liberties and Anr. v. Union of India and Ors., I AIR 2004 SCW 379 while dealing with the same issue, the Supreme Court observed as under:-

"The jurisdiction of this Court in such matter is very limited. The Court will not normally exercise its power of judicial review in such matters unless it is found that formation of belief by the statutory authority suffers from mala fide, dishonesty or corrupt practice. The order can be set aside if it is held to be beyond the limits for which the power has been conferred upon the authorities by the Legislature or is based on the grounds extraneous to the legislation and if there are no grounds at all for passing it or if the grounds are such that no one can reasonably arrive at the opinion or satisfaction required thereunder. "

20. In State of N.C.T. of Delhi and Anr. v. Sanjeev alias Bittoo AIR 2005 SCW 1987 the Supreme Court in paragraphs 16 and 18 held as follows:-

"16 ??????..One can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground is "illegality" the second "irrationality" and the third "procedural impropriety."

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18. The Court will be slow to interfere in such matters relating to administrative functions unless decision is tainted by any vulnerability enumerated above; like illegality, irrationality, and procedural impropriety. Whether action falls within any of the categories has to be established. Mere assertion in that regard would not be sufficient."

21. It is in the light of the principles stated above that we shall examine the, orders dated 31st March, 2005 and 27th October, 2004 issued by NOIDA which have been impugned in the present petition.

22. The terms and conditions set out in the brochure which were required to be followed as per the allotment letter dated 9th April, 1990 and the conditions of the lease deed dated 8th August, 1990 clearly restricted the use of the basement, ground floor, first floor and the remaining floors to that specifically mentioned. The petitioner, therefore, could have utilized such floors strictly in accordance with the aforesaid conditions and not otherwise. In the event it was not being utilized in the manner indicated then the powers provided for u/s 10(1) of the Act and also the power contained in clause XXI of the .terms of the lease deed for cancelling the lease deed, and taking possession could be invoked by

NOIDA. The records reveal that immediately after completion of the commercial building, the petitioner submitted letters dated 11th May, 1993 and 5th July, 1993 for change in user of ground floor from parking place to shops. NOIDA never gave its approval for such change in user and it appears that the petitioner on its own changed the use as a result of which notices dated 21st April, 2004 and 3rd August, 2004 were issued to the petitioner u/s 10(1) of the Act. The petitioner submitted a reply dated 23rd September, 2004 merely mentioning therein that after the issue of the completion certificate, no additional construction had been made by the petitioner and, therefore, the allegation contained in the notice were incorrect. The petitioner also made a bald denial that the allegations contained in the notices that the ground floor and the services floor were not being used in accordance with the terms and conditions was incorrect. What is important is that immediately after submitting the reply, the petitioner again submitted an application dated 7th October, 2004 before NOIDA making a request for change in the use of ground floor and upper ground floor (service floor) for shops instead of parking and in this connection made reference to Plot Nos. P-2 and P-3. The request of the petitioner was specifically turned down by NOIDA by means of the communication dated 27th October, 2004. The petitioner was also clearly intimated that the ground floor was not being used for parking purposes and that the use of basement was also against the terms and conditions since instead of storage and services it was being utilized as an office. Further even the services floor was being utilized as an office and though the first floor could be utilized for the purposes of an office and showroom but it was being used as a restaurant also in addition to office. The petitioner was, therefore, called upon to rectify the incorrect use failing which the premises could be sealed and the licence cancelled. It is in reply to this notice that the petitioner submitted a reply on 8th December, 2004 and thereafter submitted another representation dated 20th January, 2005 in continuation of the earlier representation.

23 The contention of the learned counsel for the petitioner is that, in fact he had not contravened any of the terms and conditions in respect of the basement, the ground floor, services floor or the first floor. These are essentially questions of fact. Upon an inspection having been made, the petitioner was clearly found to be using the said floors against the terms and conditions set out by NOIDA. A show cause notice was issued to the petitioner to which he submitted a reply making only a bald denial. Indeed if the ground floor was being used as a parking place, the petitioner could have substantiated his case by placing the receipts/documents/photographs in support of his contention but the petitioner did not do so and only made a bald denial. Similar is the position with the other floors. Even in this petition the petitioner has merely stated in paragraph-XXII that it has been using all the floors of the building only in accordance with the permissible limits as mentioned in Clauses (X) and (XII) of the lease deed dated 8th August, 1990. No material has been placed before us to take a contrary view. We are, therefore, unable to hold that there was any manifest error in the

exercise of administrative power or the exercise of such power was manifestly arbitrary. There is no illegality or procedural impropriety and the finding of fact recorded in the impugned order that the petitioner was utilizing the various floors contrary to the use provided for in the lease deed cannot said to be perverse.

24. This brings us to the next contention advanced by the learned counsel for the petitioner regarding discrimination. In the representation dated 20th January, 2005 the petitioner had made reference to Plot NOS. P-2 and P-3 in respect of which the basement and the ground floor could be used for shops/showrooms. It was also stated that after the allotment of the property to the petitioner, Plot Nos. P-5 and P-6 had been allotted to different buyers and NOIDA had permitted the said allottees to use the ground floor/upper ground floor for commercial purposes including shops and showrooms. It was, therefore, contended that such a benefit should also be conferred upon the petitioner.

25. From the records we find that the terms and conditions set out in the hure issued in the year 1995-96 for allotment of Plot Nos. P-2 and P-3 are entirely different. We reproduce clause 1 (f) of the aforesaid scheme relating to Plot Nos. P-2 and P-3 which is as follows:-

"Use/Uses: The basement and ground floor may be used for shops/showrooms, subject to the conditions that the activities considered to be a public nuisance/hazard shall not be out and that on all other floors the commercial activities institutipnal/residential use shall be allowed got the act to the condition that no public nuisance is cause."

6. The petitioner has not brought on record the brochure relating to Plot Nos. P-5 and P-6. From the aforesaid it is clear that in respect of Plot Nos. P-2 and P-3 the basement and the ground floor could be used for shops/showrooms subject to certain conditions and, therefore, the petitioner is not correct in drawing any analogy from Plot Nos. P-2 and P-3. This is what has also been noticed in the impugned order dated 31st March, 2005. In the absence of the brochure in respect of Plot Nos. P-5 and P-6 or the lease deed before us, we are not in a position to examine the contention of the petitioner in respect of Plot Nos. P-5 and P-6 though in the impugned order any comparison with the Plot Nos. P-5 and P-6 has also been rejected on the ground that NOIDA had only regularised the construction and not the usage. Thus the plea of discrimination raised by the learned counsel for the petitioner cannot be accepted.

27. Even otherwise, Article 14 is not meant to perpetuate an illegality. It provides for positive equality and not negative equality. Therefore, we are not bound to direct any Authority to repeat the wrong action done by it earlier. In *Sushanta Tagore and Others Vs. Union of India (UOI) and Others*, the Supreme Court rejected such a contention as sought to be advanced in the present case by observing:-

"Only because some advantages -would ensue to the people in general by reason of the proposed development, the same "would not mean that the ecology of the

place would be sacrificed. Only because some encroachments have been made and unauthorised buildings have been constructed, the same by itself cannot be a good ground for allowing other constructional activities to come up which would be in violation of the provisions of the Act. Illegal encroachments, if any, may be removed in accordance with law. It is trite law that there is no equality in illegality.

28. This view also finds support from the judgments of the Hon'ble Court in Smt. Sneh Prabha etc. Vs. State of U.P. and Another, retary, Jaipur Development Authority, Jaipur v. Daulat Mai Jain and Ors. 1 SCC 35 ; State of Haryana and Others Vs. Ram Kumar Mann, and M/s. Faridabad Ct. Scan center Vs. D.G. Health Services and others,

29. In Finance Commissioner (Revenue) v. Gulab Chandra and Anr. AIR 2001 SCW 4774, the Hon'ble Apex Court rejected the contention that as other "similarly situated persons had been retained in service, persons senior to me; petitioner could not have been discharged during the period of probation" observing that even if no action had" been taken in similar situation against similarly situated persons then too it did not confer any legal right upon the petitioner.

30. In Jalandhar Improvement Trust Vs. Sampuran Singh, and Union of India and Others Vs. Rakesh Kumar etc., the Hon'ble Supreme Court held that Courts cannot issue a direction that the same mistake be perpetuated on the ground of discrimination or hardship.

31. Any action/order contrary to law does not confer any right upon any person for similar treatment. (Vide State of Punjab and Others Vs. Dr. Rajeev Sarwal, ; Yogesh Kumar and Others Vs. Government of NTC, Delhi and Others, and Union of India (UOI) and Another Vs. International Trading Co. and Another, and Anand Button Ltd. v. State of Haryana and Ors. 2005 AIR SCW 67 .

32. In this context we would also like to observe that time has come when NOIDA must ensure that the development is carried out strictly in terms of the Rules/Regulations/Bye-laws because deviation causes immense problems to the general public. Any attempt to convert the parking places into shops or offices or even public utility booths should be immediately stopped, NOIDA must, therefore, locate all other such commercial buildings and take action wherever it is found that lessees are utilizing the floors against the user indicated.

33 The next contention of the learned counsel for the petitioner is that NOIDA should have subsequently suitably amended the lease deed of the petitioner by permitting the petitioner to change the user of certain floors. The argument proceeds that even though the terms and conditions set out in the brochure clearly restricted the use of the floor for certain purposes but such terms and conditions are arbitrary and, therefore, should be altered by permitting the petitioner to use the floors in the manner he desires:

34. The principles applied in judicial review of administrative decisions; relating to acceptance of the terms and conditions set out in; the contract have been considered by the Supreme Court in Tata Cellular Vs. Union of India, and the same are as follows:-

"The principles deducible from the above are:

- (1) The modern trend points to judicial restraint in administrative action.
- (2) The Court does not sit as a court of appeal but merely reviews the manner in which the decision was made.
- (3) The Court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.
- (4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.
- (5) The Government must have freeflow of contract. In other words, a fairplay in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides. (6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure. "

35. In Sterling Computers Limited and Others Vs. M and N Publications Limited and Others, the Supreme Court observed as follows:-

"While exercising the power of judicial review, in respect of contracts entered into on behalf of the State, the Court is concerned primarily as to whether there has been any infirmity in the "decision making process",

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By way of judicial review the Court cannot examine the details of the terms of the contract which have been entered into by the public bodies or the State, Courts have inherent limitations on the scope of any such enquiry, "

36. In M/s. Monarch Infrastructure (P) Ltd. Vs. Commissioner, Ulhasnagar Municipal Corporation and Others, it was held by the Supreme Court:-

"Broadly stated, the courts would not interfere with the matter of administrative action, or changes made therein, unless the Government's action is arbitrary or

discriminatory or the policy adopted has no nexus with the object it seeks to achieve or is mala fide.?

37. In *Air India Ltd. Vs. Cochin Int., Airport Ltd. and Others*, the Supreme Court held as follows:-

"Even when some defect is found in the decision- " making process the court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the court should intervene?"

38. After considering the aforesaid two decisions the Supreme Court in *Directorate of Education and Others Vs. Educomp Datamatics Ltd. and Others*, observed as follows:-

It has clearly been held in these decisions that the terms of the invitation to tender are not open to judicial scrutiny, the same being in (he realm of contract. That the Government must have a free hand in setting the terms of the tender. It must have reasonable play in its joints as a necessary concomitant for an administrative body in an administrative sphere. The courts would interfere with the administrative policy decision only if it is arbitre discriminatory, mala fide or actuated by bias. It is entitled to pragmatic adjustments which may be called for by the particular circumstances. The courts cannot strikd down the terms of the tender prescribed by the Government because it feels that some other terms in the tender would have been fair, wiser or logical. The courts can interfere only if the policy decision is arbitrary, discriminatory or mala fide.

39. The same principles were followed by the Supreme Court in *Master Marine Services Pvt. Ltd. v. Metcalfe & Hodgkinson Pvt. Ltd.* and Anr. 2005 AIR SCW 2189.

40. It is in the light of the aforesaid principles that we are called upon to I consider whether the action of NOIDA in refusing to amend the terms and conditions stipulated in the lease deed can be said to be arbitrary, discriminatory or mala fide. The allotment order was issued to the petitioner in the year 1990. The contention of the learned counsel for the petitioner is that NOIDA should be compelled to amend the terms and conditions merely because in the year 1995-96 when it issued the brochure in respect of Plot Nos. P-2 and P-3 certain other terms and conditions were stipulated. As is clear from the decisions referred to above the terms and conditions of contract are normally not open to judicial scrutiny and the Government must have a free hand and a reasonable play and the. Courts cannot substantiate some bther terms merely because it feels that they would fair, wiser or logical. Under the Act, the Authority has the power to issue directions u/s 8 (1) of the Act for the purposes of proper planning and development of the industrial, development area including the regulations of

buildings, maintenance of amenities etc. It is, therefore, for the Authority itself to consider the manner in which the various floors of the building shall be put to use. Judicial notice can be taken of the fact that parking problems have surfaced everywhere and if the Authority felt that the ground floor was to be utilized as a parking place then it is not open to a lessee to contend that he shall not use the ground floor as a parking place but shall use it for some other purpose like shops or showrooms. NOIDA has considered at length the request of the petitioner for change in the user and by a detailed order dated 27th October, 2004; it rejected the plea. This decision cannot be termed as arbitrary or against public interest. In fact, public interest requires that the ground floor should be used as a parking place and for no other purpose in order to cope with the ever growing demand of parking place. Such an order, therefore, does not call for any interference from this Court in exercise of its writ jurisdiction under Article 226 of the Constitution of India.

41. We must not forget what the Supreme Court has said in this context. In *Friends Colony Development Committee Vs. State of Orissa and Others*, it was observed;-

"In all developed and developing countries there is emphasis on planned development of cities which is sought. It to be achieved by zoning, planning and regulating building construction activity. Such planning, though highly complex, is a matter based on scientific research, study and experience leading to rationalisation of laws by way of legislative enactments and rules and regulations framed thereunder. Zoning and planning do result in hardship individual property owners as their freedom to use their property in the way they like, is subjected to regulation and control. The private owners are to some extent prevented from making the most profitable use of their property. But for this reason alone the controlling regulations cannot be termed as arbitrary or unreasonable. The private interest stands subordinated to the public good. It can be stated in a way that power to plan development of city and to regulate the building activity therein flows from the police power of the State. The exercise of such governmental power is justified on account of it being reasonably necessary public health, safety, morals or general welfare and ecological considerations; though an unnecessary or unreasonable intermeddling with the private ownership of the property may not be justified.

The municipal laws regulating the building construction activity may provide for regulations as to floor area, the number of floors, the extent of height rise and the nature of use to which a built-up property may be subjected in any particular area. The individuals as property owners have to pay some price for securing peace, good order, dignity, protection and comfort and safety of the community. Not only filth, stench and unhealthy places to be eliminated, but the layout helps in achieving values, youth values, seclusion and clean air to make the locality a better place to live. Building regulations also help in reduction or elimination of fire hazards, the avoidance of traffic dangers and the lessening of prevention of

traffic congestion in the streets and roads. Zoning and building regulations are also legitimized from the point of view of the control of community development, the prevention of overcrowding of land, the furnishing of recreational facilities like parks and playgrounds and the availability of adequate water, sewerage and other governmental or utility services.

Structural and lot area regulations authorise the municipal authorities to regulate and restrict the height, number of storeys and other structures; the percentage of a plot that may be occupied: the size of yards, courts and open spaces; the density of population; and the location and use of buildings and structures. All these have in our view and do achieve the larger purpose of the public health, safety or general welfare. So are front setback provisions, average, alignments and structural alterations. Any violation of zoning and regulation laws takes the toll in terms of public welfare and convenience being sacrificed apart from the risk, inconvenience and hardship which is posed to the occupants of the building.

??..The cases of professional builders stand on a different footing from an individual constructing his own ?building. A professional builder is supposed to understand the laws better and deviations by such builders can safely be assumed to be deliberate and done with the intention of earning profits and hence deserve to be dealt with sternly so as to act as a deterrent for future. It is common knowledge that the builders enter into underhand dealings. Be that as it may, the State Governments should think of levying heavy penalties on such builders and therefrom develop a welfare fund which can be utilised for compensating arid rehabilitating such innocent or unwary buyers who are displaced on account of demolition of illegal constructions.

42. In *M.I. Builders Pvt. Ltd. v. Radhey Shyam Sahu and Ors.* AIR 1099 SC 2468 the Supreme Court observed as follows:-

" High Court has directed dismantling of the whole project and for restoration of the park to its original condition. This Court in numerous decisions has held that no consideration should be shown to the builder or any other person where construction is unauthorized. This dicta is now almost bordering rule of law. Stress was laid by the appellant and the prospective allottees of the shops to exercise judicial discretion in moulding the relief Such discretion cannot be exercised which encourages illegality or perpetuates an illegality. Unauthorised construction, if it is illegal and cannot be compounded, has to be demolished. There is no way out. Judicial discretion cannot be guided by expediency. Courts are not free from statutory fetters. Justice is to be rendered in accordance with law. Judges are not entitled to exercise discretion wearing robes of judicial discretion and pass orders based solely on their personal predilections and peculiar dispositions. Judicial discretion wherever it is required to be exercised has to be in accordance with law and set legal principles. As will be seen in. moulding the relief in the present case and allowing one of the blocks meant for parking to stand we have been guided by the obligatory duties of the Mahapdlika to construct and maintain parking lots. "

43. In *V.M. Kurian v. State of Kerala and Ors.* (2001) 4 SCC 215, while quashing the order passed by the State Government exempting the provisions of Kerala Building Rules, 1984 for constructing an eight storied building contrary to the mandatory provisions of the Rules, the Supreme Court observed that the Rules were mandatory in nature and were required to be complied with. The construction of high-rise building and observance and compliance thereof is for public safety and convenience. There cannot be relaxation of the Rules which are mandatory in nature and cannot be dispensed with especially in the use of a high-rise building.

44. In *M.C. Mehta v. Union of India and Ors.* AIR 2004 SCW 4173 the Supreme Court observed as under:-

" In *Virender Gaur and Others Vs. State of Haryana and Others*, the Supreme Court observed that right to have living atmosphere congenial to human existence is a right to life. The State has a duty in that behalf and to shed its extravagant unbridled sovereign power and to force in its policy to maintain ecological balance and hygienic environment. Where in the Zonal plan, a land is marked out and reserved for park or recreational purpose, it cannot be allotted building purpose though housing is a public, purpose. Further, it was observed that though the Government has power to give directions, that power should be used only to effectuate and further goals of the approved scheme. Zonal plans etc. and the land vested under the Scheme or reserved under the plan would not be directed to be used for any other public purposes within the area envisaged thereunder. Dealing with the contention that two decades had passed, it was held that self-destructive argument to put a premium on inaction cannot be accepted.

The Delhi Development Authority has to bear in mind that it has to perform its function in accord with the provisions of the Delhi Development Act, 1957 which was enacted to provide for the development of Delhi according to the plan and for matters ancillary thereto. Amenity," as ? provided in Section 2(a), includes road, water supply, streetlighting, drainage, sewerage, public, works etc, "Building, as provided in Section 2(b), include any structure or erection or part of a structure or erection which is intended to be used for residential, industrial, commercial or other purposes, whether in actual use or not. The obligation to prepare a Master Plan is contained in Section 7 of the DD Act. The Master Plan is required to define the various zones into which Delhi may be divided for the purposes of development and indicate the manner in which the land in each zone is proposed to be used. The preparation of the zonal development plans- has been provided for in Section 8. The said plans provide for the proposed land use. The Town Planners are supposed to examine various aspects before preparation of the Master Plan and Zonal Plan and providing the land use. The Act provides for a detailed "procedure for modification of the Master Plan and the Zonal Development Plan (Section 11A). Section 14 forbids use of land in contravention of the plans. It provides that no person shall use or permit to be used any land or building otherwise than in conformity with plan in a zone. Section 29(2) is a

penal provision, inter alia, providing for the penalty on any person who uses any land or building in contravention of Section 14. Section 31A is the power of the authority to seal unauthorized development. "

The illegal industrialization in residential/npn-conforming area commenced and has continued and the Authority, the Governments and its agencies have been totally negligent in discharge of its functions and obligations under the provisions of the DD Act. "

45. This Court also in a matter dealing with NOIDA had an occasion to deal with such unauthorised construction in the case of R.K. Mittal and Others Vs. State of U.P. and Others, and it was observed as under:-

"The above decisions have clearly laid down the principle that the statutory and municipal rules and regulations have to be strictly followed, otherwise there will be chaos. If N.O.I.D. A. permits violation of the rules, it means that no rule need be followed, and the rule of law is thrown to the winds. This case is a classic illustration of this kind of illegal practice. It seems that the law is Hardly followed in N.O.I.D.A., or at least the rich and mighty are above the law.

We, therefore, direct the N.O.I.D.A. authorities to take immediate strong action "against those who have started using the residential plots wholly or partly for commercial or other non-residential use N.O.I.D.A. does not appear to have taken any punitive action against the erring lessees even after they were found to have been using the leased property for purposes other than the purpose for which the lease was granted. If it has not already taken appropriate action consequent upon the breach of the terms of the lease or any statutory rules or regulations, it should issue show cause notices to such lessees without any further loss of time and take appropriate action in accordance with the relevant rules expeditiously. If this is not done, it will give a wrong signal that the rules and restrictions imposed in regard to the user of the leased property exist only on paper and are not meant to be taken seriously. Such an attitude may lead to chaotic conditions. If despite these observations, is N.O.I.D.A. continues to show laxity in this regard, this Court would be constrained to take appropriate. action against N.O.I.D.A.

46. In the end, it must be noticed that it is settled law that writ petition under Article 226 of the Constitution is maintainable for enforcing a statutory or legal right or where there is a complaint by the petitioner that there is a breach of a statutory duty on the part of the respondents. Therefore, there must be a judicially enforceable right for the enforcement of which the writ jurisdiction can be resorted to. The Court can enforce the performance of a statutory duty by public bodies through its writ jurisdiction at the behest of a person, provided such person satisfies the Court that he has a legal right to insist on such performance. The existence of the said right is a condition precedent for invoking the writ jurisdiction. State of Kerala and Others Vs. K.G. Madhavan Pillai and Others, State of Kerala Vs. Smt. A. Lakshmikutty and others, Mani Subrat Jain

and Others Vs. State of Haryana and Others, The Calcutta Gas Company (Proprietary) Ltd. Vs. The State of West Bengal and Others, Rajendra Singh Vs. State of Madhya Pradesh and others, and Rani Laxmibai Kshetriya Vs. Chand Behari Kapoor and Others, The petitioner has failed to point out any breach of the statutory duty on the part of the respondents. On the other hand, the respondents have Saved the orders for strict compliance of the directions contained in the lease deed. Thus also, no relief can be granted to the petitioner.

47. For all the reasons stated above, there is no merit in this petition. It is, accordingly, dismissed.