IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

RSA No. : 30 of 2017 alongwith
CMP No. 8793/2017
Reserved on: 19.12.2017
Date of decision: 27.12.2017

M/s Jai Mata Naina Devi Filling Station. ....Appellant.

Versus

Bharat Petroleum Corporation Ltd. & others. ...Respondents.

Coram

Hon'ble Mr. Justice Tarlok Singh Chauhan, J.

Whether approved for reporting[1]?. Yes

For the Appellant : Mr. B.S. Chauhan, Sr. Advocate with Mr. Munish Datwalia, Advocate.

For the respondents : Mr. B.N. Misra, Advocate with Ms. Vandana Misra, Advocate.

Justice Tarlok Singh Chauhan, J.

CMP No. 8793/2017

By medium of this application, the applicant has sought an amendment of the plaint on the ground that it gathered knowledge of the fact that the policy dated 6.9.2009 had not been challenged in the suit, reference/observation

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Whether reporters of the Local papers are allowed to see the judgment? yes

whereof finds mention in the judgment under challenge passed by the first appellate court while deciding the appeal. It is further averred that the applicant had given complete narration with respect to the matter in controversy to its counsel and being not well conversant with the intricacies/nitty gritty of the pleadings, in good faith, relied on the expertise of its counsel that its case has been properly drafted. However, fact of not challenging the policy dated 6.9.2006 has adversely effected the interest of the plaintiff which has come to its knowledge only after passing of the judgment by the first appellate court. It is further pleaded that the notification dated 6.9.2006 goes to the root of the *lis* and its impleadment in the pleading before the trial court was necessary to determine the real controversy in issue. The lapse on the part of the learned counsel has prejudiced the interest of the applicant materially and for this lapse the applicant cannot be made to suffer. It is in this background that the applicant intends to add paras 7 (A) and 7 (B) after para 7 of the plaint and in the relief clause para (iii) intends to be added as under:

"7-A. That the instructions/letter/guidelines dated 6.9.2006 and advertisement dated 30.4.2010 issued by the Government of India superseding the earlier instructions/letters vide which the petrol pump was allotted to the applicant and continued till date may be declared to be nonest, void and not applicable qua the applicant as these instructions would have become ioperative prospectively in view of the clause 22 of the agreement.

7-B. That since the applicant had already applied for approval to carry on the business before the expiry of agreement dated 4.3.2004 and also before the instructions/letter dated 6.9.2006 and the respondents did not pass any order on the application till date, therefore, the applicant/plaintiff has reason to believe that contention of the applicant has been accepted/conceded.

(iii) Declaration to the effect that the instructions/letter dated 6.9.2006 and advertisement dated 30.4.2010 may be declared nonest, void and not applicable qua the rights of the applicant."

2. The respondents have opposed the application by filing reply wherein preliminary objection has been raised that after the amendment of the Code of Civil Procedure, there is a clear mandate against entertaining of the application unless the Court comes to the conclusion that despite due diligence, the party could not raise the matter before the commencement of the trial. The applicant herein has neither pleaded nor proved due diligence and, therefore, the amendment application is liable to be dismissed. It is further averred that the application to challenge the policy

has been filed after 11 long years of its formulation on 6.9.2006 and, therefore, the present application is nothing but abuse and misuse of judicial process primarily with the motive to delay the final decision of the matter. It is further averred that even if it is assumed, though not admitted, that the counsel of the applicant had failed to challenge the policy dated 6.9.2006 despite the instructions of the applicant, it would be impossible to believe that the fact came to the attention of the applicant only when the judgment was passed by the first appellate court in 2017. This averment is misleading because the suit was filed before the trial court in the year 2010 and even the trial court had clearly noted in its judgment dated 16.11.2016 that the applicant had not challenged the policy dated 6.9.2006. It has been averred that the application has been filed with ulterior motive of delaying the litigation on one pretext or the other primarily with the intention to deprive the selected scheduled caste candidate, who was given the dealership of retail outlet as per roster as well as per advertisement dated 30.4.2010.

3. I have heard the learned counsel for the parties and have perused the record of the case.

4. At the outset it may be observed that though the applicant has levelled allegations against its counsel but has failed to name the said counsel(s). A perusal of the records of the case would show that before the trial court the applicant was represented by Sh. Neelam Sharma, Advocate while in the first appellate court he came to be represented by Sh. K.S. Kaundal, Advocate, whereas before this Court, he was initially represented by Sh. Neeraj K. Sharma, Advocate who even appeared when the appeal was heard in part on 5.9.2017. However, having sensed that the Court is not inclined to interfere in the appeal, the applicant thereafter changed his counsel and appointed Sh. Munish Datwalia, Advocate and at the same time engaged the services of Sh. B.S. Chauhan, Senior Advocate. It is at the instance of Mr. Munish Datwalia, this application has been moved.

5. Sh. B.S. Chauhan, Senior Advocate on instructions of Sh. Munish Datwalia, Advocate has not been able to point out the negligence of any one of the counsels and would claim that all the counsel(s) engaged by the applicant had been negligent and would further claim that only on account of the negligence of its lawyer, the applicant

should not suffer. In support of such contention, he has placed reliance upon the judgment of the Hon'ble Supreme Court in ***M/s Ganesh Trading Co.***, vs. ***Moji Ram***, AIR 1978 SC 484, more particularly, the observations made in para 4, which read thus:

> "[4] It is clear from the foregoing summary of the main rules of pleadings that provisions for the amendment of pleadings, subject to such terms as to costs and giving of all parties concerned necessary opportunities to meet exact situations resulting from amendments, are intended for promoting the ends of justice and not for defeating them. Even if party or its counsel is inefficient in setting out its case initially the shortcoming can certainly be removed generally by appropriate steps taken by a party which must no doubt pay costs for the inconvenience or expense caused to the other side from its omissions. The error is not incapable of being rectified so long as remedial steps do not unjustifiably injure rights accrued."

6. What probably has been ignored by Mr. Chauhan, learned senior counsel while placing reliance on this judgment is that the judgment relied upon was based on the provisions of the Code as prevailing on the said date, whereas it cannot be disputed that the amendment brought about in the Code of Civil Procedure by amendment Act 22 of 2002 with effect from 1.7.2002, more particularly, the provisions of

rule 17 of order 6 have brought about far reaching changes in the position of law and the same reads thus:

> "Provided that no application for amendment shall be allowed after the trial has commenced, unless the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial."

7. The proviso appended to order 6 rule 17 of the Code now restricts the fetter of the Court. This would be embargo on the exercise of the jurisdiction. Now the discretion to grant permission to a party to amend its pleadings lies on two conditions, firstly no injustice must be done to either side and secondly, the amendment must be necessary for the purpose of determining the real question in controversy between the parties. However, to save the interest of the parties in a suit, the provision has been added which clearly states that "*no application for amendment shall be allowed after the trial has commenced, unless the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial*". Therefore, the decision in ***M/s Ganesh Trading Co***. case (supra) would hardly be of any assistance.

8. It is evident from the bare perusal of the proviso that ordinarily amendment in pleadings is not allowed after the trial has commenced unless the Court is satisfied that the party concerned could not apply even after exercise of due diligence for such amendment before the commencement of trial. In other words, it was incumbent upon the applicant to have specifically pleaded that inspite of due diligence they could not raise the matter now sought to be raised. After all, right to amend is not an absolute right but depends on various principles. Concededly, there is not even a whisper regarding this fact in the entire application.

9. The Hon'ble Supreme Court has interpreted the proviso to be a requirement mandated to prevent frivolous applications for amendment intended, only to delay the trial. In ***Salem Advocate Bar Association*** versus ***Union of India*** AIR 2005 SC 3353, it was held as under:-

> "27. Order VI Rule 17 of the Code deals with amendment of pleadings. By Amendment Act 46 of 1999, this provision was deleted. It has again been restored by Amendment Act 22 of 2002 but with an added proviso to prevent application for amendment being allowed after the trial has commenced, unless court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial. The

proviso, to some extent, curtails absolute discretion to allow amendment at any stage. Now, if application is filed after commencement of trial, it has to be shown that in spite of due diligence, such amendment could not have been sought earlier. The object is to prevent frivolous applications which are filed to delay the trial. There is no illegality in the provision."

10. The Hon'ble Supreme Court in ***Revajeetu Builders and Developers*** vs. ***Narayanaswamy and sons and others***, (2009) 10 SCC 84, after in depth and critical analysis of the entire law of both the Indian and English cases, laid down some basic principles which ought to be taken into consideration while allowing or rejecting the application for amendment and the same read thus:

"[63] On critically analyzing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while allowing or rejecting the application for amendment.

(1) Whether the amendment sought is imperative for proper and effective adjudication of the case?

(2) Whether the application for amendment is bona fide or mala fide?

(3) The amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;

(4) Refusing amendment would in fact lead to injustice or lead to multi- ple litigation;

(5) Whether the proposed amendment con- stitutionally or fundamentally changes the nature and character of the case? and

> (6) As a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application."

11. It also needs to be noticed that the Hon'ble Supreme Court has thereafter categorically held that an application made under order 6 rule 17 of the Code is very serious judicial exercise and such exercise should not be undertaken in a casual manner and further observed that while deciding an application for amendment the court must not refuse bona fide, legitimate, honest and necessary amendments and should not permit mala fide, worthless and/or dishonest amendments.

12. Earlier to that the Hon'ble Supreme Court observed that even though order 6 rule 17 was one of the important provisions of the CPC, but the Hon'ble Supreme Court had no hesitation in observing that this was one of the most misused provision of the Code for dragging the proceedings indefinitely, particularly in the Indian courts which are otherwise heavily overburdened with the pending cases. It is apposite to reproduce relevant observations and the same read thus:

> "[29] In our considered view, Order VI Rule 17 is one of the important provisions of the CPC, but we have no hesitation in also observing that this is one of the most misused provision of the Code for dragging the proceedings indefinitely, particularly in the Indian courts which are otherwise heavily overburdened with the pending cases. All Civil Courts ordinarily have a long list of cases, therefore, the Courts are compelled to grant long dates which causes delay in disposal of the cases. The applications for amendment lead to further delay in disposal of the cases."

13. Having set out the legal parameters, it would be noticed that the only ground taken by the applicant for amendment of the plaint is negligence of its counsel, whereas to my mind this application has been filed with the sole intention of dragging on these proceedings indefinitely as the applicant has *ex parte ad interim injunction* in its favour whereby it has been permitted to run the retail outlet despite having lost before both the courts below. The applicant has failed to satisfy the requirement of law that the matter now sought to be introduced by the amendment could not have been raised earlier in spite of the due diligence.

14. What is due diligence has not been defined in the Code but has been explained by the Hon'ble Supreme Court in ***Chander Kanta Bansal*** vs ***Rajinder Singh Anand***, (2008) 5 SCC 177 in the following terms:

> "16. The words "due diligence" has not been defined in the Code. According to Oxford Dictionary (Edition 2006), the word "diligence" means careful and persistent application or effort. "Diligent" means careful and steady in application to one's work and duties, showing care and effort. As per Black's Law Dictionary (Eighth Edition), "diligence" means a continual effort to accomplish something, care; caution; the attention and care required from a person in a given situation. "Due diligence" means the diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation. According to Words and Phrases by Drain-Dyspnea (Permanent Edition 13A) "due diligence", in law, means doing everything reasonable, not everything possible. "Due diligence" means reasonable diligence; it means such diligence as a prudent man would exercise in the conduct of his own affairs."

15. In view of the aforesaid discussion, not only do I find no merit in this application but I am of the considered view that the application is *mala fide* and has been filed with the sole motive of delaying decision in the appeal. That being so, the same is dismissed.

RSA No. 30/2017

1. "Litigation may turn into a fruitful industry. Though litigation is not gambling yet there is an element of chance in every litigation. Unscrupulous litigants may feel encouraged to approach the Courts, persuading the court to pass interlocutory orders favourable to them by making out a

prima facie case when the issues are yet to be heard and determined on merits and if the concept of restitution is excluded from application to interim orders, then the litigant would stand to gain by swallowing the benefits yielding out of the interim order even though the battle has been lost at the end. This cannot be countenanced. We are, therefore, of the opinion that the successful party finally held entitled to a relief assessable in terms of money at the end of the litigation, is entitled to be compensated by award of interest at a suitable reasonable rate for the period for which the interim order of the Court withholding the release of money had remained in operation". (Refer: ***South Eastern Coalfields Ltd.*** Vs. ***State of M.P***, 2003 8 SCC 648).

2. The instant case is a classical example of litigation being turned into a fruitful industry by the unscrupulous appellant, who have been encouraging the Courts, persuading them to pass interlocutory orders in its favour and may have made huge profits although it has eventually lost at the end.

3. This Regular Second Appeal under section 100 of the Code of Civil Procedure is directed against the judgment and decree dated 9.1.2017, passed by the learned Additional

District Judge-I, Solan, District Solan camp at Nalagarh in Civil Appeal No. 28-NL/13 of 2016, whereby he affirmed the judgment and decree dated 16.11.2016, passed by the learned Civil Judge (Junior Divison), Court No.2, Nalagarh, District Solan in Civil Suit No.85/1 of 2010.

The parties shall be referred to as the "plaintiff" and "defendant".

4. The plaintiff is a partnership firm duly registered under the Registration Act and is represented by its three partners. The plaintiff filed a suit for permanent prohibitory injunction on the ground that the family members of the partners of the plaintiff, who were already in the petroleum business and were running various petroleum pumps efficiently and diligently and pleased with the performance and services rendered by them, the defendants with a view to enhance its sale and image and also to counter the expansion efforts of other oil corporations, persuaded the plaintiff to provide suitable place situated either at commercially viable location or at vintage point so as to attract the customers. Accordingly, land comprising Khewat No. 314 min, Khatauni No. 328 min, Khasra No. 1178/886/1 (1-10) was identified at

village Baddi Sitalpur, Tehsil Baddi, District Solan for setting up a retail outlet. It was averred that the defendants agreed that the arrangement of *ad hoc* dealership would continue till the time regular dealership is granted to the plaintiff firm or its nominee. In pursuance to such understanding, 'No Objection Certificates' were applied from various departments of the Government by spending huge money, energy and time and thereafter retail outlet/petrol pump was given to the plaintiff firm on *ad hoc* basis by the defendants with the understanding in the guise of explicit undertaking that it shall be regularized. The outlet commenced its operation with effect from 4.3.2004. The plaintiff spent huge amount in setting up of the retail outlet and developing the site only with the hope as he was given to understand that the dealership in its favour would be regularized even though the *ad hoc* dealership agreement was only for one year with effect from 4.3.2004 to 31.3.2005, as would be evident from stipulation No. 22, which reads thus:

> "22. Notwithstanding anything contained hereinabove, this agreement unless terminated prior to 31.3.2005, will come to an end on 31.3.2005, and you will be liable to deliver vacant possession of the retail outlet with all the facilities mentioned

> hereunder alongwith any other assets of the corporation, which may be added to the said retail outlet and/or handed over to you, to the representative of the corporation unless the validity period of this agreement is extended by us in writing before expiry of the aforesaid date. If you are interested to carry on the business even after the expiry of the date mentioned above, you will have to make a formal application to the company and obtain its approval before 31.3.2005 and in case of your failure to do so, you will be treated as trespasser and will be liable to pay damage thereof and will also be liable for criminal breach of trust."

5. It was in pursuance to the above stipulation that the plaintiff sent a representation to the defendants on 11.3.2005 wherein a formal request to carry out business even after 31.3.2005 was made. It was averred that on receipt of the above said application, the defendants on their part continued supplying the requisite petroleum products to the plaintiff without any break or interruption and, therefore, the firm's request application dated 11.3.2005 stands accepted and allowed. It was averred that on the date of filing of the suit, the plaintiff was still getting regular supply from the defendants. It was further averred that the defendants have not issued any termination letter to the plaintiff nor the formal request application dated 11.3.2005 had been rejected or dismissed. However, despite this, the defendants went

ahead with an advertisement on 30.4.2010 in Hindustan Times (Chandigarh) for regularization of retail out in question, which was already reserved to the S.C. category and letter/order had been issued by the defendant-company to the plaintiff for termination of the dealership. It was averred that since the publication of advertisement cast a cloud over the title and interest of plaintiff, therefore, it approached the defendants and on failure to even take any remedial measure, plaintiff filed the instant suit for perpetual injunction and mandatory injunction.

6. The defendants contested the suit by filing written statement wherein objections regarding the maintainability, cause of action, the plaintiff having not approached the court with clean hands were taken. On merits, it was averred that the plaintiff never approached the defendants even though they were already trying to enhance their sale and image every where in India and also selected the spot at Baddi Sitalpur, Tehsil Baddi. It was averred that the defendants applied to the State of H.P. for the procurement of Government land on lease and it was due to the tireless efforts of the defendants that they were able to get

Government land in village Sitalpur, Tehsil Baddi, District Solan on a nominal rent of Rs. 5,432/- per annum for a period of ten years as per office order dated 21.8.2003 and the lease for the land was registered on 6.9.2003 at Tehsil Nalagarh. It was thereafter that the 'No Objection Certificate' was granted by the District Magistrate and the defendants made a proposal for conducting interviews towards selection of *ad hoc* dealers. Four dealers were considered in the selection process and the interviews were conducted on 2.10.2003. Based on the assessment made by the panel, M/s Jai Mata Naina Devi Filling Station was selected as the most suitable candidate for running the petrol outlet of *ad hoc* dealership and the defendants never agreed to convert *ad hoc* dealership into regular/permanent dealership in favour of the plaintiff. It was further averred that these were the defendants who set up the retail outlet/petrol pump at village Sitalpur and nothing in fact was done by the plaintiff for setting up the petrol pump/retail outlet as alleged. The dealership granted to the plaintiff was purely temporary in nature and the same was governed by letter dated 4.3.2004 issued by the authorized officer of the corporation to the

plaintiff. As per the terms and conditions of the said letter, the appointment of *ad hoc* dealer was a temporary agreement and, therefore, the plaintiff could not claim any right or title on the basis of such letter. It is further averred that no doubt the representation of the plaintiff dated 11.3.2005 was received but keeping in view the guidelines issued by the Government of India dated 9.6.2006, the defendants published advertisement in the daily news paper to allot the dealership of the retail outlet/petrol pump in favour of the person, who falls under the category of Corpus Fund Scheme (SC/ST category of dealership/widow and women above 40 years of age without earning parents).

7. Replication to the written statement was filed wherein the contents of the plaint were reiterated and reaffirmed and those of the written statement had been denied.

8. Learned trial court on 13.9.2012 framed the following issues:

1. Whether the plaintiff is entitled for the relief of perpetual permanent injunction, as prayed for? OPP
2. Whether the plaintiff is entitled for the relief of mandatory injunction, as prayed for? OPP

3. Whether the suit is not maintainable in the present form? OPD

4. Whether the plaintiff has no cause of action and locus standi to file the present suit? OPD

5. Whether the plaintiff has not come to the court with clean hands and suppressed the material facts from this court? OPD.

6. Relief.

9. After recording the evidence and evaluating the same, learned trial court dismissed the suit. Aggrieved thereby the plaintiff filed an appeal before the first appellate court, however, the same was also dismissed with costs of Rs. 2,000/- vide judgment and decree dated 9.1.2017. Undeterred the plaintiff has filed the instant appeal by claiming that the judgments rendered by the courts below are perverse being based on complete misreading and misinterpretation of the pleadings and evidence on record.

10. I have heard the learned counsel for the parties and have gone through the records of the case.

11. What is 'perverse' was considered by the Hon'ble Supreme Court in a detailed judgment in ***Arulvelu and another*** *vs.* ***State Represented by the Public Prosecutor***

and another (2009) 10 SCC 206 wherein it was held as under:-

> "26. In M. S. Narayanagouda v. Girijamma & Another AIR 1977 Kar. 58, the Court observed that any order made in conscious violation of pleading and law is a perverse order. In Moffett v. Gough, (1878) 1 LR 1r 331 the Court observed that a perverse verdict may probably be defined as one that is not only against the weight of evidence but is altogether against the evidence. In Godfrey v. Godfrey 106 NW 814, the Court defined `perverse' as turned the wrong way, not right; distorted from the right; turned away or deviating from what is right, proper, correct etc.
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> 27. The expression "perverse" has been defined by various dictionaries in the following manner:
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> 1. Oxford Advanced Learner's Dictionary of Current English Sixth Edition
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> PERVERSE:- Showing deliberate determination to behave in a way that most people think is wrong, unacceptable or unreasonable.
>
> 2. Longman Dictionary of Contemporary English - International Edition
>
> PERVERSE: Deliberately departing from what is normal and reasonable.
>
> 3. The New Oxford Dictionary of English - 1998 Edition
>
> PERVERSE: Law (of a verdict) against the weight of evidence or the direction of the judge on a point of law.
>
> 4. New Webster's Dictionary of the English Language (Deluxe Encyclopedic Edition)

PERVERSE: Purposely deviating from accepted or expected behavior or opinion; wicked or wayward; stubborn; cross or petulant.

5. Stroud's Judicial Dictionary of Words & Phrases, Fourth Edition

PERVERSE: A perverse verdict may probably be defined as one that is not only against the weight of evidence but is altogether against the evidence.

28. In Shailendra Pratap & Another v. State of U.P. (2003) 1 SCC 761, the Court observed thus: (SCC p.766, para 8

"8...We are of the opinion that the trial court was quite justified in acquitting the appellants of the charges as the view taken by it was reasonable one and the order of acquittal cannot be said to be perverse. It is well settled that appellate court would not be justified in interfering with the order of acquittal unless the same is found to be perverse. In the present case, the High Court has committed an error in interfering with the order of acquittal of the appellants recorded by the trial court as the same did not suffer from the vice of perversity."

29. In Kuldeep Singh v. The Commissioner of Police & Others (1999) 2 SCC 10, the Court while dealing with the scope of Articles 32 and 226 of the Constitution observed as under: (SCC p.14, paras 9-10)

"9. Normally the High Court and this Court would not interfere with the findings of fact recorded at the domestic enquiry but if the finding of "guilt" is based on no evidence, it would be a perverse finding and would be amenable to judicial scrutiny.

10. A broad distinction has, therefore, to be maintained between the decisions which are perverse and those which are not. If a decision is arrived at on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which

> could be relied upon, howsoever compendious it may be, the conclusions would not be treated as perverse and the findings would not be interfered with."

30. The meaning of `perverse' has been examined in H. B. Gandhi, Excise and Taxation Officer-cum- Assessing Authority, Karnal & Others v. Gopi Nath & Sons & Others 1992 Supp (2) SCC 312, this Court observed as under: (SCC pp. 316-17, para 7)

> "7. In the present case, the stage at and the points on which the challenge to the assessment in judicial review was raised and entertained was not appropriate. In our opinion, the High Court was in error in constituting itself into a court of appeal against the assessment. While it was open to the respondent to have raised and for the High Court to have considered whether the denial of relief under the proviso to Section 39(5) was proper or not, it was not open to the High Court re-appreciate the primary or perceptive facts which were otherwise within the domain of the fact-finding authority under the statute. The question whether the transactions were or were not sales exigible to sales tax constituted an exercise in recording secondary or inferential facts based on primary facts found by the statutory authorities. But what was assailed in review was, in substance, the correctness - as distinguished from the legal permissibility - of the primary or perceptive facts themselves. It is, no doubt, true that if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then, the finding is rendered infirm in law."

12. What is ‘perverse’ has further been considered by this Court in ***RSA No.436 of 2000***, titled ***‘Rubi Sood and another*** *vs.* ***Major (Retd.) Vijay Kumar Sud and others***, decided on 28.05.2015 in the following manner:-

> "25..... A finding of fact recorded by the learned Courts below can only be said to be perverse, which has been arrived at without consideration of material evidence or such finding is based on no evidence or misreading of evidence or is grossly erroneous that, if allowed to stand, it would result in miscarriage of justice, is open to correction, because it is not treated as a finding according to law.
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> 26. If a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or even the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then the finding is rendered infirm in the eye of the law.
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> 27. If the findings of the Court are based on no evidence or evidence, which is thoroughly unreliable or evidence that suffers from vice of procedural irregularity or the findings are such that no reasonable persons would have arrived at those findings, then the findings may be said to be perverse.
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> 28. Further if the findings are either ipse dixit of the Court or based on conjectures and surmises, the judgment suffers from the additional infirmity of non application of mind and thus, stands vitiated."

13. What is 'perversity' recently came up for consideration before the Hon'ble Supreme Court in ***Damodar Lal*** *vs.* ***Sohan Devi and others (2016) 3 SCC 78*** wherein it was held as under:-

"8. "Perversity" has been the subject matter of umpteen number of decisions of this Court. It has also been settled by several decisions of this Court that the first appellate court, under Section 96 of The Civil Procedure Code, 1908, is the last court of facts unless the findings are based on evidence or are perverse.

9. In Krishnan v. Backiam (2007) 12 SCC 190, it has been held at paragraph-11 that: (SCC pp. 192-93)

> "11. It may be mentioned that the first appellate court under Section 96 CPC is the last court of facts. The High Court in second appeal under Section 100 CPC cannot interfere with the findings of fact recorded by the first appellate court under Section 96 CPC. No doubt the findings of fact of the first appellate court can be challenged in second appeal on the ground that the said findings are based on no evidence or are perverse, but even in that case a question of law has to be formulated and framed by the High Court to that effect."

10. In Gurvachan Kaur v. Salikram (2010) 15 SCC 530, at para 10, this principle has been reiterated: (SCC p. 532)

> "10. It is settled law that in exercise of power under Section 100 of the Code of Civil Procedure, the High Court cannot interfere with the finding of fact recorded by the first appellate court which is the final court of fact, unless the same is found to be perverse. This being the position, it must be held that the High Court was not justified in reversing the finding of fact recorded by the first appellate court on the issues of existence of landlord-tenant relationship between the plaintiff and the defendant and default committed by the latter in payment of rent."

11. In the case before us, there is clear and cogent evidence on the side of the plaintiff/appellant that there has been structural alteration in the premises rented out to the respondents without his consent. Attempt by the respondent-defendants to establish otherwise has been found to be totally non-acceptable to the trial court as well as the first appellate court. Material alteration of a property is not a fact confined to the exclusive/and personal knowledge of the owner. It is a matter of evidence, be it from the owner himself or any other witness speaking on behalf of the plaintiff who is conversant with the facts and the situation. PW-1 is the vendor of the plaintiff, who is also his power of attorney. He has stated in unmistakable terms that there was structural alteration in violation of the rent agreement. PW-2 has also supported the case of the plaintiff. Even the witnesses on behalf of the defendant, partially admitted that the defendants had effected some structural changes.

12. Be that as it may, the question whether there is a structural alteration in a tenanted premises is not a fact limited to the personal knowledge of the owner. It can be proved by any admissible and reliable evidence. That burden has been successfully discharged by the plaintiff by examining PWs-1 and 2. The defendants could not shake that evidence. In fact, that fact is proved partially from the evidence of the defendants themselves, as an admitted fact. Hence, only the trial court came to the definite finding on structural

alteration. That finding has been endorsed by the first appellate court on re-appreciation of the evidence, and therefore, the High Court in second appeal was not justified in upsetting the finding which is a pure question of fact. We have no hesitation to note that both the questions of law framed by the High Court are not substantial questions of law. Even if the finding of fact is wrong, that by itself will not constitute a question of law. The wrong finding should stem out on a complete misreading of evidence or it should be based only on conjectures and surmises. Safest approach on perversity is the classic approach on the reasonable man's inference on the facts. To him, if the conclusion on the facts in evidence made by the court below is possible, there is no perversity. If not, the finding is perverse. Inadequacy of evidence or a different reading of evidence is not perversity.

13. In Kulwant Kaur v. Gurdial Singh Mann (2001) 4 SCC 262, this Court has dealt with the limited leeway available to the High Court in second appeal. To quote para 34: (SCC pp.278-79)

> "34. Admittedly, Section 100 has introduced a definite restriction on to the exercise of jurisdiction in a second appeal so far as the High Court is concerned. Needless to record that the Code of Civil Procedure (Amendment) Act, 1976 introduced such an embargo for such definite objectives and since we are not required to further probe on that score, we are not detailing out, but the fact remains that while it is true that in a second appeal a finding of fact, even if erroneous, will generally not be disturbed but where it is found that the findings stand vitiated on wrong test and on the basis of assumptions and

conjectures and resultantly there is an element of perversity involved therein, the High Court in our view will be within its jurisdiction to deal with the issue. This is, however, only in the event such a fact is brought to light by the High Court explicitly and the judgment should also be categorical as to the issue of perversity vis-à-vis the concept of justice. Needless to say however, that perversity itself is a substantial question worth adjudication — what is required is a categorical finding on the part of the High Court as to perversity. In this context reference be had to Section 103 of the Code which reads as below:

'103. Power of High Court to determine issues of fact.- In any second appeal, the High Court may, if the evidence on the record is sufficient, determine any issue necessary for the disposal of the appeal,—

(a) which has not been determined by the lower appellate court or by both the court of first instance and the lower appellate court, or

(b) which has been wrongly determined by such court or courts by reason of a decision on such question of law as is referred to in Section 100."

The requirements stand specified in Section 103 and nothing short of it will bring it within the ambit of Section 100 since the issue of perversity will also come within the ambit of substantial question of law as noticed above. The legality of finding of fact cannot but be termed to be a question of law. We reiterate however, that there must be a definite finding to that effect in the judgment of the High Court so as to make it evident that Section 100 of the Code stands complied with."

14. In S.R. Tiwari v. Union of India (2013) 6 SCC 602, after referring to the decisions of this Court, starting with Rajinder Kumar Kindra v. Delhi Administration,

(1984) 4 SCC 635, it was held at para 30: (S.R.Tewari case[6], SCC p. 615)

> "30. The findings of fact recorded by a court can be held to be perverse if the findings have been arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant/inadmissible material. The finding may also be said to be perverse if it is "against the weight of evidence", or if the finding so outrageously defies logic as to suffer from the vice of irrationality. If a decision is arrived at on the basis of no evidence or thoroughly unreliable evidence and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, the conclusions would not be treated as perverse and the findings would not be interfered with. (Vide Rajinder Kumar Kindra v. Delhi Admn. [(1984) 4 SCC 635 : 1985 SCC (L&S) 131 : AIR 1984 SC 1805] , Kuldeep Singh v. Commr. of Police [(1999) 2 SCC 10 : 1999 SCC (L&S) 429 : AIR 1999 SC 677] , Gamini Bala Koteswara Rao v. State of A.P. [(2009) 10 SCC 636 : (2010) 1 SCC (Cri) 372 : AIR 2010 SC 589] and Babu v. State of Kerala[(2010) 9 SCC 189 : (2010) 3 SCC (Cri) 1179] .)"
>
> This Court has also dealt with other aspects of perversity.

15. We do not propose to discuss other judgments, though there is plethora of settled case law on this issue. Suffice to say that the approach made by the High Court has been wholly wrong, if not, perverse. It should not have interfered with concurrent findings of the trial court and first appellate court on a pure question of fact. Their inference on facts is certainly reasonable. The strained effort made by the High Court in second appeal to arrive at a different finding is wholly unwarranted apart from being impermissible under law. Therefore, we have no hesitation to allow

> the appeal and set aside the impugned judgment of the High Court and restore that of the trial court as confirmed by the appellate court."

14. Thus, it can be taken to be settled that a judgment can be said to be perverse if the conclusions arrived at by the learned Courts below are contrary in evidence on record, or if the Court's entire approach with respect to dealing with the evidence or the pleadings is found to be patently illegal, leading to the miscarriage of justice, or if its judgment is unreasonable and is based on erroneous understanding of law and of the facts of the case. A perverse finding is one which is based on no evidence or one that no reasonable person would have arrived at. Therefore, unless it is found that some relevant evidence has not been considered or that certain inadmissible material has been taken into consideration, the findings cannot be said to be perverse.

15. Having noticed the pleadings, which have been set out in detail above, now I would proceed to evaluate the oral as well as documentary evidence led by the parties.

16. One of the partners of the plaintiff Rajesh Verma stepped into the witness box and tendered in examination-in-

chief his affidavit Ex.PW-1/A wherein he reiterated the contents of the plaint and tendered the documents, i.e. Form-C Ex.P-1, appointment letter Ex.P-2, invoice Ex.P-3, Form No. 26 Ex.P-4, invoices Ex.P-5 and P-6, Tatima Ex.P-7, Jamabandi Ex.P-8, limit certificate Ex.P-9, letter Ex.P-10, postal receipt Ex.P-11 and partnership deed Ex.P-12.

17. However, when put to cross-examination, the plaintiff clearly admitted that the dealership of petrol pump was given to him on *ad hoc* basis. He volunteered to state that it was mentioned in the appointment letter that if plaintiff makes representation before 31.3.2005, then the retail outlet would be allowed to continue. He denied that *ad hoc* dealership is temporary dealership. He further denied that *ad hoc* dealership had been terminated by the company. He further denied that the defendant-company had never promised to regularize the dealership. He even denied the issuance of instructions of Government of India vide letter dated 6.9.2006 whereby the petrol pumps on *ad hoc* basis were reserved for SC/ST category.

18. Now, adverting to the evidence led by the defendants, it would be noticed that they examined one

Achman Treha, who tendered in his examination-in-chief his affidavit Ex.DW-1/A wherein he reiterated the contents of written statement and tendered the documents, i.e. POA Ex.D-1, letter of Ministry of Petroleum and Natural Gas Ex. D-2 and Corporate Broadcast Ex.D-3. This witness is the Territory Manager in Noida and joined at Ambala on 1.4.2014. He stated that he was authorized to depose on behalf of defendants vide power of attorney Ex.D-1. He feigned ignorance who had made efforts to procure the land from the Government of Himachal Pradesh on lease. However, volunteered that the person authorized by the company might have made efforts at such time. He feigned ignorance regarding ignorance letter dated 11.3.2005 Ex. P-10. He, however, admitted that the defendant-company was regularly supplying petroleum product to the plaintiff since March, 2005. He denied that the expenditure of the petrol outlet was incurred by the plaintiff. He further denied that as per Ex.P-2 (appointment letter), the defendant company was bound to regularize the outlet.

This in entirety is the evidence led by the parties.

19. On the basis of aforesaid evidence there can be no dispute that the plaintiff vide letter dated 4.3.2004 was in fact appointed as *ad hoc* dealer for the petrol outlet at Baddi. However, this outlet was to be governed by stipulation 22 of the letter dated 4.3.2004, as reproduced hereinabove.

20. A perusal of the aforesaid letter clearly goes to show that no promise has been held out to the plaintiff so as to even remotely indicate that his dealership would continue even after 31.3.2005. The letter, in fact, is only for a period of one year with the provision of extension that too in writing, which clearly not only indicates but proves that such dealership was of temporary nature and, therefore, no claim for regular dealership on the basis of aforesaid agreement could have been claimed. Yet the plaintiff is operating the outlet after obtaining *ex parte* order from this Court.

21. It would be noticed that there were no factual or legal basis upon which the plaintiff could have filed the suit, yet he managed to linger on it before the trial court itself for nearly 6½ years with effect from 28.5.2010 up till 16.11.2016 and during this time, he enjoyed an order of injunction in its favour. Even after the dismissal of the suit, it promptly filed

an appeal before the first appellate court on 5.12.2016 and obtained *ex parte* stay and when the appeal itself was dismissed on 9.1.2017, it promptly filed an appeal before this Court on 18.1.2017 and obtained *ex parte ad interim order* of *status quo* from the learned Vacation Judge.

22. It would also be noticed that the plaintiff had not claimed any right to run the outlet on the basis of any of the species of estoppel like acquiescence, waiver, promissory estoppel etc. and, therefore, I really wonder as to how the suit itself was maintainable. The plaintiff even did not raise the legal pleas including legitimate expectation because such pleas obviously were not available to it, yet under the garb of having simply instituted the litigation, it has continued to reap the benefit of the litigation in the Courts itself for over a period of 6½ years.

23. What is more amazing is the fact that despite period of the agreement having come to an end on 31.3.2005, plaintiff without intervention of the Court, enjoyed supplies of petroleum products till the time of the institution of the suit, i.e. 28.5.2010 without any right. This obviously could not

have been possible without the active connivance and support from the officials of the defendants.

24. There can be no doubt that offices being held by the defendants are held by them as sacred trust and, therefore, meant for use and not abuse and in case they would surpass the rules, then law is not that powerless and would step to quash such arbitrary orders.

25. In a welfare State the Government and its authorities have to act in fair, transparent and reasonable manner. It must as said by Mr. Justice Frankfurther in ***Vitrelli*** vs. ***Satun***, 359 US 535 rigorously hold to the standard by which it professes its action to be judged, no action of the Government or its functionaries can be founded on the arbitrary exercise of power, nor can any individual be chosen for distribution of State largesse or benefits on its liking. The Government cannot be permitted to exercise its action in favour of any person on the basis of its discretion to do so unless such exercise of discretion is founded on clear cut guidelines and the policy bereft of unreasonableness or arbitrariness.

26. Admittedly the defendants are a State within the meaning of Article 12 of the Constitution of India and therefore cannot act like a private individual, who is free to act in a manner whatsoever he likes, unless it is interdicted or prohibited by law. It is settled that the State and its instrumentalities have to act strictly within the four corners of law and all its activities are governed by Rules, regulations and instructions. In addition, the defendants are bound to act in a fair and transparent manner so as to dispel all fears that its action is, in fact, activated by extraneous consideration.

27. The role of the Government and its authorities as provider of services and benefits to the people has been considered in detail by the Hon'ble Supreme Court in ***Akhil Bhartiya Upbhokta Congress*** vs ***State of Madhya Pradesh and others***, (2011) 5 SCC 29, wherein it was observed as under:

> "[46] The concept of 'State' has changed in recent years. In all democratic dispensations the State has assumed the role of a regulator and provider of different kinds of services and benefits to the people like jobs, contracts, licences, plots of land, mineral rights and social security benefits. In his work "The Modern State" MacIver (1964 Paperback Edition) advocated that the State should

be viewed mainly as a service corporation. He highlighted difference in perception about the theory of State in the following words:

> "To some people State is essentially a class-structure, "an organization of one class dominating over the other classes"; others regard it as an organisation that transcends all classes and stands for the whole community. They regard it as a power- system. Some view it entirely as a legal structure, either in the old Austinian sense which made it a relationship of governors and governed, or, in the language of modern jurisprudence, as a community "organised for action under legal rules". Some regard it as no more than a mutual insurance society, others as the very texture of all our life. Some class the State as a great "corporation" and others consider it as indistinguishable from society itself."

[47] When the Constitution was adopted, people of India resolved to constitute India into a Sovereign Democratic Republic. The words 'Socialist' and 'Secular' were added by the Constitution (Forty-second Amendment) Act, 1976 and also to secure to all its citizens Justice - social, economic and political, Liberty of thought, expression, belief, faith and worship; Equality of status and/or opportunity and to promote among them all Fraternity assuring the dignity of the individual and the unity and integrity of the Nation. The expression 'unity of the Nation' was also added by the Constitution (Forty-second Amendment) Act, 1976. The idea of welfare State is ingrained in the Preamble of the Constitution. Part III of the Constitution enumerates fundamental rights, many of which are akin to the basic rights of every human being. This part also contains various positive and negative mandates which are necessary for ensuring protection of the Fundamental Rights and making them real and meaningful.

(48) Part IV contains 'Directive Principles of State Policy' which are fundamental in the governance of the country and it is the duty of the State to apply these principles in making laws. Article 39 specifies certain principles of policy which are required to be followed by the State. Clause (b) thereof provides that the State shall, in particular, direct its policy towards securing that the ownership and control of the material resources of the community are so distributed as best to sub-serve the common good. Parliament and Legislatures of the States have enacted several laws and the governments have, from time to time, framed policies so that the national wealth and natural resources are equitably distributed among all sections of people so that have-nots of the society can aspire to compete with haves.

[49] The role of the Government as provider of services and benefits to the people was noticed in R.D. Shetty v. International Airport Authority of India, 1979 3 SCC 489 in the following words:

> "Today the Government in a welfare State, is the regulator and dispenser of special services and provider of a large number of benefits, including jobs, contracts, licences, quotas, mineral rights, etc. The Government pours forth wealth, money, benefits, services, contracts, quotas and licences. The valuables dispensed by Government take many forms, but they all share one characteristic. They are steadily taking the place of traditional forms of wealth. These valuables which derive from relationships to Government are of many kinds. They comprise social security benefits, cash grants for political sufferers and the whole scheme of State and local welfare. Then again, thousands of people are employed in the State and the Central Governments and local authorities. Licences are required before one can engage in many kinds of businesses or work. The power of giving licences means power to withhold them and this gives control to the

> Government or to the agents of Government on the lives of many people. Many individuals and many more businesses enjoy largesse in the form of Government contracts. These contracts often resemble subsidies. It is virtually impossible to lose money on them and many enterprises are set up primarily to do business with Government. Government owns and controls hundreds of acres of public land valuable for mining and other purposes. These resources are available for utilisation by private corporations and individuals by way of lease or licence. All these mean growth in the Government largesse and with the increasing magnitude and range of governmental functions as we move closer to a welfare State, more and more of our wealth consists of these new forms. Some of these forms of wealth may be in the nature of legal rights but the large majority of them are in the nature of privileges....."

[50] For achieving the goals of Justice and Equality set out in the Preamble, the State and its agencies/instrumentalities have to function through political entities and officers/officials at different levels. The laws enacted by Parliament and State Legislatures bestow upon them powers for effective implementation of the laws enacted for creation of an egalitarian society. The exercise of power by political entities and officers/officials for providing different kinds of services and benefits to the people always has an element of discretion, which is required to be used in larger public interest and for public good. In principle, no exception can be taken to the use of discretion by the political functionaries and officers of the State and/or its agencies/instrumentalities provided that this is done in a rational and judicious manner without any discrimination against anyone. In our constitutional structure, no functionary of the State or public authority has an absolute or unfettered discretion. The very idea of unfettered discretion is totally incompatible with the

doctrine of equality enshrined in the Constitution and is an antithesis to the concept of rule of law.

[51] In his work 'Administrative Law' (6th) Edition, Prof. H.W.R. Wade, highlighted distinction between powers of public authorities and those of private persons in the following words:

> "... The common theme of all the authorities so far mentioned is that the notion of absolute or unfettered discretion is rejected. Statutory power conferred for public purposes is conferred as it were upon trust, no absolutely - that is to say, it can validly be used only in the right and proper way which Parliament when conferring it is presumed to have intended. Although the Crown's lawyers have argued in numerous cases that unrestricted permissive language confers unfettered discretion, the truth is that, in a system based on the rule of law, unfettered governmental discretion is a contradiction in terms."
>
> Prof. Wade went on to say:
>
> "..... The whole conception of unfettered discretion is inappropriate to a public authority, which possesses powers solely in order that it may use them for the public good.
>
> There is nothing paradoxical in the imposition of such legal limits. It would indeed be paradoxical if they were not imposed.
>
> Nor is this principle an oddity of British or American law; it is equally prominent in French law. Nor is it a special restriction which fetters only local authorities: it applies no less to ministers of the Crown. Nor is it confined to the sphere of administration: it operates wherever discretion is given for some public purpose, for example where a judge has a discretion to order jury trial. It is only where powers are given for the personal benefit of the person empowered that the discretion is absolute. Plainly this can have no application in public law.

For the same reasons there should in principle be no such thing as unreviewable administrative discretion, which should be just as much a contradiction in terms as unfettered discretion. The question which has to be asked is what is the scope of judicial review, and in a few special cases the scope for the review of discretionary decisions may be minimal. It remains axiomatic that all discretion is capable of abuse, and that legal limits to every power are to be found somewhere."

[52] Padfield v. Minister of Agriculture, Fishery and Food, 1968 AC 997, is an important decision in the area of administrative law. In that case the Minister had refused to appoint a committee to investigate the complaint made by the members of the Milk Marketing Board that majority of the Board had fixed milk prices in a way that was unduly unfavourable to the complainants. The Minister's decision was founded on the reason that it would be politically embarrassing for him if he decided not to implement the committee's decision.

[53] While rejecting the theory of absolute discretion, Lord Reid observed:

> "Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act; the policy and objects of the Act must be determined by construing the Act as a whole and construction is always a matter of law for the court. In a matter of this kind it is not possible to draw a hard and fast line, but if the Minister, by reason of his having misconstrued the Act or for any other reasons, so uses his discretion as to thwart or run counter to the policy and objects of the Act, then our law would be very defective if persons aggrieved were not entitled to the protection of the court."

[54] In Breen v. Amalgamated Engineering Union, 1971 2 QB 175, Lord Denning MR said:

"The discretion of a statutory body is never unfettered. It is a discretion which is to be exercised according to law. That means at least this: the statutory body must be guided by relevant considerations and not by irrelevantly. It its decision is influenced by extraneous considerations which it ought not to have taken into account, then the decision cannot stand. No matter that the statutory body may have acted in good faith; nevertheless the decision will be set aside. That is established by Padfield v. Minister of Agriculture, Fisheries and Food which is a landmark in modern administrative law."

[55] In Laker Airways Ltd. v. Department of Trade,1977 QB 643, Lord Denning discussed prerogative of the Minister to give directions to Civil Aviation Authorities overruling the specific provisions in the statute in the time of war and said:

"Seeing that prerogative is a discretion power to be exercised for the public good, it follows that its exercise can be examined by the Courts just as in other discretionary power which is vested in the executive."

[56] This Court has long ago discarded the theory of unfettered discretion. In S.G. Jaisinghani v. Union of India, 1967 AIR(SC) 1427, Ramaswami, J. emphasised that absence of arbitrary power is the foundation of a system governed by rule of law and observed:

"In this context it is important to emphasize that the absence of arbitrary power is the first essential of the rule of law upon which our whole constitutional system is based. In a system governed by rule of law, discretion, when conferred upon executive authorities, must be confined within clearly defined limits. The rule of law from this point of view means that decisions should be made by the application of known principles and rules and, in general, such decisions should be predictable and the

citizen should know where he is. If a decision is taken without any principle or without any rule it is unpredictable and such a decision is the antithesis of a decision taken in accordance with the rule of law. (See Dicey-"Law of the Constitution" - Tenth Edn., Introduction ex.). 'Law has reached its finest moments', stated Douglas, J. in United States v. Underlick,1951 342 US 98, "when it has freed man from the unlimited discretion of some ruler..... Where discretion is absolute, man has always suffered'. It is in this sense that the rule of law maybe said to be the sworn enemy of caprice. Discretion, as Lord Mansfield stated it in classic terms in the case of John Wilkes (1770 98 ER 327),'means sound discretion guided by law. It must be governed by rule, not humour it must not be arbitrary, vague and fanciful"

[57] In Ramana Dayaram Shetty v. International Airport Authority of India (supra), Bhagwati, J. referred to an article by Prof. Reich "The New Property" which was published in 73 Yale Law Journal. In the article, the learned author said, "that the Government action be based on standard that are not arbitrary or unauthorized." The learned Judge then quoted with approval the following observations made by Mathew, J. (as he then was) in V. Punnen Thomas v. State of Kerala, 1969 AIR(Ker) 81 (Full Bench):

> "The Government is not and should not be as free as an individual in selecting recipients for its largesses. Whatever its activities, the Government is still the Government and will be subject to the restraints inherent in its position in a democratic society. A democratic Government cannot lay down arbitrary and capricious standards for the choice of persons with whom alone it will deal."

[58] Bhagwati, J. also noticed some of the observations made by Ray, C.J. in Eursian Equipments and Chemicals Ltd. v. State of West Bengal, 1975 1 SCC 70 who emphasized that when

the Government is trading with public the democratic form of Government demands equality and absence of arbitrariness and discrimination in such transactions and held:

> ".....This proposition would hold good in all cases of dealing by the Government with the public, where the interest sought to be protected is a privilege. It must, therefore, be taken to be the law that where the Government is dealing with the public, whether by way of giving jobs or entering into contracts or issuing quotas or licences or granting other forms of largesse, the Government cannot act arbitrarily at its sweet will and, like a private individual, deal with any person it pleases, but its action must be in conformity with standard or norms which is not arbitrary, irrational or irrelevant. The power or discretion of the Government in the matter of grant of largesse including award of jobs, contracts, quotas, licences, etc. must be confined and structured by rational, relevant and non-discriminatory standard or norm and if the Government departs from such standard or norm in any particular case or cases, the action of the Government would be liable to be struck down, unless it can be shown by the Government that the departure was not arbitrary, but was based on some valid principle which in itself was not irrational, unreasonable or discriminatory."

[59] In Kasturi Lal Lakshmi Reddy v. State of J And K, 1980 4 SCC 1, Bhagwati J. speaking for the Court observed:

> "Where any governmental action fails to satisfy the test of reasonableness and public interest discussed above and is found to be wanting in the quality of reasonableness or lacking in the element of public interest, it would be liable to be struck down as invalid. It must follow as a necessary corollary from this proposition that the Government cannot act in a manner which would benefit a private party at the

cost of the State; such an action would be both unreasonable and contrary to public interest. The Government, therefore, cannot, for example, give a contract or sell or lease out its property for a consideration less than the highest that can be obtained for it, unless of course there are other considerations which render it reasonable and in public interest to do so. Such considerations may be that some directive principle is sought to be advanced or implemented or that the contract or the property is given not with a view to earning revenue but for the purpose of carrying out a welfare scheme for the benefit of a particular group or section of people deserving it or that the person who has offered a higher consideration is not otherwise fit to be given the contract or the property. We have referred to these considerations only illustratively, for there may be an infinite variety of considerations which may have to be taken into account by the Government in formulating its policies and it is on a total evaluation of various considerations which have weighed with the Government in taking a particular action, that the court would have to decide whether the action of the Government is reasonable and in public interest. But one basic principle which must guide the court in arriving at its determination on this question is that there is always a presumption that the governmental action is reasonable and in public interest and it is for the party challenging its validity to show that it is wanting in reasonableness or is not informed with public interest. This burden is a heavy one and it has to be discharged to the satisfaction of the court by proper and adequate material. The court cannot lightly assume that the action taken by the Government is unreasonable or without public interest because, as we said above, there are a large number of policy considerations which must

necessarily weigh with the Government in taking action and therefore the court would not strike down governmental action as invalid on this ground, unless it is clearly satisfied that the action is unreasonable or not in public interest. But where it is so satisfied, it would be the plainest duty of the court under the Constitution to invalidate the governmental action. This is one of the most important functions of the court and also one of the most essential for preservation of the rule of law. It is imperative in a democracy governed by the rule of law that governmental action must be kept within the limits of the law and if there is any transgression, the court must be ready to condemn it. It is a matter of historical experience that there is a tendency in every Government to assume more and more powers and since it is not an uncommon phenomenon in some countries that the legislative check is getting diluted, it is left to the court as the only other reviewing authority under the Constitution to be increasingly vigilant to ensure observance with the rule of law and in this task, the court must not flinch or falter. It may be pointed out that this ground of invalidity, namely, that the governmental action is unreasonable or lacking in the quality of public interest, is different from that of mala fides though it may, in a given case, furnish evidence of mala fides."

[60] In Common Cause, A Registered Society v. Union of India, 1996 6 SCC 530 the two Judge Bench considered the legality of discretionary powers exercised by the then Minister of State for Petroleum and Natural Gas in the matter of allotment of petrol pumps and gas agencies. While declaring that allotments made by the Minister were wholly arbitrary, nepotistic and motivated by extraneous considerations the Court said:

"The Government today -- in a welfare State -- provides large number of benefits to the citizens. It distributes wealth in the form of allotment of plots, houses, petrol pumps, gas agencies, mineral leases, contracts, quotas and licences etc. Government distributes largesses in various forms. A Minister who is the executive head of the department concerned distributes these benefits and largesses. He is elected by the people and is elevated to a position where he holds a trust on behalf of the people. He has to deal with the people's property in a fair and just manner. He cannot commit breach of the trust reposed in him by the people."

[61] The Court also referred to the reasons recorded in the orders passed by the Minister for award of dealership of petrol pumps and gas agencies and observed:

"24.....While Article 14 permits a reasonable classification having a rational nexus to the objective sought to be achieved, it does not permit the power to pick and choose arbitrarily out of several persons falling in the same category. A transparent and objective criteria/procedure has to be evolved so that the choice among the members belonging to the same class or category is based on reason, fair play and non-arbitrariness. It is essential to lay down as a matter of policy as to how preferences would be assigned between two persons falling in the same category. If there are two eminent sportsmen in distress and only one petrol pump is available, there should be clear, transparent and objective criteria/procedure to indicate who out of the two is to be preferred. Lack of transparency in the system promotes nepotism and arbitrariness. It is absolutely essential that the entire system should be transparent right from the

stage of calling for the applications up to the stage of passing the orders of allotment."

[62] In Shrilekha Vidyarthi v. State of U.P., 1991 1 SCC 212, the Court unequivocally rejected the argument based on the theory of absolute discretion of the administrative authorities and immunity of their action from judicial review and observed:

".... We have no doubt that the Constitution does not envisage or permit unfairness or unreasonableness in State actions in any sphere of its activity contrary to the professed ideals in the Preamble. 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. This is more so when the modern trend is also to examine the unreasonableness of a term in such contracts where the bargaining power is unequal so that these are not negotiated contracts but standard form contracts between unequals.....

Even assuming that it is necessary to import the concept of presence of some public element in a State action to attract Article 14 and permit judicial review, we have no hesitation in saying that the ultimate impact of all actions of the State or a public body being undoubtedly on public interest, the requisite public element for this purpose is present also in contractual matters. We, therefore, find it difficult and unrealistic to exclude the State actions 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.

It can no longer be doubted at this point of time that Article of the Constitution of India applies also to matters of governmental policy and if the policy or any action of the Government, even in contractual matters, fails to satisfy the test

of reasonableness, it would be unconstitutional. (See Ramana Dayaram Shetty v. The International Airport Authority of India, 1979 AIR(SC) 1628] and Kasturi Lal Lakshmi Reddy v. State of Jammu and Kashmir, 1980 AIR(SC) 1992], In Col. A.S. Sangwan v. Union of India, 1981 AIR(SC) 1545], while the discretion to change the policy in exercise of the executive power, when not trammelledly the statute or rule, was held to be wide, it was emphasised as imperative and implicit in Article 14 of the Constitution that a change in policy must be made fairly and should not give the impression that it was so done arbitrarily or by any ulterior criteria. The wide sweep of Article 14 and the requirement of every State action qualifying for its validity on this touch-stone, irrespective of the field of activity of the State, has long been settled. Later decisions of this Court have reinforced the foundation of this tenet and it would be sufficient to refer only to two recent decisions of this Court for this purpose."

[63] Similarly, in L.I.C. of India v. Consumer Education & Research Centre, 1995 5 SCC 482, the Court negatived the argument that exercise of executive power of the State was immune from judicial review and observed:

> ".... Every action of the public authority or the person acting in public interest or its acts give rise to public element, should be guided by public interest. It is the exercise of the public power or action hedged with public element becomes open to challenge. If it is shown that the exercise of the power is arbitrary, unjust and unfair it should be no answer for the State, its instrumentality, public authority or person whose acts have the insignia of public element to say that their actions are in the field of private law and they are free to prescribe any conditions or limitations in their actions as private citizens, similicitor, do in the field of private law. Its actions must be based on

some rational and relevant principles. It must not be guided by traditional or irrelevant considerations.....

This Court has rejected the contention of an instrumentality or the State that its action is in the private law field and would be immune from satisfying the tests laid under Article 14. The dichotomy between public law and private law rights and remedies, though may not be obliterated by any straight jacket formula, it would depend upon the factual matrix. The adjudication of the dispute arising out of a contract would, therefore, depend upon facts and circumstances in a given case.

The distinction between public law remedy and private law filed cannot be demarcated with precision. Each case will be examined on its facts and circumstances to find out the nature of the activity, scope and nature of the controversy. The distinction between public law and private law remedy has now become too thin and practicably obliterated.....

In the sphere of contractual relations the State, its instrumentality, public authorities or those whose acts bear insignia of public element, action to public duty or obligation are enjoined to act in a manner i.e. fair, just and equitable, after taking objectively all the relevant options into consideration and in a manner that is reasonable, relevant and germane to effectuate the purpose for public good and in general public interest and it must not take any irrelevant or irrational factors into consideration or arbitrary in its decision. Duty to act fairly is part of fair procedure envisaged under Articles 14 and 21. Every activity of the public authority or those under public duty or obligation must be informed by reason and guided by the public interest."

[64] In New India Public School v. HUDA, 1996 5 SCC 510, this Court approved the judgment of the Division Bench of the Punjab and Haryana High Court in Seven Seas Educational Society v. HUDA,1996 AIR(P&H) 229, whereby allotment of land in favour of the appellants was quashed and observed:

> ".... A reading thereof, in particular Section 15(3) read with Regulation 3(c) does indicate that there are several modes of disposal of the property acquired by HUDA for public purpose. One of the modes of transfer of property as indicated in Sub- section (3) of Section 15 read with sub-regulation (c) of Regulation 5 is public auction, allotment or otherwise. When public authority discharges its public duty the word "otherwise" would be construed to be consistent with the public purpose and clear and unequivocal guidelines or rules are necessary and not at the whim and fancy of the public authorities or under their garb or cloak for any extraneous consideration. It would depend upon the nature of the scheme and object of public purpose sought to be achieved. In all cases relevant criterion should be pre-determined by specific rules or regulations and published for the public. Therefore, the public authorities are required to make necessary specific regulations or valid guidelines to exercise their discretionary powers, otherwise, the salutory procedure would be by public auction. The Division Bench, therefore, has rightly pointed out that in the absence of such statutory regulations exercise of discretionary power to allot sites to private institutions or persons was not correct in law."

[65] What needs to be emphasized is that the State and/or its agencies/instrumentalities cannot give largesse to any person according to the sweet will and whims of the political entities and/or officers of the State. Every action/decision of the State and/or its agencies/instrumentalities to give largesse or confer

benefit must be founded on a sound, transparent, discernible and well defined policy, which shall be made known to the public by publication in the Official Gazette and other recognized modes of publicity and such policy must be implemented/executed by adopting a non- discriminatory or non-arbitrary method irrespective of the class or category of persons proposed to be benefitted by the policy. The distribution of largesse like allotment of land, grant of quota, permit licence etc. by the State and its agencies/instrumentalities should always be done in a fair and equitable manner and the element of favoritism or nepotism shall not influence the exercise of discretion, if any, conferred upon the particular functionary or officer of the State.

[66] We may add that there cannot be any policy, much less, a rational policy of allotting land on the basis of applications made by individuals, bodies, organizations or institutions de hors an invitation or advertisement by the State or its agency/instrumentality. By entertaining applications made by individuals, organisations or institutions for allotment of land or for grant of any other type of largesse the State cannot exclude other eligible persons from lodging competing claim. Any allotment of land or grant of other form of largesse by the State or its agencies/instrumentalities by treating the exercise as a private venture is liable to be treated as arbitrary, discriminatory and an act of favoritism and nepotism violating the soul of the equality clause embodied in Article 14 of the Constitution."

28. What are the duties, responsibilities and obligations of public authority in a system based on rule of law has been subject matter of a very recent decision of the Hon'ble Supreme Court in ***Indian Oil Corporation Ltd &***

Ors vs. ***Shashi Prabha Shukla & anr.,*** Civil Appeal No. 5565 of 2009 decided on 15.12.2017, wherein it was observed as under:

> "[23] It is no longer res integra that a public authority, be a person or an administrative body is entrusted with the role to perform for the benefit of the public and not for private profit and when a prima facie case of misuse of power is made out, it is open to a court to draw the inference that unauthorized purposes have been pursued, if the competent authority fails to adduce any ground supporting the validity of its conduct.
>
> [24] The following extract from the Halsbury's Laws of England, Fourth Edition, Vol.1(1) Administrative Law provide the foundation of these observations:
>
> > "A public authority may be described as a person or administrative body entrusted with functions to perform for the benefit of the public and not for private profit. Not every such person or body is expressly defined as public authority or body, and the meaning of a public authority or body may vary according to the statutory context."
>
> [25] In re, the duties, responsibilities and obligations of a public authority in a system based on rule of law, unfettered discretion or power is an anathema as every public authority is a trustee of public faith and is under a duty to hold public property in trust for the benefit of the laity and not for any individual in particular. The following excerpts from the Foulkes Administrative Law, 7th Edition at page 174 provide the elaborate insight:
>
> > "A true trust exists when one person, the trustee, is under a duty to hold the trust property vested in him for the benefit of other persons, the beneficiaries. The term 'trust' is, however, used in a much wider sense. We may speak of government being 'entrusted' with power, of Parliament as

the trustee which the nation has authorized to act on its behalf. The purpose of the use of the concept in such contexts is of course to emphasize that the powers and duties of such bodies should be exercised not for the advancement of their own interest, but that of the others, to underline their obligation to others.

[26] The distinction between the power of a public authority and a private person has since been succinctly brought about in the following quote from the celebrated work "Administrative Law", Tenth Edition by H.W.R. Wade and C.F. Forsyth:

"The common theme of all the authorities so far mentioned is that the notion of absolute or unfettered discretion is rejected. Statutory power conferred for public purposes is conferred as it were upon trust not absolutely that is to say, it can validly be used only in the right and proper way which parliament when conferring if is presumed to have intended. In a system based on rule of law, unfettered governmental discretion is contradictory in terms ....

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

[27] In Akhil Bhartiya Upbhokta Congress vs. State of M.P., 2011 5 SCC 29 , this Court was seised as well with the nature of

the norms to be adhered to for allotment of land, grant of quotas, permits, licenses etc. by way of distribution thereof as State largesse. The following observations provide the guiding comprehension:

> 65. What needs to be emphasised is that the State and/or its agencies/instrumentalities cannot give largesse to any person according to the sweet will and whims of the political entities and/or officers of the State. Every action/decision of the State and/or its agencies/instrumentalities to give largesse or confer benefit must be founded on a sound, transparent, discernible and well-defined policy, which shall be made known to the public by publication in the Official Gazette and other recognised modes of publicity and such policy must be implemented/executed by adopting a non-discriminatory and non-arbitrary method irrespective of the class or category of persons proposed to be benefited by the policy. The distribution of largesse like allotment of land, grant of quota, permit licence, etc. by the State and its agencies/instrumentalities should always be done in a fair and equitable manner and the element of favouritism or nepotism shall not influence the exercise of discretion, if any, conferred upon the particular functionary or officer of the State.
>
> 66. We may add that there cannot be any policy, much less, a rational policy of allotting land on the basis of applications made by individuals, bodies, organisations or institutions dehors an invitation or advertisement by the State or its agency/instrumentality. By entertaining applications made by individuals, organisations or institutions for allotment of land or for grant of any other type of largesse the State cannot exclude other eligible persons from lodging competing claim. Any allotment of

land or grant of other form of largesse by the State or its agencies/instrumentalities by treating the exercise as a private venture is liable to be treated as arbitrary, discriminatory and an act of favouritism and/or nepotism violating the soul of the equality clause embodied in Article 14 of the Constitution.

[28] In his work Administrative Law (6th Edn.) Prof. H.W.R. Wade highlighted the distinction between powers of public authorities and those of private persons in the following words:

"The common theme of all the authorities so far mentioned is that the notion of absolute or unfettered discretion is rejected. Statutory power conferred for public purposes is conferred as it were upon trust, no absolutely —that is to say, it can validly be used only in the right and proper way which Parliament when conferring it is presumed to have intended. Although the Crown's lawyers have argued in numerous cases that unrestricted permissive language confers unfettered discretion, the truth is that, in a system based on the rule of law, unfettered governmental discretion is a contradiction in terms."

29. While rejecting the theory of absolute discretion, Lord Reid observed in Padfield v. Minister of Agriculture, Fisheries and Food2 :

"… Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act; the policy and objects of the Act must be 2 [1968] AC 997 34 determined by construing the Act as a whole and construction is always a matter of law for the court. In a matter of this kind it is not possible to draw a hard and fast line, but if the Minister, by reason of his having misconstrued the Act or for any other reason, so uses his discretion as to thwart or run counter to the policy and objects of the Act, then our law would be very defective

if persons aggrieved were not entitled to the protection of the court."

[30] The role of the Government as provider of services and benefits to the people was noticed in Ramana Dayaram Shetty v. International Airport Authority of India, 1979 3 SCC 489 in the following words:

"11. Today the Government in a welfare State, is the regulator and dispenser of special services and provider of a large number of benefits, including jobs, contracts, licences, quotas, mineral rights, etc. The Government pours forth wealth, money, benefits, services, contracts, quotas and licences. The valuables dispensed by Government take many forms, but they all share one characteristic. They are steadily taking the place of traditional forms of wealth. These valuables which derive from relationships to Government are of many kinds. They comprise social security benefits, cash grants for political sufferers and the whole scheme of State and local welfare. Then again, thousands of people are employed in the State and the Central Governments and local authorities. Licences are required before one can engage in many kinds of businesses or work. The power of giving licences means power to withhold them and this gives control to the Government or to the agents of Government on the lives of many people. Many individuals and many more businesses enjoy largesse in the form of government contracts. These contracts often resemble subsidies. It is virtually impossible to lose money on them and many enterprises are set up primarily to do business with the Government. The Government owns and controls hundreds of acres of public land valuable for mining and other purposes. These resources are available for utilisation by private corporations and individuals by way of lease or licence. All

these mean growth in the Government largesse and with the increasing magnitude and range of governmental functions as we move closer to a welfare State, more and more of our wealth consists of these new forms. Some of these forms of wealth may be in the nature of legal rights but the large majority of them are in the nature of privileges."

[31] In the same vein, in Natural Resources Allocation, In Re, Special Reference No.1 of 2012 , this Court summed up the long line of judicial enunciations on this theme thus:

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

[32] This Court in Center for Public Interest Litigation and others Vs. Union of India and others,2012 3 SCC 2 , while examining the challenge to the allocation of 2G Telecom Services, reflected on the considerations that should inform the process thereof and observed thus:

> "95. This Court has repeatedly held that wherever a contract is to be awarded or a licence is to be given, the public authority must adopt a transparent and fair method for making selections so that all eligible persons get a fair opportunity of competition. To put it differently, the State and its agencies/instrumentalities must always adopt a rational method for disposal of public property and no attempt should be made to scuttle the claim of worthy applicants. When it comes to alienation of scarce natural resources like spectrum, etc. it is the burden of the State to ensure that a non-discriminatory method is adopted for distribution and alienation, which would necessarily result in protection of national/public interest.
>
> [33] Jurisprudentially thus, as could be gleaned from the above legal enunciations, a public authority in its dealings has to be fair, objective, non-arbitrary, transparent and non-discriminatory. The discretion vested in such an authority, which is a concomitant of its power is coupled with duty and can never be unregulated or unbridled. Any decision or action contrary to these functional precepts would be at the pain of invalidation thereof. The State and its instrumentalities, be it a public authority, either as an individual or a collective has to essentially abide by this inalienable and non-negotiable prescriptions and cannot act in breach of the trust reposed by the polity and on extraneous considerations. In exercise of uncontrolled discretion and power, it cannot resort to any act to fritter, squander and emasculate any public property, be it by way of State largesse or contracts etc. Such outrages would clearly be unconstitutional and extinctive of the rule of law which forms the bedrock of the constitutional order."

29. After making the observations and after having found the complexity of the offices of the Indian Oil Corporation, the Hon'ble Supreme Court passed the following orders:

> "35.....In this view of the matter, we direct the Corporation to cause an in-house inquiry to be made to fix the liability of the errant officials on the issue and decide appropriate action(s) against them in accordance with law within a period of two months herefrom. The Corporation after completing this exercise would submit a report before this Court for further orders, if necessary. We make it clear that any breach or non-compliance of this direction would be per se construed to be a contempt of this Court with penal consequences as contemplated in law."

30. What, therefore, can be deduced from the law expounded by the Hon'ble Supreme Court is that the State and/or its agencies/instrumentalities cannot give largesse to any person according to the sweet will and whims of their entities. Every action/decision of the State and/or its agencies/instrumentalities to give largesse or confer benefit must be founded on a sound, transparent, discernible and well defined policy, which shall be made known to the public by publication in the official Gazette and other recognized modes of publicity and such policy must be implemented/executed by adopting a non- discriminatory or

non-arbitrary method irrespective of the class or category of persons proposed to be benefitted by the policy. The distribution of largesse like allotment of land, grant of quota, permit licence, retail outlets etc. by the State and its agencies/instrumentalities should always be done in a fair and equitable manner and the element of favoritism or nepotism is not to influence the exercise of such discretion, if any, conferred upon the particular functionary or officer of the State.

31. It is proved on record that the claim set up by the plaintiff was absolutely false. In ***Maria Margarida Sequeria Fernandes*** v. ***Erasmo Jack de Sequeria***, 2012 5 SCC 370, the Supreme Court held that false claims and defences are serious problems with the litigation. The Supreme Court held as under:-

> "False claims and false defences
>
> 84. False claim s and defences are really serious problems with real estate litigation, predominantly because of ever escalating prices of the real estate. Litigation pertaining to valuable real estate properties is dragged on by unscrupulous litigants in the hope that the other party will tire out and ultimately would settle with them by paying a huge amount. This happens because of the enormous delay in adjudication of cases in our Courts. If

pragmatic approach is adopted, then this problem can be minimized to a large extent."

32. In ***Dalip Singh*** v. ***State of U.P.***, 2010 2 SCC 114, the Supreme Court observed that a new creed of litigants have cropped up in the last 40 years who do not have any respect for truth and shamelessly resort to falsehood and unethical means for achieving their goals. The observations of the Supreme Court are as under:-

"1. For many centuries, Indian society cherished two basic values of life i.e., 'Satya' (truth) and 'Ahimsa' (non-violence). Mahavir, Gautam Buddha and Mahatma Gandhi guided the people to ingrain these values in their daily life. Truth constituted an integral part of the justice-delivery system which was in vogue in the pre-Independence era and the people used to feel proud to tell truth in the courts irrespective of the consequences. However, postIndependence period has seen drastic changes in our value system. The materialism has over shadowed the old ethos and the quest for personal gain has become so intense that those involved in litigation do not hesitate to take shelter of falsehood, misrepresentation and suppression of facts in the court proceedings.

2. In last 40 years, a new creed of litigants has cropped up. Those who belong to this creed do not have any respect for truth. They shamelessly resort to falsehood and unethical means for achieving their goals. In order to meet the challenge posed by this new creed of litigants, the courts have, from time to time, evolved new rules and it is now well established that a litigant, who attempts to pollute the stream of justice or who touches the pure

fountain of justice with tainted hands, is not entitled to any relief, interim or final."

33. In ***Satyender Singh*** v. ***Gulab Singh***, 2012 129 DRJ 128, the Division Bench of Delhi High Court following Dalip Singh v. State of U.P. observed that the Courts are flooded with litigation with false and incoherent pleas and tainted evidence led by the parties due to which the judicial system in the country is choked and such litigants are consuming Courts? time for a wrong cause."

The observations of Court are as under:-

"2. As rightly observed by the Supreme Court, Satya is a basic value of life which was required to be followed by everybody and is recognized since many centuries. In spite of caution, courts are continued to be flooded with litigation with false and incoherent pleas and tainted evidence led by the parties. The judicial system in the country is choked and such litigants are consuming courts" time for a wrong cause. Efforts are made by the parties to steal a march over their rivals by resorting to false and incoherent statements made before the Court. Indeed, it is a nightmare faced by a Trier of Facts; required to stitch a garment, when confronted with a fabric where the weft, shuttling back and forth across the warp in weaving, is nothing but lies. As the threads of the weft fall, the yarn of the warp also collapses; and there is no fabric left."

34. In ***Sky Land International Pvt. Ltd***. v. ***Kavita P. Lalwani,*** 2012 191 DLT 594, Delhi High Court held as under:-

> "26.20 Dishonest and unnecessary litigations are a huge strain on the judicial system. The Courts are continued to be flooded with litigation with false and incoherent pleas and tainted evidence led by the parties. The judicial system in the country is choked and such litigants are consuming courts" time for a wrong cause. Efforts are made by the parties to steal a march over their rivals by resorting to false and incoherent statements made before the Court.
>
> 26.22 Unless the Courts ensure that wrongdoers are denied profit or undue benefit from the frivolous litigation, it would be difficult to control frivolous and uncalled for litigations. In order to curb uncalled for and frivolous litigation, the Courts have to ensure that there is no incentive or motive for uncalled for litigation. It is a matter of common experience that the Courts? scarce and valuable time is consumed or more appropriately wasted in a large number of uncalled for cases. It becomes the duty of the Courts to see that such wrong doers are discouraged at every step and even if they succeed in prolonging the litigation, ultimately they must suffer the costs. Despite settled legal positions, the obvious wrong doers, use one after another tier of judicial review mechanism as a gamble, knowing fully well that the dice is always loaded in their favour, since even if they lose, the time gained is the real gain. This situation must be redeemed by the Courts."

35. The judicial system has been abused and virtually brought to its knees by unscrupulous litigants like the

plaintiff in this case. It has to be remembered that Court's proceedings are sacrosanct and should not be polluted by unscrupulous litigants. The defendant/appellant has abused the process of the Court.

36. The Hon'ble Supreme Court in ***K.K.Modi*** vs ***K.N.Modi and others***, reported in (1998) 3 SCC 573 has dealt in detail with the proposition as to what would constitute an abuse of the process of the Court, one of which pertains to re-litigation. It has been held at paragraphs 43 to 46 as follows:

> "43. The Supreme Court Practice 1995 published by Sweet & Maxwell in paragraph 18/19/33 (page 344) explains the phrase "abuse of the process of the Court" thus: "This terms connotes that the process of the Court must be used bona fide and properly and must not be abused. The Court will prevent improper use of its machinery and will in a proper case, summarily prevent its machinery from being used as a means of vexation and oppression in the process of litigation. . . . . .
>
> The categories of conduct rendering a claim frivolous, vexatious or an abuse of process are not closed but depend on all the relevant circumstances. And for this purpose considerations of public policy and the interests of justice may be very material."
>
> 44. One of the examples cited as an abuse of the process of Court is re-litigation. It is an abuse of the process of the Court and contrary to justice and public policy for a party to re-litigate the same issue which has already been tried and decided earlier against him. The re-agitation may or may not be barred as res

judicata. But if the same issue is sought to be re-agitated, it also amounts to an abuse of the process of the Court. A proceeding being filed for a collateral purpose, or a spurious claim being made in litigation may also in a given set of facts amount to an abuse of the process of the Court. Frivolous or vexatious proceedings may also amount to an abuse of the process of Court especially where the proceedings are absolutely groundless. The Court then has the power to stop such proceedings summarily and prevent the time of the public and the Court from being wasted. Undoubtedly, it is a matter of Courts' discretion whether such proceedings should be stopped or not; and this discretion has to be exercised with circumspection. It is a jurisdiction which should be sparingly exercised, and exercised only in special cases. The Court should also be satisfied that there is no chance of the suit succeeding.

45. In the case of Greenhalgh v. Mallard,1947 2 AllER 255, the Court had to consider different proceedings on the same cause of action for conspiracy, but supported by different averments.

The Court held that if the plaintiff has chosen to put his case in one way, he cannot thereafter bring the same transaction before the Court, put his case in another way and say that he is relying on a new cause of action. In such circumstances he can be met with the plea of res judicata or the statement or plaint may be struck out on the ground that the action is frivolous and vexatious and an abuse of the process of the Court.

46. In Mcllkenny v. Chief Constable of West Midlands Police Force, 1980 2 AllER 227, the Court of Appeal in England struck out the pleading on the ground that the action was an abuse of the process of the Court since it raised an issue identical to that which had been finally determined at the plaintiffs ' earlier criminal trial. The Court said even when it is not possible to strike out the plaint on the ground of issue estoppel, the action can be struck out as an abuse of the process of the Court because it is an

> abuse for a party to re-litigate a question or issue which has already been decided against him even though the other party cannot satisfy the strict rule of res judicata or the requirement of issue estoppels."

37. The plaintiff by keeping these proceedings alive has gained an undeserved and unfair advantage. The plaintiff has successful in dragging the proceedings for a very long time on one count or the other and because of his wrongful possession he has drawn delight in delay in disposal of the cases by taking undue advantage of procedural complications. The case at hand shows that frivolous defences and frivolous litigation is a calculated venture involving no risks situation. One has only to engage professionals to prolong the litigation so as to deprive the rights of a person and enjoy the fruits of illegalities. The Court has been used as a tool by the plaintiff to perpetuate illegalities and has perpetuated an illegal possession. It is on account of such frivolous litigation that the court dockets are overflowing. Here it is apt to reproduce the observations made by the Hon'ble Supreme Court in paras 174, 175 and 197 of the judgment in ***Indian Council for Enviro-Legal Action*** vs.

Union of India and others, 2011 8 SCC 161 which are as under:

> "174. In Padmawati vs Harijan Sewak Sangh, 2008 154 DLT 411 decided by the Delhi high Court on 6.11.2008, the court held as under: (DLT p.413, para 6)
>
> > "6. The case at hand shows that frivolous defences and frivolous litigation is a calculated venture involving no risks situation. You have only to engage professionals to prolong the litigation so as to deprive the rights of a person and enjoy the fruits of illegalities. I consider that in such cases where Court finds that using the Courts as a tool, a litigant has perpetuated illegalities or has perpetuated an illegal possession, the Court must impose costs on such litigants which should be equal to the benefits derived by the litigant and harm and deprivation suffered by the rightful person so as to check the frivolous litigation and prevent the people from reaping a rich harvest of illegal acts through the Court. One of the aims of every judicial system has to be to discourage unjust enrichment using Courts as a tool. The costs imposed by the Courts must in all cases should be the real costs equal to deprivation suffered by the rightful person."
>
> We approve the findings of the High Court of Delhi in the aforementioned case.
>
> 175. The Court also stated: (Padmawati case, DLT pp. 414-15, para 9)
>
> > "Before parting with this case, we consider it necessary to observe that one of the main reasons for over-flowing of court dockets is the frivolous litigation in which the Courts are engaged by the litigants and which is dragged as long as possible. Even if these litigants ultimately loose the lis,

they become the real victors and have the last laugh. This class of people who perpetuate illegal acts by obtaining stays and injunctions from the Courts must be made to pay the sufferer not only the entire illegal gains made by them as costs to the person deprived of his right and also must be burdened with exemplary costs. Faith of people in judiciary can only be sustained if the persons on the right side of the law do not feel that even if they keep fighting for justice in the Court and ultimately win, they would turn out to be a fool since winning a case after 20 or 30 years would make wrongdoer as real gainer, who had reaped the benefits for all those years. Thus, it becomes the duty of the Courts to see that such wrongdoers are discouraged at every step and even if they succeed in prolonging the litigation due to their money power, ultimately they must suffer the costs of all these years long litigation. Despite settled legal positions, the obvious wrong doers, use one after another tier of judicial review mechanism as a gamble, knowing fully well that dice is always loaded in their favour, since even if they lose, the time gained is the real gain. This situation must be redeemed by the Courts."

197. The other aspect which has been dealt with in great details is to neutralize any unjust enrichment and undeserved gain made by the litigants. While adjudicating, the courts must keep the following principles in view.

1. It is the bounden duty and obligation of the court to neutralize any unjust enrichment and undeserved gain made by any party by invoking the jurisdiction of the court.

2. When a party applies and gets a stay or injunction from the court, it is always at the risk and responsibility of the party applying. An order of stay cannot be presumed to be conferment of additional right upon the litigating party.

3. Unscrupulous litigants be prevented from taking undue advantage by invoking jurisdiction of the Court.

4. A person in wrongful possession should not only be removed from that place as early as possible but be compelled to pay for wrongful use of that premises fine, penalty and costs. Any leniency would seriously affect the credibility of the judicial system.

5. No litigant can derive benefit from the mere pendency of a case in a court of law.

6. A party cannot be allowed to take any benefit of his own wrongs.

7. Litigation should not be permitted to turn into a fruitful industry so that the unscrupulous litigants are encouraged to invoke the jurisdiction of the court.

8. The institution of litigation cannot be permitted to confer any advantage on a party by delayed action of courts."

38. The further question which now arises is as to how to curb this tendency of abuse of process of court. As suggested in Kishore Samrita, one of the ways to curb this tendency is to impose realistic or punitive costs. The Hon'ble Supreme Court in ***Ramrameshwari Devi and others*** Vs. ***Nirmala Devi and others***, 2011 8 SCC 249 took judicial notice of the fact that the courts are flooded with these kinds of cases because there is an inherent profit for the

wrongdoers and stressed for imposition of actual, realistic or proper costs and it was held:-

> "52. The main question which arises for our consideration is whether the prevailing delay in civil litigation can be curbed? In our considered opinion the existing system can be drastically changed or improved if the following steps are taken by the trial courts while dealing with the civil trials:
>
> A. Pleadings are the foundation of the claims of parties. Civil litigation is largely based on documents. It is the bounden duty and obligation of the trial Judge to carefully scrutinize, check and verify the pleadings and the documents filed by the parties. This must be done immediately after civil suits are filed.
>
> B. The court should resort to discovery and production of documents and interrogatories at the earliest according to the object of the Act. If this exercise is carefully carried out, it would focus the controversies involved in the case and help the court in arriving at the truth of the matter and doing substantial justice.
>
> C. Imposition of actual, realistic or proper costs and/or ordering prosecution would go a long way in controlling the tendency of introducing false pleadings and forged and fabricated documents by the litigants. Imposition of heavy costs would also control unnecessary adjournments by the parties. In appropriate cases the courts may consider ordering prosecution otherwise it may not be possible to maintain purity and sanctity of judicial proceedings.
>
> D. The court must adopt realistic and pragmatic approach in granting mesne profits. The court must

carefully keep in view the ground realities while granting mesne profits.

E. The courts should be extremely careful and cautious in granting ex parte ad interim injunctions or stay orders. Ordinarily short notice should be issued to the defendants or respondents and only after hearing the parties concerned appropriate orders should be passed.

F. Litigants who obtained ex parte ad interim injunction on the strength of false pleadings and forged documents should be adequately punished. No one should be allowed to abuse the process of the court.

G. The principle of restitution be fully applied in a pragmatic manner in order to do real and substantial justice.

H. Every case emanates from a human or a commercial problem and the court must make serious endeavour to resolve the problem within the framework of law and in accordance with the well-settled principles of law and justice.

I. If in a given case, ex parte injunction is granted, then the said application for grant of injunction should be disposed of on merits, after hearing both sides as expeditiously as may be possible on a priority basis and undue adjournments should be avoided.

J. At the time of filing of the plaint, the trial court should prepare a complete schedule and fix dates for all the stages of the suit, right form filing of the written statement till pronouncement of the judgment and the courts should strictly adhere to the said dates and the said timetable as far as possible. If any interlocutory application is filed then the same be disposed of in between the said dates of hearing fixed in the said suit itself so that the date fixed for the main suit may not be disturbed."

39. The Hon'ble Supreme Court in ***Indian Council for Envirolegal Action*** Vs. ***Union of India and others***, (2011) 8 SCC 161 observed:-

> "191. In consonance with the principles of equity, justice and good conscience Judges should ensure that the legal process is not abused by the litigants in any manner. The court should never permit a litigant to perpetuate illegality by abusing the legal process. It is the bounden duty of the court to ensure that dishonesty and any attempt to abuse the legal process must be effectively curbed and the court must ensure that there is no wrongful, unauthorized or unjust gain for anyone by the abuse of the process of the court. One way to curb this tendency is to impose realistic costs, which the respondent or the defendant has in fact incurred in order to defend himself in the legal proceedings. The courts would be fully justified even imposing punitive costs where legal process has been abused. No one should be permitted to use the judicial process for earning undeserved gains or unjust profits. The court must effectively discourage fraudulent, unscrupulous and dishonest litigation.
>
> 192. The court's constant endeavour must be ensure that everyone gets just and fair treatment. The court while rendering justice must adopt a pragmatic approach and in appropriate cases realistic costs and compensation be ordered in order to discourage dishonest litigation. The object and true meaning of the concept of restitution cannot be achieved or accomplished unless the courts adopt a pragmatic approach in dealing with the cases.
>
> 193. This Court in a very recent case Ramrameshwari Devi v. Nirmala Devi had an occasion to deal with similar questions of law regarding imposition of realistic costs and restitution. One of

us (Bhandari, J.) was the author of the judgment. It was observed in that case as under: (SCC pp. 268-69, paras 54-55)

> "54. While imposing costs we have to take into consideration pragmatic realities and be realistic as to what the defendants or the respondents had to actually incur in contesting the litigation before different courts. We have to also broadly take into consideration the prevalent fee structure of the lawyers and other miscellaneous expenses which have to be incurred towards drafting and filing of the counter-affidavit, miscellaneous charges towards typing, photocopying, court fee, etc.
>
> 55. The other factor which should not be forgotten while imposing costs is for how long the defendants or respondents were compelled to contest and defend the litigation in various courts. The appellants in the instant case have harassed the respondents to the hilt for four decades in a totally frivolous and dishonest litigation in various courts. The appellants have also wasted judicial time of the various courts for the last 40 years."

40. The answer to the question as to why the plaintiff kept the instant litigation alive is not difficult to find. The Court can take judicial notice that Baddi is probably the only developed and still rapidly developing industrial area in the whole of Himachal Pradesh and, therefore, there was and still a great demand of fuel. It was for this sole reason that this litigation has been kept alive knowing fully well that there was no substance in the same.

41. Accordingly, the appeal is dismissed with costs of Rs. 50,000/- to be paid by the plaintiff to the defendants. The defendants are directed to take over the possession of the retail out within 48 hours of receipt of certified copy of this judgment and thereafter to handover the same to the eligible candidate.

42. In addition to above, the Corporation is directed to cause an in-house inquiry to be made to fix the liability of the errant officials on the issue and decide appropriate action(s) against them in accordance with law within a period of two months irrespective of the fact whether such officials are still serving or have retired. The Corporation after completing this exercise shall submit a report before this Court for further orders and for this purpose the case be listed before this Court on 28.2.2018. That apart, the defendants shall claim damages from the plaintiff and also register a case of criminal breach of trust.

43. The appeal is disposed of as aforesaid, so also the pending application, if any.

(Tarlok Singh Chauhan)
Judge

27.12. 2017*awasthi*