Punjab Communications Ltd vs Union Of India & Others on 4 May, 1999

Equivalent citations: AIR 1999 SUPREME COURT 1801, 1999 AIR SCW 1394, (1999) 3 SCALE 149, 1999 (4) ADSC 491, 1999 (4) SCC 727, 1999 (3) LRI 445, 1999 ADSC 4 491, (1999) 3 JT 331 (SC), 1999 (6) SRJ 361, (1999) 4 SUPREME 454

Author: M.Jagannadha Rao

Bench: S.B.Majmudar, M. Jagannadha Rao

PETITIONER:
PUNJAB COMMUNICATIONS LTD.

Vs.

RESPONDENT:
UNION OF INDIA & OTHERS

DATE OF JUDGMENT: 04/05/1999

BENCH:
S.B.MAJMUDAR, & M. JAGANNADHA RAO.,

JUDGMENT:

M.JAGANNADHA RAO,J.

Leave granted.

These two appeals have been filed by the Punjab Communications Ltd (hereinafter called the `PCL'), a public-sector undertaking of the State of Punjab against the judgment dated 27.2.1998 of the High Court of Punjab & Haryana in CWP No.124 of 1998 and against the order in the review application dated 19.3.1998 in RA 138 of 1998. The Transfer Petition (C) No.680 of 1998 is filed by Sri D.P.Srivastava for transfer of a public interest writ petition No.4112 M/B of 1997 from the Allahabad High Court to this Court as some points are common to the appeals and the writ petition.

Though the main judgment in the writ petition has been rendered by the High Court on 27.2.1998, the events which have taken place during the pendency of these appeals have changed the complexion of the case and, according to the respondent-Union of India, the writ petition has practically become infructuous and no relief can be granted. We shall narrate the facts which have

given rise to the writ petition and shall also refer to the subsequent events.

In September 1993, the Asian Development Bank (hereinafter called the `ADB') agreed to grant a soft loan of US $ 113 m to the Union of India (1st respondent) for funding a project meant to provide digital wireless telecom facility to 36,000 identified villages in Eastern U.P. The Department of Tele-communications (hereinafter called `DOT') floated a tender on 9.10.1996 inviting offers open to Indian and foreign companies. There were 14 offers including one from the appellant. The Technical Evaluation Committee (hereinafter called the `TEC') examined the offers and wherever there were deviations in the offers that were made, the TEC sought clarifications on 3.6.1997 from the bidders to be given by 10.6.1997. The appellant replied and resubmitted the "proveness" certificates which were included in the original bid pagers at pages 226 to 228. This was a certificate dated 28.2.1997 issued by the Chinese Post and Telecommunication Department where the technology submitted by the appellant was stated to have been implemented. After scrutiny, the TEC short-listed the appellant (PCL) and BEL on 7.7.1997. It is the appellant's case that on account of some pressure brought on respondents 5 (Member (P) Telecom Commission) DOT and Respondent 6 (Advisor (T) Telecom Commission) DOT, the matter was referred by the 5th respondent to a High Level Committee, with a view to obtain an opinion disqualifying the appellant so that the Department could go in for an outmoded `analog' system (rather than the current `digital' system) to be provided by some multinational company which was wanting to dump its outmoded `analog' system in the India. It is the appellant's case that this was done with a view to enable the issue of a fresh notification calling for fresh tenders pertaining to `analog' system. It appears that on 23.9.1997, the abovesaid High Level Committee submitted its report stating that there were two `deviations' in the tenders submitted by the appellant as noticed by the Technical Evaluation Committee in respect of the required specifications. The Committee required the department to negotiate orally with the appellant. It is the appellant's contention that at an extremely short notice of 2 days, a mock negotiation was held on 29.10.1997, and some oral questions were asked. It is said that the appellant had answered all these questions put by the respondents by means of the appellant's documents already on record but these were not accepted. According to the appellant no agreed minutes were recorded. On 19.11.1997, a note signed by the 6th respondent, the convenor of the High Level Committee, was prepared stating that the further Technical Evaluation of the project was likely to go beyond 27.11.1997 due to complexities of bids offered by manufacturers and also in view of the want of authentication of the "proveness" of the system proposed by the appellant. It then stated that a decision had been taken not to go ahead with the ADB loan. The note stated as follows:

> "Department should not go in for ADB loan as it would result in heavy commitment charges and Department must go ahead for implementation of rural telecom project through its own resources"

According to the appellant, these minutes dated 19.11.1997 were back-dated inasmuch as, even as late as 20.11.1997, the Chairman TC's office diary recorded a note that the Chairman (TC) wanted para 2 to be modified to say that the Department did not have any technically responsive bid and that none of the offered systems were proven and therefore Department might not go ahead with the loan and the draft might be modified in consulation with ADV(T)/DDG(LPT) & resubmitted.

According to the appellant, the convenor of the High Level Committee created these imaginary deficiencies in the appellant's bid and prepared backdated minutes and showed that all the High Level Committee members had signed the minutes on 17.11.1997 itself. These backdated minutes, it is alleged, were prepared as a ground for rejection of the tender, in spite of the fact that 5 years were spent on drafting the specifications and in the evaluation of bids. According to the appellant, the Sr.DDG-TX who is said to have signed these "concocted backdated"

> minutes had, in reality, not even seen these minutes, let alone signing them. The appellant stated that the said officer disowned signing such minutes dated 17.11.1997. The appellant made a representation on 23.11.1997 to the 2nd respondent and on 16.12.1997, the impugned order was passed, cancelling the tenders.
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> The appellant then filed writ petition on 6.1.1998 in the High Court of Punjab & Haryana. The High Court dismissed the writ petition on 27.2.1998. A review application was filed but that was also dismissed on 19.3.1998. Thereafter, the appellant moved this Court in June, 1998.
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> This Court issued notice on 8.6.1998 in the application for leave returnable by 22.6.1998 and stated that till then the Union of India should not return the bid papers to the appellant.
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> We shall now refer to the subsequent events that have taken place after the filing of the SLP in this Court.
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> On 2.9.1998, when the matter came before the Court, a copy of the communication of the Ministry of Finance dated 1.9.1998 received by the DOT was placed before the Court. That letter showed that pursuant to a letter of the DOT dated 29.4.1998, the ADB had come to know about the inability of the DOT to avail of the ADB loan. This Court requested the Additional Solicitor General of India to take appropriate instructions from the concerned department and directed that an intimation be sent to the ADB to keep the letter of cancellation of loan in abeyance, awaiting further orders from this Court.
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> On 22.9.1998, the Additional Solicitor General of India informed this Court that the Union of India had communicated to the ADB about the pendency of the case. Thereafter, this Court permitted the parties to the case, if they thought it fit, to inform the ADB about the order which this Court passed on that day i.e. 22.9.1998.
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> Thereafter, several affidavits came to be filed by the Union of India as directed by the Court. The affidavit dated 4.1.1999 stated that the DOT had conveyed, through the Department of Economic Affairs, to the ADB on 17.9.1998 for keeping the letter of cancellation of ADB loan in abeyance. It was also stated that the ADB, in its letter dated 29.10.1998, had informed the Department of Economic Affairs that it had decided that it was not "practical" to keep the loan offer open and that, in fact, formal

> steps had been taken to cancel the loan-offer on 6.11.1998. The DOT also stated that the ADB had approved the withdrawal of the loan on 6.11.1998.
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> This Court was informed on 5.1.1999 that, in the meantime, the Government of India was thinking of calling for fresh tenders for installation of telephones under a new scheme for rural areas spread over different States and this Court directed a further affidavit to be filed in this behalf.
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> A fresh affidavit dated 15.1.1999 was filed on behalf of the Union of India to the effect that the ADB loan had a validity period of one year which had automatically lapsed on 27.11.1997, that there was a time constraint in regard to the ADB loan and that remainders were received from the Department of Economic Affairs to avail the loan latest by 27.11.1997, that the DOT had informed the Finance Department that it was not availing the loan and that it had decided "to fund the Rural Telecom Project through its own resources"

It was stated that this decision was taken to avoid heavy commitment charges of ADB loan if the evaluation/decision on the previous tender went beyond 27.11.1997. Thereafter, the previous tenders were cancelled on 16.12.1997, stating that:

"no bidder qualified the technical/commercial evaluation"

It was also stated that the Department of Economic Affairs had, by their letter dated 26.11.1998, already confirmed that the ADB had approved withdrawal of the loan on 6.11.1998 as already informed to this Court.

In regard to the new scheme for rural telephones, it was stated in the affidavit of the respondent that under the scheme of Village Public Telephones (VPT), during 1997-98 42,855 VPTs were provided, that for 1998-99, the target was 45,000 VPTs and out of that 10,150 were already provided by December, 1998 through other schemes in progress. It was stated that the Department had already covered 6,100 villages out of 36,000 village in Eastern Uttar Pradesh which were to be covered under the previous tender and that another 5,500 VPTs would be provided by March, 1999. It was further clarified as follows:

> "All the villages in UP(E) would be provided Telecom facilities during the 9th Plan period along with the rest of the Country. Presently, out of 75,000 villages of UP(E), 32,000 villages have already been provided Telecom facilities."

It was stated that during 1997-98, the Department had opened 990 new rural exchanges and had provided 7.16 lakhs new telephone connections in rural areas and had incurred an expenditure of Rs.1060 crores for rural telephones. So far as 1998-99 was concerned, the Department had allocated 1,485 crores for rural networks to be opened in 1,385 new rural exchanges and `to provide 8.4 lakhs telephone connections. The Department had already installed 295 rural exchanges and provided 2 lakhs telephones between April, 1998 and December, 1998. For 1999-2000, it was planned to

allocate Rs.2000 crores for rural network and to provide 12.5 lakhs telephone connections. It was also stated that, presently, there were 18,500 indigenously developed C-DOT exchanges which were working in rural area having total capacity of 40 lakh lines, landlines, digital MARR etc. So far as remote/inaccessible areas were concerned, it was stated in the affidavit of the respondent that a choice of technology was made by including wireless in local loop (WLL) based on area of application as stated in the affidavit dated 5.11.1998. The Department had already floated a tender for 20,000 lines for Digital Wireless Local loop Systems for rural areas - for the entire country, including UP. A copy of the Bid document was filed. It was alleged that the appellant, among other manufacturers, had also actively participated in the finalisation of the Technical Specifications of the new tenders. These specifications were slightly different from the earlier ADB tender and were based on latest `Generic Requirement' (GR) prepared by the Telecom Engineering Centre (TEC) of the Department, after extensive consultation with the manufacturers. The bid document for this tender was on sale w.e.f. 8.1.1999 and 7 companies had already purchased the same and the tenders were scheduled to be opened on 4.2.1999. It was stated for the respondents across the Bar that the appellant had also responded to the new advertisement. Again C-DOT TDMA PMP Technology, field-trial orders were placed on M/s ITI for 25 Systems having capacity for providing 4,000 Village Panchayat Telephones (VPTs). These telephones were expected to be installed by February, 1999 in 17 Telecom Circles spread throughout the Country and these systems were more cost-effective than WLL system and were based on indigenous technology developed by M/s C- DOT. Against satellite based technology, notice inviting tenders had been issued on 30.12.1998 for 1,000 terminals and the tender was scheduled to be opened on 9.4.1999.

Two tabular statements were filed by the Union of India during the process of hearing of the cases. One showed, District-wise, the number of villages identified for the earlier ADB tender and the villages provided with VPT out of the said villages. It was shown that out of 32,350 villages in UP Telecom Circle in UP Districts, 8524 villages out of the villages identified for ADB tender, (i.e. in Eastern UP) were already provided with telephones. A separate tabular statement was filed showing the progress of telephone installation in the rural sector right from 1992. As on 31.12.1998, the position is stated to be as follows:

> "Assam & Nagaland - 72.3%; AP -78.5%; AS
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> - 48.2%; Bihar -24.2%; Gujarat - 76.8%; Haryana - 99.4%; Himachal Pradesh -40.4%; J&K-41.75%; Karnataka-81%; Kerala - 100%; Madhya Pradesh - 55.1%; Maharashtra - 69.5%; NE - 26.7%; Orissa - 41.7%; Punjab
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> - 94.1%; Rajasthan - 56.3%; Tamil Nadu - 98.4%; UP(Eastern) - 43.9%; UP(Western) - 34.4%; Delhi - 100%; Calcutta - 90%. In all, 6,07,491 villages, the average is 51.8%".

It will be noticed that the percentage of telephones in Bihar, Himachal Pradesh, J&K, North East and Orissa is less than the percentage in Eastern UP.

These are the subsequent events that have taken place during the pendency of these matters in this Court. It will be noticed that these events have substantially changed the very basis of the original

writ petition filed in the High Court of Punjab & Haryana. The ADB loan on which the tender was based now stands withdrawn; the tenders for installing 38,000 telephones in Eastern UP stand withdrawn and invitations for new Tenders spread over several rural areas in various States have now been made. In fact, the new tenders have also been submitted. It is stated for the respondents that the appellant is also participating in these new tenders. We have, therefore, to decide this appeal in the light of the above subsequent developments.

Learned Senior counsel Sri D.D.Thakur and Sri R.F.Nariman for the appellant and Senior counsel Sri Rajeev Dhawan for the petitioner in the Transfer Petition have submitted that in spite of these developments, the question whether the various officers conspired and played fraud in seeing to it that the ADB loan lapsed or stood withdrawn, has still to be gone into. They contend that when the writ petition was filed on 6.1.1998, the position was that with a view to allow multi- national companies to dump outmoded analog technology into India, the officers were wanting to float fresh tenders in which such analog technology could be made the basis of the tenders, either wholly or partly, that the said attempt was successfully thwarted by the appellant filing the writ petition in the High Court of Punjab and Haryana and that with a view to spite the appellant, the officers had all conspired and played fraud in having the ADB loan withdrawn and the ADB tender cancelled. This, according to the appellant, amounted to a fraud on the appellant and also on the people of Eastern UP and has to be investigated. The excuse put forward by the officers of DOT that ADB loan would be expensive was absurd inasmuch as there was a 5 year moratorium on interest and the interest rate was something like 4% and there were other very favourable terms. It was argued that there was no point in having such a beneficial loan withdrawn and spending funds of the Government of India. The learned Senior counsel for appellant and for petitioner in the Transfer Petition contended that the scheme meant for a very backward area like Eastern UP could not be allowed to be frustrated in this manner.

Alternatively, it was contended by the learned senior counsel for the appellant that the appellant had a legitimate expectation of a substantive nature, that, even if the Government wanted to put its own funds, the original tender notification would be processed for the benefit of Eastern UP. The respondents cannot change the policy to benefit the rural areas in the whole country and abandon the original tender notification for Eastern UP.

Dr.Rajeev Dhawan for the petitioner in the Transfer Petition contended that fraud in private- law field was different from fraud in the public- law field. This Court should, therefore, decide whether these officials got the High Level Committee appointed only with a view to harm the appellant and whether the Committee was stage- managed by a few officers who had other motives. Learned counsel Sri Dhawan also contended that this was a case of legitimate expectation for the appellant in the civil appeal as also to the 36,000 villages in Eastern UP. The learned Senior counsel for the State of Punjab Sri P.C.Jain also supported the case of the appellant on the ground that the appellant was its public sector undertaking.

On the other hand, it was contended vehemently for the Union of India by Sri C.S.Vaidyanathan, the learned Additional Solicitor General of India, that there was absolutely no truth in the contention of the appellant that there was a conspiracy or fraud to shelve the ADB loan, or to bring in outmoded

technology into India through certain favoured multinationals. According to him, there were two main defects in the tender submitted by the appellant, one was a technical one and the other was the absence of proof of `proveness'. Even though, final opportunity was given, the appellant having agreed to produce fresh certificate from China, (apart from the certificate initially filed) to prove `proveness' of the system in that country - the appellant failed to do so. The High Level Committee's proceedings, in fact, showed that it wanted to accept the appellant's tender and it gave an opportunity to the appellant to make good the defects but the attitude of the appellant was not helpful and it was the inaction of the appellant that was the cause for the delay that led to a situation where the time limit set by the ADB came very close and was expiring. As there was no chance of the appellant curing the defects within the few days that were left, the ADB loan had to be withdrawn. Photocopies of the entire departmental proceedings were placed before the Court to show that everything was done bonafide and the allegations of the appellant were wild and unsubstantiated. It was argued that there was no forgery or ante-dating of any minutes. Two files in the respective departments were moving simultaneously and there was absolutely no truth in the allegations of ante-dating the minutes. Now that the ADB loan stood withdrawn and the ADB tender had also fallen through, the writ petition had become totally infructuous. The Government of India decided to go on with its own funds and now a new policy decision was taken to benefit rural areas in the whole country and not merely the 36,000 villages in Eastern UP. This was because there were other rural areas in other States which were more backward then Eastern UP. In those places, the percentage of telephones was far less than in Eastern UP. In fact, fresh tenders have been called for to benefit the backward rural areas in the whole country and the new tenders are no longer confined exclusively to Eastern UP. A Tabular statement relating to the national figures regarding telephones is placed before the Court to show that there are even more backward rural areas in some States where the percentage of telephone was less than in Eastern UP. The Government has, now plans to cover all backward rural areas in the country in the next few years and monies have also been allocated. All these details have been given in the additional affidavits and statements filed in the Court. There is no question of dumping outdated technology into India. The new tenders and the future schemes are based on the latest `digital' technology and not on the outmoded `analogy' technology. The new government policies are wider and cannot be challenged in this writ petition which had become infructuous. There is no proof of fraud either in private law or public law established. There can be no legitimate expectation in regard to the ADB loan contract and in any event the new policy is based on overriding considerations of public interest and cannot be questioned. The appeals are liable to be dismissed. It is also argued that there is no need to transfer the writ petition filed by Mr. OP Srivastava from the Allahabad High Court to this Court. That has also, it is stated, become infructuous.

On these submissions, the following questions arise for consideration:

(1) Whether, after the ADB loan for the contract for providing telephones for Eastern UP was withdrawn, it is necessary to give any finding on the question of alleged fraud or to grant any directions regarding the bids offered for the ADB contract?

(2) Whether, if initially the Government decided to fund the proposed contract for Eastern UP from its own resources, it was permissible for the Government to change

its policy into one for providing telephones for rural areas in the entire country and whether the `legitimate expectation' of the appellant in regard to the earlier notification required, this Court to direct that the notification for Eastern UP should be continued?

Point 1 The disputes between the parties, before the ADB loan was withdrawn, were (i) whether there was a conspiracy or fraud or other manouvre on the part of the DOT-officials to shelve the ADB loan to spite the appellant and bring in outmoded `analog' technology through favoured multinationals and (ii) whether the appellant (a) complied with the technical specifications and (b) produced adequate proof of the `proveness' of the system offered by the appellant i.e. as to its successful implementation in China.

A review of the facts and the subsequent events would show that the issues which were live when the writ petition of the appellant was pending in the High Court have now lost all their relevance. The entire tender was based on the ADB loan. If the ADB loan itself has now stood withdrawn, there is now no possibility of the ADB loan project for Eastern UP being started or completed. It will well nigh be impossible to issue any directions to the Union of India to seek a renewal of the lapsed loan nor to issue any directions to continue the project for Eastern UP on the basis of ADB loan.

Even so, learned Senior counsel for the appellant and the petitioner in the Transfer petition have argued the case on merits as if the ADB loan were still alive. We have been taken through several volumes of correspondence between the various departments, and the minutes of various officers and of the High Level Committee to prove arbitrariness in the non-acceptance of the appellant's bid on two counts. We have heard these submissions very patiently but the point is whether this Court is to give findings on issues which have become non-issues now after the withdrawal of the ADB loan. We have given our anxious consideration to the various contentions raised on behalf of the appellant and the petitioner in the Transfer Petition and we are of the view that a detailed decision on the said questions is not called for. A question of fraud was also raised. But once the ADB loan is withdrawn the question has also become a non-issue. The position is that in respect of the ADB loan project, no fresh tenders based on `analog' system have been invited nor has any multinational company been awarded any contract based on outmoded analog system. The said question of fraud is no longer relevant. On all these issues we should not be understood as having expressed any opinion. Further, there cannot be a cause of action on the basis of an "attempt at fraud" which did not materialise. It is true as stated in De Smith Administrative Law (para 13.010)(5th Ed.) that it is fundamental to the legitimacy of public decision-making that official decisions should not be infected with motives such as fraud (or dishonesty) malice or personal self interest. Duty to act in good faith is inherent in the process. Learned senior counsel for the petitioner in the Transfer Petition, Sri Rajeev Dhavan referred to Shrisht Dhawan vs. Shaw Brothers [1992 (1)SCC 534] where the distinction between fraud in public law and private law has been adverted to. But all these legal principles are not relevant if, the so called or alleged attempt at fraud did not fructify. We accordingly do not think it worthwhile to go into the question of `fraud' either. We may once again clarify that we should not be understood as having decided anything on the merits of these questions. Point 1 is decided accordingly.

Point 2 It was argued that even if the ADB loan was withdrawn, when the State decided to go ahead with its own funds, it should have gone ahead with the same notification calling for tenders for Eastern UP sans ADB loan. The change in the policy to benefits other backward areas in the courts was unwarranted. Reliance was placed on the principles of promissory estoppel and legitimate expectation. It was contended that the project for Eastern UP should still go ahead and it was not open to the Union of India to deprive the appellant company of its reasonable and legitimate expectation regarding the acceptance of the bid offered for the Eastern UP project; It was not open to the State to deprive the expectation of villagers in 36000 villages in Eastern UP and to change over to a new policy of providing telephones to rural areas in all the States. Such is the contention of the appellant. We do not propose to deal with question of promissory estoppel because the parties were still at the stage of the tenders, at the relevant time. We shall, therefore, confine ourselves to the point relating to legitimate expectation of the appellant and the effect of the change of policy.

The principle of `legitimate expectation' is still at a stage of evolution as pointed out in De Smith Administrative Law (5th Ed.) (para 8.038). The principle is at the root of the rule of law and requires regularity, predictability and certainity in governments' dealings with the public. Adverting to the basis of legitimate expectation its procedural and substantive aspects, Lord Steyn in Piersova vs. Secretary of State [1997 (3) All E.R. 577 (at 606) (HL)] goes back to Dicey's description of the rule of law in his "Introduction to the study of the Law of the Constitution" (10th Ed., 1959 p.203) (*) as containing principles of enduring value in the work of a great Jurist. Dicey said that the constitutional rights have roots in the common law. He said: .lm15 "The `rule of law', lastly, may be used as a formula for expressing the fact that with us, the law of constitution, the rules which in foreign countries naturally form part of a constitutional code, are not the source but the consequence of the rights of individuals, as defined and enforced by the Courts; that, in short, the principles of private law have with us been by the action of the Courts and Parliament so extended as to determine the position of the Crown and its servants, thus the constitution is the result of the ordinary law of the land".

.....L.....T.....T.....T.....T.....T..J This, says Lord Steyn, is the pivot of Dicey's discussion of rights to personal freedom and to freedom of association and of public meeting and that it is _____ * See also `The Rule of Law as the Rule of Reason:

> Consent and Constitutionalism in (1999) 115 L.Q.R. 221 at 234 that `Fairness is both procedural and substantive': Due Process and Fair Procedure by D.J. Galligam (1996); and at p.242 quoting Dicey (1959) at p.203-204 clear that Dicey regards the rule of law as having both procedural and substantive effects. "The rule of law enforces minimum standards of fairness, both substantive and procedural". On the facts in Pierson, the majority held that the Secretary of State could not have maintained a higher tariff of sentence than recommended by the judiciary when admittedly no aggravating circumstances existed. The State could not also increase the tariff with retrospective effect.

The basic principles in this branch relating to `legitimate expectation' were enunciated by Lord Diplock in Council of Civil Service Unions vs. Minister of the Civil Service 1985 AC 374 (408-

409). It was observed in that case that for a legitimate expectation to arise, the decisions of the administrative authority must affect the person by depriving him of some benefit or advantage which either (i) he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received assurance from the decision-maker that they will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn. The procedural part of it relates to a representation that a hearing or other appropriate procedure will be afforded before the decision is made. The substantive part of the principle is that if a representation is made that a benefit of a substantive nature will be granted or if the person is already in receipt of the benefit that it will be continued and not be substantially varied, then the same could be enforced. In the above case, Lord Fraser accepted that the civil servants had a legitimate expectation that they would be consulted before their trade union membership was withdrawn because prior consultation in the past was the standard practice whenever conditions of service were significantly altered. Lord Diplock went a little further, when he said that they had a legitimate expectation that they would continue to enjoy the benefits of the trade union membership. The interest in regard to which a legitimate expectation could be had must be one which was protectable. An expectation could be based on an express promise or representation or by established past action or settled conduct. The representation must be clear and unambigious. It could be a representation to the individual or generally to a class of persons.

The principle of substantive legitimate expectation, that is, expectation of a favourable decision of one kind or another, has been accepted as part of the English Law in several cases. (De Smith, Administrative Law, 5th Ed) (para 13.030); (See also Wade, Administrative Laws, 7th Ed.) (pp 418-419). According to Wade, the doctrine of substantive legitimate expectation has been "rejected" by the High Court of Australia in Attorney General for N.S.W vs. Quinn (1990) 93 ALR 1 (But see Teon's case referred to later) and that the principle was also rejected in Canada in Reference Re Canada Assistance Plan (1991) 83 DLR (4th) 297 = 1991 (2)SCR 525 but favoured in Ireland : Cannon vs. Minister for the Marine 1991 (1) I.R. 82 The European Court goes further and permits the Court to apply proportionality and go into the balancing of legitimate expectation and the Public interest.

Even so, it has been held under English law that the decision maker's freedom to change the policy in public interest, cannot be fettered by the application of the principle of substantive legitimate expectation. Observations in earlier cases project a more inflexible rule than is in vogue presently. In Re Findlay (1985 AC 318) the House of Lords rejected the plea that the altered policy relating to parole for certain categories of prisoners required prior consultation with the prisoner. Lord Scarman observed:

> "But what was their legitimate expectation. Given the substance and purpose of the legislative provisions governing parole, the most that a convicted prisoner can

> legitimately expect is that his case be examined individually in the light of whatever policy the Secretary of State sees fit to adopt provided always that the adopted policy is a lawful exercise of the discretion conferred upon him by the statute. Any other view would entail the conclusion that the unfettered discretion conferred by statute upon the minister can in some cases be restricted so as to hamper, or even to prevent changes of policy."

To a like effect are the observations of Lord Diplock in Hughes vs. Department of Health and Social Security 1985 AC 778 (788):

> "Administrative policies may change with changing circumstances, including changes in the political complexion of governments. The liberty to make such changes is something that is inherent in our constitutional form of government."

(See in this connection Mr.Dotan's article "why Administrators should be bound by their policies"

> (Vol.17) 1997 Oxford Journal of Legal Studies, p.23). But today the rigidity of the above decisions appears to have been somewhat relaxed to the extent of application of Wednesbury rule whenever there is a change in policy and we shall be referring to these aspects presently.
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> Before we do so, we shall refer to some of the important decisions of this Court to find out the extent to which the principle of substantive legitimate expectation is accepted in our country. In Navjyoti Co- op. Group Housing Society vs. Union of India [1992 (4) SCC 477, the principle of procedural fairness was applied. In that case the seniority as per the existing list of co-operative housing societies for allotment of land was altered by a subsequent decision. The previous policy was that the seniority amongst housing societies in regard to allotment of land was to be based on the date of registration of the society with the Registrar. But on 20.1.1990, the policy was changed by reckoning seniority as based upon the date of approval of the final list by the Registrar. This altered the existing seniority of the societies for allotment of land. This Court held that the Societies were entitled to a `legitimate expectation' that the past consistent practice in the matter of allotment, will be followed even if there was no right in private law for such allotment. The authority was not entitled to defeat the legitimate expectation of the societies as per the previous seniority list without some overriding reason of public policy to justify change in the criterion. No such overriding public interest was shown. According to the principle of `legitimate expectation', if the authority proposed to defeat a person's legitimate expectation, it should afford him an opportunity to make a representation in the matter. Reference was made to Halsbury's Laws of England (p.51, Vol.1(1) (4th Ed. re-issue) and to the case in Council of Civil Service Unions 1985 AC 374, already referred to. It was held that the doctrine imposed, in essence, a duty to act fairly by taking into consideration all relevant factors, relating to such legitimate expectation. Within the contours of fair dealing, the reasonable opportunity to make representation against change of

policy, came in. The next case in which the principle of `legitimate expectation' was considered is the case in Food Corporation of India vs. M/s Kamdhenu Cattle Feed Industries [1993 (1) SCC 71]. There the Food Corporation of India invited tenders for sale of stocks of damaged food grains and the respondent's bid was the highest. All tenderers were invited for negotiation but the respondent did not raise his bid during negotiation while others did. The respondent filed a writ petition claiming that it had a legitimate expectation of acceptance of its bid, which was the highest. The High Court allowed the writ petition. Reversing the judgment, this Court referred to Council of Civil Service Union Case 1985 AC 374 and to Preston In re 1985 AC 835. It was held that though the respondent's bid was the highest, still it had no right to have it accepted. No doubt, its tender could not be arbitrarily rejected but if the corporation reasonably felt that the amount offered by the respondent was inadequate as per the factors operating in the commercial field, the non- acceptance of bid could not be faulted. The procedure of negotiation itself involved the giving due weight to the legitimate expectation of the highest bidder and this was sufficient.

This Court considered the question elaborately in in Union of India vs. Hindustan Development Corporation [1993 (3) SCC 499]. There tenders were called for supply of cast-steel bogies to the railways. The three big manufacturers quoted less than the smaller manufacturers. The Railways then adopted a dual pricing policy giving counter offers at a lower rate to the bigger manufacturers who allegedly formed a cartel and a higher offer to others so as to enable a healthy competition. This was challenged by the three big manufacturers complaining that they were also entitled to a higher rate and a large number of bogies. This Court held that the change into a dual pricing policy was not vitiated and was based on `rational and reasonable' grounds. In that context, this Court referred to Halsbury's Laws of England (4th Ed.)(Vol.1(I) 151). This Court referred to Schmidt vs. Secretary of State for Home Affairs [1969 (2) Ch 149] which required an opportunity to be given to an alien if the leave given to him to stay in UK was being revoked before expiry of the time and to Attorney General of Hong Kong vs. Ng Yuen Shiu [1983 (2) AC 629] which required the Government of Hong Kong to honour its undertaking to treat each deportation case on its merits; this Court also referred to Council of Civil Service Unions vs. Minister for the Civil Service 1985 AC 835 which related to alteration of conditions relating to membership of trade unions and the need to consult the unions in case of change of policy as was the practice in the past, and to Food Corporation of India case 1993 (1) SCC 71 and Nayjyoti Co-op. Group Housing Society's case 1992 (4) SCC 477. This Court then observed that legitimate expectation was not the same thing as anticipation. It was also different from a mere wish or desire or hope. Nor was it a claim or demand based on a right. A mere disappointment would not give rise to legal consequences. This Court held(p.540) as follows:

"The legitimacy of an expectation can be inferred only if it is founded on the sanction of law or custom or an established procedure followed in regular and natural sequence. Such expectation should be justifiably legitimate and protectable."

After quoting Wade, Administrative Law (6th Ed.)(p.424, 522), this Court referred to the judgment of the Australian High Court in Attorney General for New South Wales vs. Quin [(1990) 64 Aust. LJR 327] in which the principle itself, according to Wade, did not find acceptance. In that case a Stipendiary Magistrate incharge of a Court of Petty Sessions under the old court system was refused appointment to the system of local courts which replaced the previous system of Petty Sessions Courts. In 1987 the Attorney General who was hitherto recommending former magistrates on the ground of `fitness' for appointment to the new local courts, deviated from that policy and decided to go by assessment of merit of the competing applicants. The Court of Appeal had directed that the case of Mr. Quin must be considered separately and not in competition with other applicants, but it was reversed by the majority of the High Court of Australia(Mason, CJ, Brennan & Dawson,JJ) (Deane and Toohey, JJ dissenting). Mason, CJ held that the Court could not fetter the executive discretion to adopt a different policy which was better calculated to serve the administration of justice and make it more effective. The grant of substantive relief in such a case would effectively prevent the executive from giving effect to the new policy which it wished to pursue in relation to the appointment of magistrates. Brennan,J. observed very clearly that the notion of legitimate expectation (falling short of a legal right) was too nebulous to form a basis for invalidating the exercise of power. He said that such a principle would "set the courts adrift on a featureless sea of pragmatism." Dawson,J. held that the contention ofthe respondent exceeded the bounds of procedural fairness and intruded upon the freedom of the executive.(*) This Court in Hindustan Development Corporation's case 1993 (3) SCC 499 then proceeded to refer to R vs. Secretary of State for the Home Department ex parte Ruddock (1987) 2 All E.R. 518 and Findlay vs. Secretary of State for the Home Department (1984 3 All E.R. 801 and to Breen vs. Amalgamated Engineering Union, (1971) 1 All E.R. 1148. This Court accepted (see p.546) that the principle of legitimate expectation gave the applicant sufficient locus standi to seek judicial review and that the doctrine was confined mostly to a right to fair hearing before a decision which resulted in negativing a promise or withdrawing an undertaking, was taken. It did not involve any crystallised right. The protection of such legitimate expectation did not require the fulfilment of the expectation where an overriding public interest required otherwise. However, the burden lay on the decision maker to show such an overriding public .ls1 _____ * In a later decision from Australic in Minister for Immigration and Ethnic Affairs vs. Teoh [(1995) 69 ALJR 423] the High Court held that the U.N.Covenant on the rights of the Child, which was not incorporated into Australian Law, may nevertheless give rise to a legitimate expectation that the decision maker would comply with it, atleast to the extent of giving an affected person a hearing. This decision has been treated as controversial and critised (See Taggart) (1996) 112 L.Q.R. 50. The decision no doubt held that such an expectation did not, however, compel action consistent with the Treaty provisions. McHugh,J. dissented. [See Unincorporated Treaties in Australian Law] (1996 PL 190 and Lord Lester's article in 1996 PL 187). interest. A case of substantive legitimate expectation would arise when a body by representation or by past practice aroused expectation which it would be within its powers to fulfil. The Court could interfere only if the decision taken by the authority was arbitrary, unreasonable or not taken in public interest. If it is established that a legitimate expectation has been improperly denied on the application of the above principles, the question of giving opportunity can arise if failure of justice is shown. The Court must follow (p.548) an objective method by which the decision making authority is given the full range of choice which the legislature

is presumed to have intended. (In this connection we shall advert to a similar view of Laws, J. and also to the contrary view of Sedley, J). If the decision is reached fairly and objectively, it cannot be interfered with on the ground of procedural fairness. An example was given that if a renewal was given to an existing licence holder, a new applicant cannot claim an opportunity based on natural justice. On facts, it was held that legitimate expectation was denied on the basis of reasonable considerations. The next case in which the question was considered is Madras City Wine Merchants' Association vs. State of Tamil Nadu [1994 (5) SCC 509]. In that case the rules relating to renewal of liquor licences were statutorily altered by repealing existing rules. It was held that the repeal being the result of a change in the policy by legislation the principle of non-arbitrariness was not invocable. In that context, this Court referred to a large number of authorities on the question. This Court in M.P. Oil Extraction vs. State of M.P. [1997 (7) SCC 592] considered the question again. In that case, it was held that the State's policy to extend renewal of an agreement to selected industries which came to be located in Madhya Pradesh on invitation of State, - as against other local industries - was not arbitrary and the said selected industries had a legitimate expectation of renewal under renewal claims which should be given effect to according to past practice unless there was any special reason not to adhere to the practice. It was clearly held that the principle of substantive legitimate expectation was accepted by this Court earlier. Reference was made to Food Corporation's case 1993 (1) SCC 71; Navjyoti Co-op. Group Housing Society's case 1992 (4) SCC 477 and to Hindustan Development Corporation's case 1993 (3) SCC 499. Lastly we come to the three judge judgment in National Buildings Construction Corporation vs. S.Raghunathan & Others [1998 (7) SCC 66]. This was a service matter. The respondents were appointed in CPWD and they went on deputation to the NBCC in Iraq and they opted to draw, while on deputation, their grade pay in CPWD plus deputation allowance. Besides that, the NBCC granted them Foreign Allowance at 125% of the basic pay. Meanwhile their Basic Pay in CPWD was revised w.e.f. 1.1.1986 on the recommendation of the 4th Pay Commission. They contended that the abovesaid increase of 125% should be given by NBCC on their revised scales. This was not accepted by NBCC by orders dated 15.10.1990. The contention of the respondents based on legitimate expectation was rejected in view of the peculiar conditions under which NBCC was working in Iraq. It was observed that the doctrine of `legitimate expectation' had both substantive and procedural aspects. This Court laid down a clear principle that claims on legitimate expectation required reliance on representation and resultant detriment in the same way as claims based on promissory estoppel(*).

The .ls1

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See, however, DeSmith (5th Ed.) Administrative Law (para 8.060) where he says that in important cases, a legitimate expectation has been founded in the absence of detrimental reliance and that there are good reasons for doing so. R vs. Secretary of State for Home Department exp. Asif Mahmood Khan 1984 (1) WLR 1337; Attorney General of Hong Kong vs. Ng Yuen Shiu 1983 (2) AC 629; R vs. Secretary of State for the Home Department ex parte Ruddock 1987 (1) WLR 1982. .ls2 principle was developed in the context of `reasonableness' and in the context of `natural justice'. This Court referred to R vs. IRC exp Preston 1985 AC 835, Food Corporation's case 1993 (1) SCC 71, Hindustan Development Corporation's case 1993 (3) SCC 499, the Australian Case in Quin (1990) 64 Aust. LJR 327 and M.P.Oil Extraction's case 1997 (7) SCC 592, the Council of Civil Service Union's case 1985 AC 374 and Navjyoti's case 1992 (4) SCC

477. The above survey of cases shows that the doctrine of legitimate expectation in the substantive sense has been accepted as part of our law and that the decision maker can normally be compelled to give effect to his representation in regard to the expectation based on previous practice or past conduct unless some overriding public interest comes in the way. The judgment in Raghunathan's case requires that reliance must have been placed on the said representation and the representee must have thereby suffered detriment. The more important aspect, in our opinion, is whether the decision maker can sustain the change in policy by resort to Wednesbury principles of rationality or whether the Court can go into the question whether decision maker has properly balanced the legitimate expectation as against the need for a change? In the latter case the Court would obviously be able to go into the proportionality of the change in the policy. This aspect has come up for consideration recently in the English Courts. The debate was started by Laws,J. in R vs. Secretary of State for Transport, ex parte Richmond upon Thames London BC 1994 (1) WLR 74 where the learned Judge laid down that the Wednesbury reasonableness test alone applied for finding out if the change from one policy to another was justified. That was a case in which, in relation to airports a new system of night flying restrictions were imposed. The new policy related to the fixation of the maximum number of take-off and landing movements variable according to the type of aircraft involved and the noise the aircraft generated during the night time. The Wednesbury test was held applicable. Laws,J. stated:

> "The Court is not the Judge of the merits of the decision maker's policy .... the public authority in question is the Judge of the issue whether `overriding public interest' justifies such a change in policy ... But that is no more than saying that a change in policy, like any discretionary decision by a public authority, must not transgress Wednesbury principles."

But this view of Laws,J. was dissented by Sedley, J. in R vs. Ministry of Agriculture Fisheries & Food, ex parte Hamble Coffshore Fisheries Ltd. 1995 (2) All E.R. 714. The learned Judge observed that if the outcome is challenged by way of judicial review, he `did not consider that the courts' criterion was restricted to consider the rationality of the policy maker's conclusions. He held that while policy was for the policy maker alone, the fairness of his or her decision remained the courts' concern. He said that to say so did not amount to placing the Judge in the seat of the minister.

The judgment of Sedley, J. has since been overruled in R vs. Secretary of State for the Home Department and another, ex parte Hargreaves and others 1997 (1) WLR 906(A). In that case, the facts were that the eligibility for `home leave' of prisoners was initially one third of the term of sentence as per in earlier decision of the government of 1994 (accepting Lord Woolf's Report, 1990) and Hargreaves would attain that eligibility by 12-4-95 to put in his application. But the Home Secretary felt that the scheme was being abused and therefore he modified the eligibility to one half of the period of sentence by notice dated 20.4.95. This postponed Hargreaves' eligibility to 12.4.96. Though the applicant had "become eligible" by 20.4.95, the Courts rejected his plea of legitimate expectation because eligibility merely enabled consideration of the application for home leave. The case was similar to Findlay 1985 AC 318 which related to change in parole policy and which was held valid. It was held that the change in home leave policy did not violate the earlier policy. In the Court of Appeal, Hirst, LJ said described the principle laid down by Sedley,J. as based on `heresy' and stated:

> "On matters of substance (as contrasted to procedure) Wednesbury provides the correct test. It follows that ... his (Sedley,J.'s) ratio in so far as he propounds a balancing exercise to be undertaken by the Court should, in my opinion, be overruled."

The result is that change in policy can defeat a substantive legitimate expectation if it can be justified on Wednesbury reasonableness. We have noticed that in Hindustan Development Corporation case [1993 (3) SCC 449] also it was laid down that the decision maker has the choice in the balancing of the pros and cons relevant to the change in policy. It is, therefore, clear that the choice of the policy is for the decision-maker and not for the Court, The legitimate substantive expectation merely permits the Court to find out if the change in policy which is the cause for defeating the legitimate expectation is irrational or perverse or one which no reasonable person could have made.

The Court of Appeal considered the question again in a tax case in R vs. Commissioner of Inland Revenue, ex parte Unilever Plc (1990) (Vol.68) Tax Cases 205 = 1996 STC 681. A particular loss relief was being granted at a second stage on more than 30 occasions during 20 years though the relief was not claimed within the stipulated period of two years. In respect of 1988, the relief claimed beyond time was for the first time refused. It was contended that there was a substantive legitimate expectation that the revenue would continue to follow the previous practice in regard to claims for loss relief. It was held that the Court was still confined to Wednesbury principles but that on facts it a case of `exceptional' circumstances and it would be unfairness amounting to abuse of power to refuse to follow past practice. Lord Woolf MR agreed that no doubt the Revenue was the best Judge of what was fair. But on facts, the learned Judge treated the case as exceptional. Simon Brown, LJ also agreed with this view. He in addition emphasised the detrimental test as did this Court in Raghunathan's case (p.231). Noting that substantive legitimate expectation was rooted in the theory of `legal certainty', he observed as follows (p. 233):

> "Of course legal certainty is a highly desirable objective in public administration as elsewhere.....the central Wednesbury principle is that an administrative decision is

> unlawful if "...so outrageous in its defiance of logic of or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it". The flexibility necessarily inherent in that guiding principle should not be sacrificed on the altar of legal certainty."

L.....I.....T.....T.....T.....T.....T.....T..J On facts, the case was treated as one containing exceptional circumstances which, even going by the Wednesbury principle, required relief to be granted. Thus both in ex p.Hargreaves (in which the challenge failed) and ex p. Unilever (in which the challenge succeeded), the protection for substaitive legitimate expectation was based on Wednesbury unreasonableness. In sum, this means that the judgment whether public interest overrides the substaitive legitimate expectation of individuals will be for the decision-maker who has made the change in the policy and the Courts will intervene in that decision only if they are satisfied that the decision is irrational or perverse [See 1997 Public Law, 375 "Wednesbury Protection of Substantive legitimate expectation by Christopher Forsyth]. The observations of this Court in Hindustan Development Corporation's case 1993 (3) SCC 499; in M.P. Oil Extraction's case 1997 (7) SCC 592 and in S.Raghunathan's case 1998 (7) SCC 66) are more or less to a similar effect, though no specific reference was made to the Wednesbury rule.

After Hargreaves, Wednesbury principle is now consistently followed in England. We shall refer to two recent cases. Lapse of time resulted in a changed policy in R vs. Cardiff County Council, Exp. Scars Group Properties Ltd. [1998 Public Law 518]. The position there was that a company was granted planning permission in 1993 and the relevant highway authority had indicated that it had no objection to entering into a highway improvement agreement under Section 278 of the Highways Act, 1990. The proposed highway scheme was approved in 1995. But in 1996, there was a reorganisation of local Government in Wales, and the successor authority withheld its authority for the approved scheme until an updated traffic impact analysis had been submitted and was considered. It was held by Carnworth,J that where a formal decision had been made in relation to a subject matter affecting private rights, that decision would be considered binding unless and until there had been some change which undermined the foundation of the original decision; the question whether there could be such a change was for the authority, subject to Wednesbury unreasonableness test. In that case, the highway authority had not rejected the agreement outright but had requested a new traffic analysis, which was prima facie reasonable because of lapse of time. In yet another case in McPhee vs. North Lanarkshine Council [1998 SLT 1317] (See 1999 Public Law 152- 153), the petitioner was a traveller who consented to vacate a site after receiving a letter from the Director of Housing telling her that she would be offered a pitch at the site after the refurbishment work had been carried out. The Council subsequently refused to grant her a pitch. She sought a `declarator' that she was `entitled to be offered accommodation by way of a petition on the site and that on the same terms and conditions as any other family seeking accommodation from the respondents". It was held by Lady Congreve,J. that an authority providing an assurance as to a substantive right may depart from it but will fall to be scrutinised by reference to Wednesbury reasonableness. Since it could not be said that no reasonable authority could do anything other than grant her application, the remedy of declarator was inappropriate.

In view of the above legal position, can it be said on the facts of this case that the substantive legitimate expectations of the appellant have been contravened?

It will be noticed that at one stage when the ADB loan lapsed, the Government took a decision to go ahead with the project on its own funds. But later it thought that the scheme regarding telephones in rural areas must cover not only the villages in Eastern UP but also in other backward rural areas in other States. The statistics given in the counter-affidavits of the Union of India to which we have already referred, show that there are other States in the country where the percentage of telephones is far less than what it is in eastern UP. The said facts are the reason for the change in the policy of the government and for giving up the notification calling for bids for Eastern UP. Such a change in policy cannot, in our opinion, be said to be irrational or perverse according to Wednesbury principles. In the circumstances, on the basis of the clear principles laid down in exp. Hargreaves and exp. Unilever, the Wednesbury principle of irrationality or perversity is not attracted and the revised policy cannot be said to be in such gross violation of any substantive legitimate expectation of the appellant which warrants interference in judicial review proceedings. Point 2 is held against the appellant.

The appeal and Transfer Petition are dismissed but in the circumstances, without costs.