Supreme Court of India
Fomento Resorts & Hotels & Anr vs Minguel Martins & Ors on 20 January, 2009
Author: Singhvi
Bench: B.N. Agrawal, G.S. Singhvi

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.4154 OF 2000

Fomento Resorts and Hotels Ltd. and another ...Appellant(s)

Versus

Minguel Martins and others ...Respondent(s)

WITH

Civil Appeal Nos.4155 and 4156 of 2000

JUDGMENT

SINGHVI, J.

1. The above noted appeals are directed against order dated 25.4.2000 passed by Goa Bench of the High Court of Bombay in Writ Petition No.330 of 1991 Shri Minguel Martins vs. M/s Sociedade e Fomento Industries Pvt. Ltd. and others, Writ Petition No.36 of 1992 Goa Foundation and another vs. Fomento Hotels and Resorts Limited and others and Writ Petition No.141 of 1992 Shri Gustavo Renato de Cruz Pinto vs. State of Goa and others whereby directions have been given for demolition of construction made in survey No.803 (new No.246/2) within the area of Gram Panchayat, Taleigao, for resumption of the land acquired on behalf of appellant No.1, Fomento Resorts and Hotels Limited, earlier known as M/s. Gomantak Land Development Pvt. Ltd. and keeping public access to the Vainguinim beach from point `A' to point `B' shown in plan Exhibit-A open without any obstruction of any kind.

2. For deciding the questions arising in the appeals, it will be useful to notice the relevant facts:

(i) Dr. Alvaro Remiojo Binto owned several parcels of land in Village Taleigao, District Tiswadi, Goa. He sold plots bearing survey Nos.803 and 804 (new Nos.246/2 and 245/2) to Gustavo Renato da Cruz Pinto and plots bearing survey Nos.787 and 805 (new Nos.246/1 and 245/1) to M/s. Sociedade e Fomento Industries Pvt. Ltd. (appellant No.2 herein).

(ii) After purchasing the land, appellant No.2 leased out the same to appellant No.1. The latter submitted an application to Gram Panchayat Taleigao (for short `the Gram Panchayat') for grant of permission to construct hotel complex near Vainguinim beach. On a reference made by the Gram Panchayat, Chief Town Planner, Government of Goa, Daman and Diu vide his letter dated 1.8.1978 informed that the plans submitted by appellant No.1 are in conformity with the regulations in force in the area but observed that right of the public to access the beach must be maintained by providing necessary footpath. Paragraph 2 of that letter reads as under:-

> "The road leading to the hotel complex is at present used by general public to approach the Vainguinim Beach which is popular picnic spot for the people of Panaji, as well as other parts of Goa. It will need to be ensured that the right of access to the beach is maintained by the applicant by providing the necessary footpath to the beach at an appropriate place. The parking facilities provided will also have to take care of the parking of vehicles of such members of the public in an appropriate manner. This will ensure that the beach remains open to public as it is at present and that the public is not deprived of this beautiful and frequently used beach."
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> [emphasis added]
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> (iii) Thereafter, the Gram Panchayat issued letter dated 22.8.1978, whereby appellant No.1 was permitted to lay access road linking Dona-Paola-Bambolim Road to the construction site and construct the hotel subject to the conditions specified in the letter including the one relating to public access to the beach. This was reiterated by the Sarpanch of the Gram Panchayat in his letter dated 1.12.1978.

(iv) In furtherance of the permission granted by the Gram Panchayat, appellant No.1 commenced construction of the hotel, which is now known as Hotel Cidade de Goa on the land forming part of survey No.787 (new No.246/1) and completed the same by May, 1983 in different stages, the details of which are given below:-

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"Period              Physical Progress        Expenditure Ex

Upto Dec. Site Development.    Approx. Rs.15 lakhs


Jan. 79 to Site Development and plinth Approx. Rs.20 lakhs
Dec. 79    level construction works of
              Central Facility area and first
        Cluster

Jan.80 to Site Development and shell       Approx Rs.40 lakhs
Dec.80      work of Central Facility areas
            and first cluster of rooms.

Jan.81 to Complete structural works       Approx.Rs.160 lakhs
Dec. 81     Complete civil works.
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	Complete interiors, complete Air-conditioning, water supply, and sanitation and electrical works of central Facility areas and first cluster of rooms.	
Jan.82 to Dec.82	Complete air-conditioning, water supply and sanitation, and electrical works and civil works and interiors of second and third clusters of rooms.	Approx. Rs.210 lakhs
Upto May 1983	Complete air-conditioning water supply and sanitation and electrical works and civil works and interiors of fourth cluster of rooms.	Approx. Rs.65 lakhs"

(v) During construction of the hotel building, appellant No.1 made an application dated 29.9.1979 to the Sarpanch of the Gram Panchayat, for permission to change the location of the footpath and parking area by stating that in view of installation of 10,000 Kg. gas tank (poisonous gas at high pressure), pressurized water tank and high voltage electric transformer near the hotel building, it will not be in public interest to locate the footpath and parking area at the sanctioned site.

(vi) The Sarpanch of the Gram Panchayat neither forwarded the application of appellant No.1 to the Town and Planning Department for eliciting its views nor placed the same before the Gram Panchayat. Instead he, on his own, wrote letter dated 29.9.1979 to appellant No.1 giving an impression that the Gram Panchayat does not have any objection to the change of location of the footpath and parking area. Thereafter, appellant No.1 is said to have shifted access to the beach from the location originally sanctioned. However, the maps produced before this Court during the course of hearing show that the footpath is still near the gas tank.

(vii) In the meanwhile, Shri Gustavo Renato da Cruz Pinto, Smt. Surana Pepfira Pinto and Miss Befta Sara Da Costa Pinto filed Special Civil Suit No.313/1978/A in the Court of Civil Judge, Senior Division, at Panaji against appellant No.2, Dr. Alvaro Remiojo Binto and four others for a decree of possession by pre-emption in respect of the land comprised in survey Nos.787 and 805 and also to restrain the defendants, their agents, servants, etc. from changing, alienating or raising any construction on the suit land by alleging that they were owners of property bearing survey Nos.803, 804, 806, 807, 788 and 789 situated at Taleigao and since time immemorial they and their predecessors were using footpath passing through survey Nos.787, 805 and 769 for going to Panaji-Dona Paola-Bambolim road, which was sought to be obstructed. Defendant No.1 in the suit (appellant No.2 herein) filed written statement to contest the suit. After some time, the parties

compromised the matter in terms of which the plaintiffs gave up their claim for pre- emption in respect of plot bearing survey Nos.787 and 805 and defendant No.1 agreed to exchange the plot bearing survey No.790 with plots bearing survey Nos.788 and 789 belonging to the plaintiffs and also that it will have no right of access through any of the properties of the plaintiffs. As a sequel to this, the plaintiffs applied for withdrawal of the suit. By an order dated 20.12.1978, the Civil Judge permitted them to do so.

(viii) Soon after withdrawal of the suit for pre-emption, appellant No.1 made an application dated 15.11.1978 to Shri Shankar Laad, Minister of Revenue, Government of Goa for acquisition of land comprised in survey Nos.788, 789, 803, 804, 806 and 807 (new Nos.246/3, 246/4, 246/2, 245/2, etc.) of Village Taleigao, Dona Paula for construction of Beach Resort Hotel Complex by highlighting its benefit to the State. Paragraphs 3 to 6 of the application, which have bearing on the decision of these appeals, read as under:

> "3. It is proposed to put up a hotel complex in the two phases, in the first phase it is proposed that a hotel building is put up in Plot No. 787 in the second phase it is proposed that a Yoga Centre, Health Club and Water Sports facilities for promoting tourism are put in Plot No. 805. Our Hotel Project which is estimated to cost Rs.150 lakhs and will have 100 rooms in its first phase will add to meeting the much needed demand for accommodation by the international tourists.

4. In the first phase of the hotel complex it is necessary to develop plot No.787 and to immediately proceed to construct the Hotel Building thereon. The land in plot No.787 consists of hilly and rocky area and the land abutting on the beach is also of different levels. In order to put up a hotel building in this plot it would be necessary to undertake cutting of rock which would disturb the topography of the area entailing considerable expense. It is, therefore, necessary that the lay-out for the hotel building is finalized in a manner that the rock cutting is minimized and, at the same time, the natural surroundings of the rock and foliage is maintained. Exclusive cutting of rock is also likely to result in land-slides and may pose danger to the foundation of the hotel buildings and its residents. It is, therefore, necessary to construct the hotel building as near the beach as possible, i.e. on the lowest level of the land abutting the beach.

5. There are two small plots bearing No.788 and 789 area abutting the beach. Those two small plots fall almost midway along the beach frontage of our said plot No.787 and project into the said plot. Those two small plots are in the lowest level of the land and as such are most suited for including in the lay-out plan of the hotel. These two small plots being closest to the beach it is essential for us to install a first aid post and a medical aid centre for providing safety measures to the people using the beach facilities. Besides it is a precondition for a beach resort hotel giving comforts to provide those facilities both for the residents and for public at large. Keeping in view those factors it is necessary that these two small plots of land are immediately acquired and included in the lay-out plan of the hotel. It is also necessary that the acquisition of these two small plots of land is urgently completed and possession handed over to enable the lay out plan of the hotel building to be readjusted at this initial stage itself, on the ground prepared by proper leveling and terracing before the actual construction work could begin. It is, therefore, necessary that the two plots of land be urgently

acquired in the first instance so that there is no delay whatsoever in implementing the first phase of the hotel project.

6. In order to take in hand the second phase of the hotel complex it would be desirable to acquire plot Nos. 803 and 804 which intervene between our second Plot No. 805 and our first plot No. 787 and plot Nos. 806 and 807 which adjoin our second plot No. 805. This would enable us to undertake the second phase of the project as described above. The entire complex will then become one composite unit and these facilities could then be easily availed of by the hotel residents and the resident of this territory. The facilities provided by the hotel will be open for use on membership to non-residents also. Such facilities are not readily and easily available to the people of this."

(ix) Acting on the application made by the developer, the Government of Goa issued notification No.HD/LQN/315/78 dated 29.10.1980 under Section 4(1) of Land Acquisition Act, 1894 (for short `the 1894 Act') for acquisition of the plots comprised in survey No.803 (new No.246/2) and survey No.804 (new No.245/2).

(x) After holding enquiry under Section 5A of the 1894 Act, the State Government issued declaration under Section 6, which was published in Gazette dated 27.10.1983.

(xi) Gustavo Renato da Cruz Pinto and some others filed Writ Petition No.8/1984 for quashing the aforementioned notifications on various grounds including the one that before acquiring the land, government did not make enquiry as per the requirement of Rule 4 of the Land Acquisition (Companies) Rules, 1963 (for short `the Rules'). The writ petitioners also highlighted discrepancies in different notifications issued by the State Government. Respondent No.2 in the writ petition (appellant No.1 herein) filed reply affidavit stating therein that Rule 4 of the Rules is not mandatory and non compliance thereof did not affect legality of the acquisition. In paragraphs 67 and 76 of the reply affidavit, it was averred that part of the project i.e. hotel is complete and has started functioning. In paragraph 79, it was averred that besides the hotel project, cottages were proposed to be constructed on plot bearing survey No.805 and the acquired land in survey Nos.803 and 804 will be used for putting up health club, yoga centre, water sports and other recreational facilities, which are integral part of the project.

(xii) By an order dated 26.6.1984, Goa Bench of the High Court of Bombay allowed the writ petition and quashed the impugned notifications only on the ground of non compliance of Rule 4 of the Rules. That order was reversed by this Court in M/s. Fomento Resorts and Hotels Ltd. vs. Gustavo Renato Da Cruz Pino and Others [(1985) 2 SCC 152] and the case was remitted to the High Court for deciding other grounds of challenge. It, however, appears that after the judgment of this Court, the parties compromised the matter and the writ petition was withdrawn on 26.3.1985.

(xiii) In the meanwhile, appellant No.1 entered into an agreement with the government as per the requirement of Section 41 of the 1894 Act. The agreement was signed on 26.10.1983. The opening three paragraphs and Clauses 3, 4 and 6 of the agreement read as under:-

"WHEREAS the principal objects for which the Company is established are, inter alia, construction of a tourism development project, etc. etc. AND WHEREAS for the purpose of the construction of this tourism development project comprising of a hotel at Curla, Vainguinim, Dona Paula, Goa, the Company has applied to the Government of Goa. Daman and Diu (hereinafter referred to as "The Government") for acquisition under the provisions of the Land Acquisition Act, 1894 (hereinafter referred to as "the said Act") of the pieces of land containing 19,114 square metres, situated in the District of Tiswadi and more particularly described in the Schedule appended hereto and delineated in the Plan hereunder annexed (hereinafter called "the said land") for the following purpose, namely -Tourism Development Project - construction of hotel at Curla, Vainguinim, Taleigao. AND WHEREAS the Government being satisfied by an enquiry held under Section 40 of the said Act that the proposed acquisition is needed for the aforesaid purpose and the said work is likely to prove useful to the public, has consented to acquire on behalf of the company the said land, hereinbefore described.

3. The said land, when so transferred to and vested in the Company shall be held by the Company as its property to be used only in furtherance of and for the purpose for which it is required subject nevertheless to the payment of the agricultural, non-agricultural or other assessments and cesses, if any, and so far as the said land is or may from time to time be liable to such assessments and cesses under the provisions of the law for the time being in force.

4.(i) The Company shall not use the said land for any purpose other than that for which it is acquired.

(ii) The Company shall undertake the work of creation of sports and other recreational facilities/amenities within one year from the date on which the possession of the said land is handed to the Company and complete the same within three years from the aforesaid date.

(iii) Where the Government is satisfied after such enquiry as it may deem necessary that the Company was prevented by reasons beyond its control from creating the sports and other recreational amenities within the time specified in the Agreement, the Government may extend the time for that purpose by a period not exceeding one year at a time so however that the total period shall not exceed six years.

(iv) The Company shall keep at all times and maintain the said land and the amenities created thereon, in good order and condition to the satisfaction of the Government or any Officer or Officers authorized by the Government.

(v) The Company shall maintain all records of the Company properly and supply to the Government punctually any information as may from time to time be required by the Government.

(vi) The company shall not use the said land or any amenities created thereon for any purpose which in the opinion of the Government is objectionable.

(vii) The Company shall conform to all the laws and the rules and guidelines made by the Government from time to time regarding preservation of ecology and environment.

(viii) The Company shall never construct any building or structures in the acquired land. Prior approval of Eco-Development Council of the Government of Goa, Daman and Diu will be obtained before undertaking activities for its development, besides other statutory requirements under the existing laws.

(ix) The public access/road to the beach shall not be affected or obstructed in any manner.

6. In case the said land is not used for the purposes for which it is acquired as hereinafter recited or is used for any other purpose or in case the Company commits breach of any of the conditions hereof, the said land together with the improvements, if any, affected thereon, shall be liable to resumption by the Government subject however, to the condition that the amount spent by the Company for the acquisition of the said land or its value as undeveloped land at the time of resumption, whichever is less, but excluding the cost or value of any improvements made by the Company to the said land or any structure standing on the said land, shall be paid as compensation to the Company.

Provided that the said land and the amenities, if any, created thereon shall not be so resumed unless due notice of the breach complained of has been given to the Company and the Company has failed to make good the breach or to comply with any directions issued by the Government in this behalf, within the time specified in the said notice for compliance therewith."

[Emphasis added]

(xiv) Although, the agreement was signed on 26.10.1983, possession of the acquired land was given to appellant No.1 only after withdrawal of Writ Petition No.8 of 1984 for which permission was granted on 26.3.1985.

(xv) After delivery of possession of the acquired land, Smt. Anju Timblo, Director of appellant No.1, made an application to Panjim Planning and Development Authority (hereinafter referred to as `the Development Authority') under Sections 44(1) read with Section 49(1) of the Goa, Daman & Diu Town and Country Planning Act, 1974 (hereinafter described as `Town & Country Planning Act') for grant of permission for extension of the existing hotel building on survey Nos.246/1, 246/3 and 246/4 (old survey Nos.787, 788 and 789). The applicant did not seek extension of hotel building to survey No.246/2 apparently because of the express embargo contained in Clause 4(viii) of the agreement that the company shall never construct any building or structure in the acquired land.

(xvi) The aforementioned application was considered by the EEC in its 23rd meeting held on 11.6.1987 and was favourably recommended subject to the condition that pedestrian path along the beach may be made available by constructing an access from the jetty so that public can reach the beach during the high tide period. Thereafter, the matter was considered in the meeting of the EDC held on 11.9.1987 and it was decided to accept the recommendations of the EEC, subject to the

condition regarding pedestrian path. The decision of the EDC was communicated to Smt. Anju Timblo by the Chief Town Planner vide his letter dated 14.10.1987, the relevant portion of which read as under:

"In continuation of this office letter No. DE/4757(DZ/2009)3055/87 dated 10.7.87, it is to inform that the project was discussed in the 10th meeting of the Eco Development Council held on 11.9.87 and the Council has cleared the project as per the plans submitted by you with condition that pedestrian path be made available by construction an access from the jetty so that the public can reach the beach even during high tide."

(xvii) In furtherance of the decision taken by the EDC, the Development Authority issued an order under Section 44(3)(c) read with Section 49(2) of the Town and Country Planning Act whereby permission was granted to appellant No.1 for extension of the existing hotel building. The opening paragraph and Clause 10 of the conditions incorporated in that order, read as under:

"Whereas an application has been made by Shri/Smt. Anju Timblo, Development permission is issued for extension to the existing Hotel Building with respect to his/her land zoned as commercial zone bearing Survey No. 246 approved Sub No. 1, 3 and 4 Chalta No. - P.T. Sheet No. ___ of Taleigao Village Town in accordance with the provisions of Section 44(1)/49(1) of the Goa, Daman and Diu Town and Country Planning Act, 1974, read with Rule 13 of the Planning & Development Rules 1977 framed thereunder. And whereas, a development charge affixed at Rs.84,170/- has been paid by him/her.

Therefore, under the powers vested in this Authority under Section 44(3)) / 49(2) of the Goa, Daman & Diu Town & Country Planning Act, 1974, the above said applicant is granted development permission to carry out development in accordance with the enclosed plans subject to the following conditions:- "........

10) The Pedestrian path has to be made available by constructing an access from the jetty so that the public can reach the beach even during high tide." (xviii) After some time another application was made on behalf of appellant No.1 under Section 46 read with Section 44 of the Town and Country Planning Act for renewal of the permission granted vide order dated 15.4.1988 with a deviation in respect of plots bearing survey Nos.246/1, 2, 3 and 4. Thus, for the first time, a request was made for raising construction in survey No. 803 (new No.246/2) in the garb of making deviation from the permission already granted. This application was not put up either before the EEC or EDC and was straightaway considered by the Goa Town and Country Planning Board (for short `the Board') in its meeting held on 20.6.1991 as an additional item and the following decision was taken:- "The proposal relating to extension/deviation of Hotel Cidade de Goa which also involves relaxation in number of floors was considered and approved subject to the condition that the height shall not exceed the stipulated limit of 17.5 mts. which was applicable at the time when the project was approved".

(xix) The above reproduced decision of the Board was forwarded by the State Government to the Development Authority. However, without even waiting for consideration by the competent body,

appellant No.1 appears to have started construction by deviating from the approved plan. This compelled the Chairman of the Development Authority to send letter dated 12.7.1991 to appellant No.1 requiring it to refrain from going ahead with further construction.

(xx) It is not borne out from the record that matter relating to extension of the hotel building on plot bearing survey No.803 (new No.246/2) was ever placed before the EDC, but the Development Authority suo moto passed order dated 20.4.1992 vide which permission was granted to appellant No.1 to carry out the development on plot bearing survey No.246/1, 2, 3 and 4 subject to the terms and conditions specified therein, including the following:

"The condition No.10 of the Order No.PDA/T/7471/297/88 dated 15.4.1988 should be strictly adhered to."

(xxi) When appellant No.1 started extension of the hotel building in violation of the permission accorded by the EDC, Shri Minguel Martins, who claims to have purchased plots carved out of survey No.792 (new No.242/1), popularly known as `Machado's Cove', filed Writ Petition No.330/1991, for issue of a direction to the State Government, Village Panchayat Taleigao and other official respondents to remove the illegal construction made by appellant No.1, to refrain from granting any permission for construction or regularizing the construction already made by appellant No.1 and also revoke the permission granted vide order dated 15.4.1988. He further prayed for issue of a direction to respondent Nos.1 and 2 in the writ petition (appellants herein) to keep the traditional access to the beach open and not to put up any further construction on plots bearing survey Nos.787 and 803, which would interfere with the public road, parking lot and public access to the beach. In paragraph 3 of his petition, Shri Minguel Martins made a mention of the alleged violation of the conditions contained in letters dated 1.8.1978 and 22.8.1978 issued by the Chief Town Planner and Sarpanch of the Gram Panchayat respectively by asserting that respondent Nos.1 and 2 (appellants herein) have closed the road and footpath to the beach and commenced construction of the parking, which he has been challenged in Writ Petition No.284/1991. In paragraphs 5 to 7, he referred to agreement dated 26.10.1983, and alleged that in complete violation of the mandate thereof, respondent Nos.1 and 2 have made construction in survey No.803 and blocked public access to the beach. He also pleaded that even though the land was acquired for sports and recreational facilities and use thereof for any other purpose is prohibited by the terms of agreement, the official respondents are trying to regularize illegal structures put up by respondent Nos.1 and 2 and even violation of CRZ is being ignored. Another plea taken by Shri Minguel Martins was that respondent Nos.1 and 2 have constructed sewerage treatment plant and laundry without obtaining permission from the competent authority under the Water (Prevention and Control of Pollution) Act, 1974 and the Environment Protection Act, 1986.

(xxii) In the reply affidavit filed on behalf of respondent Nos.1 and 2 in Writ Petition No.330/1991 (appellants herein), it was pleaded that the petitioner is liable to be non- suited on the ground of laches and also on the ground that disputed questions of fact are involved. It was further pleaded that the writ petition has been instituted with an oblique motive at the instance of Dr. Alvaro de Souze Macahdo, one of the co-owners of survey No.792 and developer of Machado's Cove, namely, M/s. Alcon Real Estate Private Ltd., who filed Civil Suit No.67 of 1986 for similar relief but could not

persuade Civil Judge, Junior Division, Panaji to entertain their prayer for temporary injunction. The appellants alleged that after having failed to secure injunction from the civil court, Victor Albuquerque, the partner of M/s. Alcon Real Estates Private Ltd. filed Writ Petition No.284/1991 and Minguel Martins filed Writ Petition No.330/1991 and this was indicative of the fact that the petitioner was in collusion with the developer of Machado's Cove. They also questioned, the locus of the petitioner by stating that plot bearing survey No.792 has not been sub-divided and he does not have any interest in that property. On merits it was averred that road, car parking facilities and footpath leading to the beach have been provided in accordance with the condition imposed by the Chief Town Planner and Gram Panchayat and the same are in existence since 1979 and are being used by the public without any obstruction. The appellants denied existence of a pathway through survey Nos.792 and 803 and pleaded that members of the public do not have the right to access the beach through survey No.803. The appellants also relied on Section 16 of the 1894 Act and averred that even if there existed access to the beach through the acquired land, the same stood extinguished after vesting of the land in the government, possession of which was given to appellant No.1 on 26.3.1985. On the issue of extension of hotel building, the appellants pleaded that additional construction was made in accordance with the permission granted vide order dated 15.4.1988 and after obtaining approval of the proposed deviation from the competent authority. As regards, the laundry and water treatment plant, it was averred that temporary sheds were constructed for laundry after obtaining permission from the Sarpanch of the Gram Panchayat and that treated effluent are intended to be used for gardening, manuring and other purposes for which no separate permission was necessary. The appellants referred to Suit No.313/1978/A filed by Gustavo Renato da Cruz Pinto and others for decree of possession by pre-emption and averred that the so called admissions made in the written statement about the existence of public pathway through plots bearing survey Nos.792 and 803 is not binding on them because contents of the written statement were not verified by the authorized representative of appellant No.2, on the basis of personal knowledge and in their rejoinder, even the plaintiffs had not accepted the existence of such pathway. In support of their plea that there is no public pathway or access to the beach through survey Nos. 792 and 803, the appellants relied on the judgment of Special Civil Suit No. 67/1986 - Alvaro De Souza Machado and another vs. Sociedade De Fomento Industrial Pvt. Ltd. and another.

(xxiii) The Goa Foundation, which is the registered society and is engaged in the protection of ecology and environment in the State of Goa and Dr. Claudo Alvares, Secretary of the Goa Foundation filed Writ Petition No.36/1992 with prayers similar to those made in Writ Petition No. 330/1991. They also invoked Article 51(g) of the Constitution of India and pleaded that the Vainguinim beach, which is a public asset, is sought to be privatized by the respondents (appellants herein) and they have advertised the hotel in foreign country as having a private beach. In paragraph 9 of Writ Petition No.36/1992, the petitioners claimed that the villagers of Taleigao and general public have been using access to the beach that run through plots bearing survey Nos.792 and 803 (new Nos.242/1 and 246/2) in addition to the path running along the boundary of survey No.787 (new No.246/1). They relied on the admissions contained in the written statement filed on behalf of appellant No.2 in Special Civil Suit No.313/1978/A to show that public access to the beach exists through survey No.803 and pleaded that in complete disregard of agreement dated 26.10.1983, the appellants have constructed hotel building without obtaining permission from the competent authority and they have unauthorisedly put up wall encircling those plots and thereby

privatized Vainguinim beach.

(xxiv) Shri Gustavo Renato da Cruz Pinto, who had earlier filed Special Civil Suit No.313/78/A for pre-emption, also joined the fray by filing Writ Petition No.141/1992. He claimed that public access to the beach through plot bearing survey No.803 has been blocked in utter violation of the conditions specified in agreement dated 26.10.1983. Another plea taken by Gustavo Renato da Cruz Pinto was that the land was acquired under Section 40(1)(b) of the 1894 Act and, therefore, the respondents in the writ petition are duty bound to provide amenities to the public in terms of agreement dated 26.10.1983, which they have failed to do.

(xxv) The reply affidavits filed in Writ Petition Nos.36/1992 and 141/1992 were substantially similar to the counter filed in Writ Petition No.330/1991 except that in the reply affidavit of Writ Petition No.36/1992, the appellants denied that they were trying to privatize Vainguinim beach. They claimed that the disputed construction is located at a distance of 200 meters from high tide line and about 1000 meters from Dona Paula jetty. According to the appellants, the beach in question is not a type of coastal beach but has exclusiveness and in that sense it was advertised as a private beach. While defending Writ Petition No.141/1992, Smt. Anju Timblo claimed that there has been no violation of agreement dated 26.10.1983 and the construction has been made after obtaining permission from the competent authority. She also enclosed permission granted by the Sarpanch of the Gram Panchayat for putting up temporary shed for washing machines.

(xxvi) A separate reply affidavit was filed by Shri Moraed Ahmed, Member Secretary of Development Authority in Writ Petition No.330/1991. The substance of his affidavit was that the Development Authority has neither granted approval to the deviation nor renewed the development permission of appellant No.1. He also referred to the illegal construction found at the time of inspections conducted on 15.5.1990 and 14.5.1991 which blocked public access to the river or reduced its width and averred that on being asked to do so, appellant No.1 demolished the obstruction/illegal construction.

3. At the hearing of the writ petitions, learned counsel appearing on behalf of the petitioners did not press the grounds of challenge involving violation of CRZ Regulation and construction of sewerage treatment plant without obtaining permission/consent from the competent authority. After taking note of their statement, the High Court considered other issues raised before it and held that the land was acquired under Section 40(1)(b); that the extension of the hotel building on an area measuring 1000 square meters of survey No.803 (new No.246/2) and other constructions were legally impermissible. The High Court negatived the argument of the appellants' counsel that in view of Section 16 of the 1894 Act encumbrance, if any, stood wiped out by observing that traditional public right of way cannot be strictly treated as an encumbrance and existence of the way which was in use from time immemorial by the public openly, peacefully and continuously can not be affected, more so, because in the agreement itself, access through survey No.803 (new No.246/2) is acknowledged in the form of Clause 4(ix). The High Court also rejected the explanations given by the appellants for advertising the beach as a private beach and held that they cannot obstruct the passage by putting up wall/barbed wire fencing. In the end, the High Court observed that after executing agreement dated 26.10.1983, the State Government totally abandoned its duty and did not

bother to ensure compliance of the condition incorporated in it.

4. On the aforesaid premise, the High Court allowed the writ petitions and gave the following directions:-

> a. The constructions which have come up in survey No.246/2 (old 803) are required to be demolished and the concerned authorities shall take action in this respect, within a period of eight weeks from today and the compliance report within two weeks therefrom. b. A notice for resumption of the land as required under proviso to clause 6 of the agreement dated 26.10.1983 shall be issued within ten weeks by the Government to the hotel to show cause as to why, in the circumstances, the acquired land should not be resumed. The Government shall then take appropriate decision in accordance with law.
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> c. The access which is shown in plan Exh.A colly which is at page 33 of Writ Petition No.141 of 1992 shall be kept open without any obstruction of any kind from point A-B in order to come from Machado Cove side from point A to 803 (246/2 new) and then to go to the beach beyond point B. We have already pointed out that this plan is to the scale.
>
> d. The challenge relating to yellow access and shifting the same to purple access which is raised in Writ Petition No.330/91 has been exhaustively dealt with in separate judgment in connected Writ Petitions No.284/91 and 37/92 and the order passed therein shall govern the said challenge.

5. Before proceeding further, we consider it necessary to mention that during the pendency of these appeals, the appellants filed I.As. for permission to file additional documents including copy of the agreement entered into between plot owners/developers of Machado's Cove (old survey No.792) with plot purchasers showing the pathway to be maintained in terms of order dated 9.4.1992 passed in W.P. No.141/1992, photographs showing the pathway and extension of the hotel building on survey No.803 (new No.246/2) which is partly occupied by health club, gymnasium, beauty parlour, barber shop, steam, sauna, video games arcade and aerobics and part of circulation hall, kitchen etc., photograph showing development of garden in survey No.803, a sketch showing the location of path as per Exhibit A, copies of correspondence between the developer and appellant No.1 on the one hand and functionaries of the State Government and Gram Panchayat on the other hand, orders of the Development Authority, letter dated 12.7.1991 of the Chairman of the Development Authority, pleadings of and/or evidence produced by the parties in Special Civil Suit Nos.313/1978/A and 67/1986 and the judgment of Special Civil Suit No.67/1986.

6. It is also apposite to mention that while issuing notice in Writ Petition No.141/1992, the High Court passed an interim order directing appellant No.1 to maintain the public access from point `A' to `B' in survey No.803 (new No.246/2). In the special leave petitions, paragraphs 1 and 2 of the directions contained in High Court's order and action initiated for resumption of the land were stayed, but at the same time, the Court recorded that learned counsel for the petitioner has agreed

that pathway from point `A' to `B' in survey No.246/2 as shown at page 49 of Volume II of the paper book in SLP (C) No.9875/2000 shall be maintained till further orders, [This page is a plan showing the status of various plots including survey No.803 (new No.246/2) through which the public path passes from point `A' to `B'].

7. Shri Anil B. Divan, learned senior counsel appearing for the appellant, argued that land in survey Nos.803 and 804 was acquired under Section 40(1)(aa) and not under Section 40(1)(b) of the 1894 Act and the High Court committed serious error in recording a finding that the acquisition was under Section 40(1)(b). Learned senior counsel submitted that the expression "public purpose" appearing in clause (aa) of Section 40(1) is relatable to the purpose of company and not as the term is generally understood in the context of the provisions contained in Part II of the 1894 Act. Shri Divan further submitted that in the absence of a specific stipulation to that effect in the notification published under Section 4(1) of the 1894 Act and agreement dated 26.10.1983, the High Court was not justified in issuing a mandamus for providing access to the beach through that survey number. An alternative argument of Shri Divan is that the so called public access to the beach through survey No.803 was running parallel to the nallah dividing survey No.803 on the one hand and survey Nos.804 and 805 on the other hand and no useful purpose will be served by insisting on maintaining that access because new path has been made available for access to the beach by constructing road, car parking, etc. in compliance of the condition imposed by the Chief Town Planner in his letter dated 1.8.1978 and by the Gram Panchayat while granting permission for construction of hotel in survey No.787. Learned senior counsel referred to the affidavit filed on behalf of the State Government before this Court and argued that when parties to the agreement have clearly understood the terms thereof and the EDC gave permission for construction of sports facilities and amenities without insisting that the same should be allowed to be used by members of the public, except on paying the specified fees, the High Court committed an error by issuing a mandamus for resumption of the land on the ground of the alleged violation of agreement dated 26.10.1983. Learned senior counsel extensively referred to the pleadings of three writ petitions and additional documents filed in these appeals to show that hotel building was extended on plot bearing survey No.803, after obtaining permission from the EDC and Development Authority and submitted that the irregularity, if any, committed in that regard will be deemed to have been regularized by order dated 20.4.1992 passed by the Development Authority. Shri Divan relied on Clause 6 of the agreement and argued that even if the appellants can be said to have violated any of the conditions of agreement, it is for the Government to take action for resumption of the land, after giving opportunity to them to rectify the defect, etc. and the High Court could not have usurp the power of the Government and directed demolition of the disputed construction. Learned senior counsel also referred to judgment dated 13.3.2006 passed in Special Civil Suit No.67/1986 and argued that in the face of unequivocal finding recorded by the competent court that there is no pathway from survey No.792 (Machado's Cove) to survey No.803, the direction given by the High Court for resumption of the land on the ground that access to the beach available to the public through survey No.803 (new No.246/2) has been blocked in violation of the terms of agreement dated 26.10.1983, is liable to be set aside. He further argued that the so-called admissions made in the written statement filed in Special Civil Suit No.313/78/A cannot be read against the appellants because the written statement was not signed by authorized representative of appellant No.2 on personal knowledge and, in any case, the finding recorded by the competent court in Special Civil

Suit No.67/1986 should be treated as conclusive on the issue of non-existence of passage through survey No.803. In support of this argument, learned senior counsel relied on the judgment of this Court in Nagubai Ammal & ors. Vs. B. Shama Rao & ors. [(1956) SCR 451] and of Allahabad High Court in Anurag Misra vs. Ravindra Singh and another [AIR 1994 Allahabad 124].

8. Shri Pallav Shihsodia, learned senior counsel appearing on behalf of the State of Goa and other official respondent, adopted the arguments of Shri Anil Divan and submitted that right of the public to use the traditional passage through private land bearing survey No.803 (new No.246/2) could, at the best, be treated as easementary right which stood extinguished with the acquisition of land under Section 4(1) of the 1894 Act, and vesting thereof in the State Government in terms of Section 16. Shri Shishodia referred to the counter affidavit filed on behalf of the State in these appeals and submitted that once possession of the acquired land was taken by the Government free from all encumbrances, the writ petitioners could not have asked for an access to the beach through survey No.803 for members of the public. He submitted that if public is allowed to use survey No.803, there will always be a possibility of threat to the security of the inmates of the hotel, which will affect inflow of tourist in the area and have adverse impact on the economy of the State.

9. Ms. Indira Jaising, learned senior counsel for the Goa Foundation, referred to notification dated 29.10.1980 and agreement dated 26.10.1983 to show that the land in dispute was acquired for execution of work for the benefit of general public and argued that the High Court did not commit any error by recording a finding that the acquisition was under Section 40(1)(b). She pointed out that the land was acquired with the sole object of enabling appellant No.1 to develop sports and recreational facilities/amenities which could be used by the occupants of the hotel rooms as also the general public and argued that the same cannot be said to be for the purposes of the company. Ms. Jaising emphasised that on the date of acquisition, the appellant No.1 had already constructed the hotel and argued that in the garb of creating facilities and amenities for the occupants of the hotel rooms, it could not have extended hotel building on 1000 sq. meters of plot bearing survey No.803, and that too in violation of the express bar contained in Clause 4(viii) of agreement dated 26.10.1983. She argued that order dated 20.4.1992 passed by the Development Authority permitting construction on plot bearing survey No.803 is liable to be ignored in view of Clause 4(viii) of the agreement. She further argued that even if this Court comes to the conclusion that appellant no.1 could construct building on survey No.803 by way of extension of the existing hotel, the disputed construction cannot be saved because permission of the EDC was not obtained. Ms. Jaising invoked the doctrine of public trust and argued that in view of the unequivocal condition incorporated in Clause 4(ix) of the agreement that access to the beach will be maintained without any obstruction, right of the members of public to go to the beach through survey No.803 cannot be stultified by putting up wall/barbed wire fencing or by creating any other impediment. Learned senior counsel submitted that the beach in question is not a private beach and, therefore, the public at large cannot be denied the right to access the beach. She further submitted that if appellants are allowed to prevent the public from going to the beach through the traditional path from Dona-Paola-Bambolim Road through survey Nos.792 and 803, the same would amount to privatization of the public beach, which is legally impermissible. As regards the judgment in Special Civil Suit No.67/1986, Ms. Jaising submitted that the same is not relevant for deciding the issues raised in these appeals because neither any of the writ petitioners nor the State Government were parties to that litigation

and, in any case, in view of the unequivocal stipulation contained in Clause 4(ix) of the agreement, appellant No.1 cannot wriggle out of its statutory obligation to maintain passage through plot bearing survey No.803. She countered the submission of Shri Divan that in view of the availability of alternative access to the beach through the road, car parking and footpath constructed by appellant No.1, the High Court should not have insisted on continuing access to the beach through survey No. 803 by asserting that the said access has been provided in terms of letter dated 1.8.1978 of the Chief Town Planner and permission granted by the Gram Panchayat vide letter dated 22.8.1978 in lieu of the access available to the public through survey No.787 and the same cannot be made basis for depriving members of the public to continue to avail access to the beach through the traditional path available to them survey No. 803. Learned senior counsel also pointed out that the alternative access is totally illusory because it ends on the rocks through which no person can easily go to the beach.

10. We have considered the respective arguments/submissions. The questions which require determination by this Court are:

> (i) Whether land bearing survey Nos.803 (new No.246/2) and 804 (new No.245/2) was acquired under Section 40(1)(aa) or it was an acquisition under Section 40(1)(b)?
>
> (ii) Whether any public access was available to the beach through survey No.803 (new No.246/2) before its acquisition by the State Government and whether in terms of Clause 4(ix) of the agreement, appellant No.1 is required to maintain the said access/road to the beach, without any obstruction?
>
> (iii) Whether public access to the beach through survey No.803 (new No.246/2) stood extinguished with the vesting of land in the State Government under Section 16 of the 1894 Act?
>
> (iv) Whether construction of hotel building on a portion of survey No.803 (new No.246/2) is contrary to the purpose of acquisition and is violative of the prohibition contained in Clause 4(viii) of agreement dated 26.10.1983 and the High Court rightly directed demolition thereof in accordance with Clause 6 of the agreement?
>
> (v) Whether denial of the facilities and amenities created by appellant No.1 in survey No.803 (new No.246/2) to the members of public is contrary to the purpose of acquisition and is also violative of the agreement and this could be made a ground for resumption of the acquisition of land?

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11. The decision of this question depends on the interpretation of Sections 40 (1) and 41 of the 1894 Act. However, before adverting to those sections, we deem it proper to notice other relevant provisions. Section 4 provides for publication of a preliminary notification evidencing prima facie satisfaction of the government that land in any locality is needed or is likely to be needed for any public purpose. This section prescribes the mode of publication of notification and also indicates the

steps which could be taken for survey etc. of the land for deciding whether the same is fit for the purpose for which it is needed. Section 5A postulates giving of an opportunity to any person interested in the land to raise objection against proposed acquisition and casts a duty on the Collector to hear the objector in person and submit his report to the Government. Section 6 postulates making of a declaration containing satisfaction of the appropriate Government arrived at, after considering the report, if any, made under Section 5A(2) that the particular land is needed for a public purpose or for a company. This is subject to the provisions of Part VII of the Act. Section 39, which finds place in Part VII, lays down that the provisions of Sections 6 to 37 (both inclusive) shall not be put in force for acquiring land on behalf of a company under that part without the previous consent of the appropriate Government, and unless the company executes an agreement in terms of Section 41.

12. In R.L. Arora vs. State of U.P. [(1962) Suppl. 2 SCR 149] (hereinafter referred to as `first R.L. Arora case'), the Constitution Bench considered the legality of the acquisition made on behalf of Lakshmi Ratan Engineering Works Limited, Kanpur, which was engaged in manufacture of textile machinery parts. The appellant, who was owner of the land, challenged the acquisition on the ground that it was not for a public purpose. It was argued on behalf of the appellant that the impugned acquisition cannot be treated to have been made under Section 40(1)(b), merely because the products of the company, for which land is sought to be acquired will be useful to the public. It was urged that, if Section 40(1) is given such an interpretation, the Government will become an agent for acquiring lands on behalf of the companies engaged in producing something which may be used by the public. The respondents argued that Section 40(1)(b) is of wide amplitude and land can be acquired under the Act for any company when the work set up by it is likely to prove useful to the public. The majority of the Constitution Bench held that Section 40(1)

(b) must be read in conjunction with Section 41 to find out the intention of the legislature when it provides for acquisition of land for a company through the agency of the Government, and rejected the argument of the respondents by making the following observations:

"..... If we were to give the wide interpretation contended for on behalf of the respondents on the relevant words in ss. 40 and 41 it would amount to holding that the legislature intended the Government to be a sort of general agent for companies to acquire lands for them, so that there owners may make profits. It can hardly be denied that a company which will satisfy the definition of that word in s. 3(e) will be producing something or other which will be useful to the public and which the public may need to purchase. So on the wide interpretation contended for on behalf of the respondents, we must come to the conclusion that the intention of the legislature was that the Government should be an agent for acquiring land for all companies for such purposes as they might have provided the product intended to be produced is in a general manner useful to the public, and if that is so there would be clearly no point in providing the restrictive provisions in ss. 40 and 41. The very fact therefore that the power to use the machinery of the Act for the acquisition of land for a company is conditioned by the restrictions in ss. 40 and 41 indicates that the legislature intended that land should be acquired through the coercive machinery of the Act only for the restricted purpose mentioned in ss. 40 and 41, which would also be a public purpose for the purpose of s. 4. ....."

"Let us therefore turn to the words of s. 40(1)(b), which says that acquisition should be for some work which is likely to prove useful to the public. Now if the legislature intended these words to mean that even where the product of the work is useful to the public, land can be acquired for the company for that purpose, the legislature could have easily used the words "the product of" before the words "such work". The very fact that there is no reference to the product of the work in s. 40(1)(b) shows that when the legislature said that the work should be likely to prove useful to the public it meant that the work should be directly useful to the public through the public being able to use it instead of being indirectly useful to the public through the public being able to use its product. We have no doubt therefore that when s. 40(1)(b) says that the work should be useful to the public it means that it should be directly useful to the public which should be able to make use of it. This meaning in our opinion is made perfectly clear by what is provided in the fifth term in s. 41. Before the machinery of the Act can be put into operation to acquire land for a company, the Government has to take an agreement from the company, and that agreement must provide, where acquisition is needed for the construction of some work and that work is likely to prove useful to the public, the terms on which the public shall be entitled to use the work. ....."

13. With a view to over come the difficulty created in the acquisition of land for private companies on account of the judgment in first R.L. Arora's case, Clause (aa) was inserted in Section 40(1) by the Land Acquisition (Amendment) Act, 1961. Section 40 (as it stands after 1961 amendment) and Sections 41 and 42 of the 1894 Act read as under:

"40. Previous enquiry. - (1) Such consent shall not be given unless the appropriate Government be satisfied either on the report of the Collector under section 5A, sub- section (2), or by an enquiry held as hereinafter provided, -

(a) that the purpose of the acquisition is to obtain land for the erection of dwelling houses for workmen employed by the Company or for the provision of amenities directly connected therewith, or (aa) that such acquisition is needed for the construction of some building or work for a Company which is engaged or is taking steps for engaging itself in any industry or work which is for a public purpose, or

(b) that such acquisition is needed for the construction of some work, and that such work is likely to prove useful to the public.

(2) Such enquiry shall be held by such officer and at such time and place as the appropriate Government shall appoint.

(3) Such officer may summon and enforce the attendance of witnesses and compel the production of documents by the same means and, as far as possible, in the same manner as is provided by the Code of Civil Procedure, 1908 (5 of 1908) in the case of a Civil Court.

41. Agreement with appropriate Government. - If the appropriate Government is satisfied after considering the report, if any, of the Collector under section 5A, sub- section (2), or on the report of the officer making an inquiry under section 40 that the proposed acquisition is for any of the

purposes referred to in clause (a) or clause (aa) or clause (b) of sub-section (1) of section 40], it shall require the Company to enter into an agreement with the appropriate Government, providing to the satisfaction of the appropriate Government for the following matters, namely :- (1) the - payment to the appropriate Government of the cost of the acquisition; (2) the transfer, on such payment, of the land to the Company. (3) the terms on which the land shall be held by the Company, (4) where the acquisition is for the purpose of erecting dwelling houses or the provision of amenities connected therewith, the time within which, the conditions on which and the manner in which the dwelling houses or amenities shall be erected or provided;

(4A) where the acquisition is for the construction of any building or work for a Company which is engaged or is taking steps for engaging itself in any industry or work which is for a public purpose, the time within which, and the conditions on which, the building or work shall be constructed or executed; and (5) where the acquisition is for the construction of any other work, the time within which and the conditions on which the work shall be executed and maintained and the terms on which the public shall be entitled to use the work.

42. Publication of agreement.- Every such agreement shall, as soon as may be after its execution, be published in the Official Gazette, and thereupon (so far as regards the terms on which the public shall be entitled to use the work) have the same effect as if it had formed part of this Act."

14. In this case, we are not concerned with Clause (a) of Section 40(1) because the land in survey Nos.803 (new No.246/2) and 8042 (new No. 245/2) was not acquired for erection of dwelling houses for workmen employed by appellant No.1 or for provision of amenities directly connected therewith.

15. The dispute between the parties centers round the remaining two clauses of Section 40(1). According to the appellants, the acquisition was under Clause (aa), whereas writ-petitioners (private respondents herein) pleaded that the acquisition was under Clause (b). A careful reading of the two clauses shows that while Clause (aa) envisages acquisition for the construction of some building or work for a company which is engaged or is taking steps for engaging itself in any industry or work which is for a public purpose, Clause (b) refers to acquisition for construction of some work which is likely to prove useful to the public. The difference in the language of the two clauses clearly brings out this distinction. In the second part of Clause (aa), the legislature has used the expression `in any industry or work which is for a public purpose'. This means that the particular acquisition can be treated to have been made under that clause if it is for construction of some building or work for a company which is engaged or is likely to engage itself in any industry or work which may not necessarily be useful to the public in general. As against this, usefulness of the construction of some work to the general public is sine qua non for acquisition under Clause (b). The expression "public purpose" used in Clause (aa) was interpreted in R.L. Arora vs. State of Uttar Pradesh & others [(1964] 6 SCR 784] (herein after referred to "second R.L. Arora's case") which was instituted by the land owner for striking down the amendment made in 1961 for validating the acquisition, which was quashed in the first R.L. Arora's case. It was argued on behalf of the petitioner that even if the amendment was not treated ultra vires the provisions of the Constitution, the disputed acquisition is liable to be annulled because the condition prescribed in Clause (aa) of Section 40(1) was not

fulfilled, inasmuch as the acquisition was not for a public purpose. It was submitted that unless there was any direct connection or close nexus between the articles produced by the company and general good of the public, the impugned acquisition cannot be treated as covered by Clause (aa). The majority of the Constitution Bench rejected this argument and held:-

"In approaching the question of construction of this clause, it cannot be forgotten that the amendment was made in consequence of the decision of this Court in R.L. Arora case and the intention of Parliament was to fill the lacuna, which, according to that decision, existed in the Act in the matter of acquisitions for a company .... Further, a literal interpretation is not always the only interpretation of a provision in a statute and the court has to look at the setting in which the words are used and the circumstances in which the law came to be passed to decide whether there is something implicit behind the words actually used which would control the literal meaning of the words used in a provision of the statute.

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Therefore, we have to see whether the provision in clause (aa) bears another construction also in the setting in which it appears and in the circumstances in which it was put on the statute book and also in view of the language used in the clause. The circumstances in which the amendment came to be made have already been mentioned by us and the intention of Parliament clearly was to fill up the lacuna in the Act which became evident on the decision of this Court in R.L. Arora case . . . . It was only for such a company that land was to be acquired compulsorily and the acquisition was for the construction of some building or work for such a company i.e. a company engaged or about to be engaged in some industry or work which is for a public purpose. In this setting it seems to us reasonable to hold that the intention of Parliament could only have been that land should be acquired for such building or work for a company as would subserve the public purpose of the company; it could not have been intended, considering the setting in which clause (aa) was introduced, that land could be acquired for a building or work which would not subserve the public purpose of the company .... Further, acquisition is for the construction of some building or work for a company and the nature of that company is that it is engaged or is taking steps for engaging itself in any industry or work which is for a public purpose. When therefore the building or work is for such a company it seems to us that it is reasonable to hold that the nature of the building or work to be constructed takes colour from the nature of the company for which it is to be constructed. We are therefore of opinion that the literal and mechanical construction for which the petitioner contends is neither the only nor the true construction of clause (aa) and that when clause (aa) provides for acquisition of land needed for construction of some building or work it implicitly intends that the building or work which is to be constructed must be such as to subserve the public purpose of the industry or work in which the company is engaged or is about to be engaged. In short, the words `building or work' used in clause (aa) take their colour from the adjectival clause which governs the company for which the building; or work is being constructed . . . . It is only in these cases where the company is engaged in an industry or work of that kind and where the building or work is also constructed for a purpose of that kind, which is a public purpose, that acquisition can be made under clause (aa). As we read the clause we are of opinion that the public purpose of the company

for which acquisition is to be made cannot be divorced from the purpose of the building or work and it is not open for such a company to acquire land under clause (aa) for a building or work which will not subserve the public purpose of the company".

16. The same question was again considered in State of West Bengal and another vs. Surendra Nath Bhattacharya and another [(1980) 3 SCC 237]. In that case, acquisition was made on behalf of a company which was carrying on the business of manufacturing of sodium silicate, plaster of paris etc. The manufactured goods of the company were widely used all over India, saving large amount of foreign exchange which was earlier used for importing similar goods. The Division Bench of Calcutta High Court quashed the acquisition on the ground that it was not for a public purpose. After noticing the majority judgment in second R.L. Arora's case, the Court held:-

"The effect of the observations made above leads to the irresistible conclusion that the words "public purpose" are not to be interpreted in a restricted sense but takes colour from the nature of the industry itself, the articles that it manufactures and the benefit to the people that it subserves. This Court clearly indicated that the land should be acquired for building or work which would serve the public purpose of the company and not public purpose as it is generally understood. In the instant case, we have also set out the nature of the products of the company and have stressed the fact that the articles produced by the company are used for the benefit of the people and as it saves lot of foreign exchange, it is unmistakably for the general good of the country particularly from the economic point of view. In these circumstances, it cannot be said that the object of the company in extending its operations by enlarging the area of its production was not for the public purpose of the company. Taking an overall picture of the nature of the products of the company, its various activities, the general public good that it seeks to achieve and the great benefit that the people derive, it cannot be said that the acquisition, in the present case, was not for a public purpose. According to the test laid down by this Court, it is sufficient if it is shown that the building sought to be built or the work undertaken subserves the public purpose of the company which is completely fulfilled in this case."

17. In Pratibha Nema and others vs. State of M.P. and others [(2003) 10 SCC 626], this Court analysed the provisions of Part II and VII of the 1894 Act, referred to the earlier judgments in Somwanti vs. State of Punjab [AIR 1963 SC 151], second R.L. Arora's case, Jage Ram vs. State of Haryana [(1971) 1 SCC 671], Bajirao T. Kote vs. State of Maharashtra [(1995) 2 SCC 442] and observed:- "These decisions establish that a public purpose is involved in the acquisition of land for setting up an industry in the private sector as it would ultimately benefit the people. However, we would like to add that any and every industry need not necessarily promote public purpose and there could be exceptions which negate the public purpose. But, it must be borne in mind that the satisfaction of the Government as to the existence of public purpose cannot be lightly faulted and it must remain uppermost in the mind of the court.

.....

Thus the distinction between public purpose acquisition and Part VII acquisition has got blurred under the impact of judicial interpretation of relevant provisions. The main and perhaps the decisive

distinction lies in the fact whether the cost of acquisition comes out of public funds wholly or partly. Here again, even a token or nominal contribution by the Government was held to be sufficient compliance with the second proviso to Section 6 as held in a catena of decisions. The net result is that by contributing even a trifling sum, the character and pattern of acquisition could be changed by the Government. In ultimate analysis, what is considered to be an acquisition for facilitating the setting up of an industry in the private sector could get imbued with the character of public purpose acquisition if only the Government comes forward to sanction the payment of a nominal sum towards compensation. In the present state of law, that seems to be the real position."

18. Section 41 lays down that if the appropriate Government is satisfied, after considering the report, if any, of the Collector under Section 5A(2) or on the report of the officer making an inquiry under Section 40, that the proposed acquisition is for any of the purposes referred to in clause (a) or (aa) or clause (b) of sub-section (1) of Section 40, then it shall require the company to enter into an agreement on the matters enumerated in Clauses 1 to 5. Clause 4(A) of Section 41, which is relatable to an acquisition under Section 40(1)(aa), requires that the agreement must indicate the time within which and the conditions on which the building or work shall be constructed or executed. Clause (5) of Section 41, which is relatable to an acquisition under Section 40(1)(b), also postulates indication of time within which work is executed or maintained and the terms on which public shall be entitled to use the work.

19. In State of West Bengal vs. P.N. Talukdar [AIR 1965 SC 646] this Court considered a question similar to question No.1 framed by us and observed: "..... Generally speaking the appropriate government would not state in so many words whether it was proceeding under Clause (a), or Clause (aa) or Clause (b). The question whether consent has been given under one clause or the other or more than one clause has to be decided on the basis of the agreement and the notification under Section 6. We have also no doubt that it is open to the appropriate government to give consent on being satisfied as to one of the three clauses only or as to more than one clause. In the present case reliance has been placed on behalf of the State Government on all the three clauses and particularly on clauses (aa) and (b), to show that the consent was given after keeping in mind all the three clauses of Section 40(1). The question as to which clause of Section 40(1) was acted upon by the State Government to give consent is important because on that will depend the nature of the agreement which has to be made under Section 41. Where the purpose of the acquisition is as mentioned in Clause (a), the agreement has to provide for the time within which, the conditions on which and the manner in which the dwelling houses or amenities shall be erected or provided. Where the consent is based on Clause (aa), the agreement is to provide for the time within which and the conditions on which, the building or work shall be constructed or executed. Where the consent is given on the basis of Clause (b), the agreement, is to specify the time within which and the conditions on which the work shall be executed and maintained, and the terms on which the public shall be entitled to use the work. It will be seen from the above that there are bound to be differences in the terms to be embodied in an agreement under Section 41 depending upon whether the consent was given."

20. In the light of the above, we shall now consider whether on a conjoint reading of notification dated 29.10.1980 and agreement dated 26.10.1983, acquisition of survey Nos.803 and 804 (new

Nos.246/2 and 245/2) can be treated as having been made under Section 40(1)(aa) or it was an acquisition under 40(1)(b) of the 1894 Act. A brief recapitulation of the facts shows that soon after commencing work for construction of the hotel, appellant No.1 approached the State Government for acquisition of land comprised in various survey numbers including survey Nos.803 and 804 (new Nos.246/2 and 245/2) by indicating that the first phase of its project envisages construction of hotel building in survey No.787 and in the second phase, it was intending to put up a yoga centre, health club and water sports facilities in survey No.805 for promoting tourism, which will also be useful to the general public. Appellant No.1 pointed out that two small plots bearing survey Nos.788 and 789, abutting the beach, are required for installing a first aid post and a medical aid centre, which are necessary for beach resort hotel and for providing safety measures and facilities to the residents of the hotel and also for the public at large, using the beach. Appellant No.1 then submitted that for second phase of the hotel complex, it will be desirable to acquire survey Nos.803 and 804 so that the entire complex will become one composite unit. In the end, appellant No.1 indicated that the facilities provided by the hotel will be open for use to the non-residents on membership basis. The notification issued by the State Government under Section 4(1) shows that the land was needed for a public purpose, namely, the tourism development project - construction of hotel at Curla, Vainguinim, Taleigao. In our view, as appellant No.1 was engaged in executing a project of tourism development, i.e., construction of hotel along with amenities like yoga centre, health club and water sports facilities, acquisition of survey Nos.803 and 804 (new Nos.246/2 and 245/2) was clearly relatable to its project. This is also borne out from the language of agreement dated 26.10.1983, which records satisfaction of the Government that the land was needed for the purpose of executing tourism development project of appellant No.1. Clause 4

(ii) of the agreement shows that appellant No.1 was required to undertake the work of creation of sports and recreational facilities / amenities within one year of getting possession and complete the same within three years. This work was certainly ancillary to the tourism development project being executed by appellant No.1. Therefore, there is no escape from the conclusion that the acquisition was under Section 40(1)(aa) of the 1894 Act and the contrary finding recorded by the High Court is legally unsustainable. It is also necessary to bear in mind that tourism is an important industrial activity in Goa which attracts tourists from all over the country and abroad. A huge amount of foreign exchange is generated by this industry apart from providing employment and ancillary benefits to a large section of the population of the State. Therefore, acquisition of land for tourism development project is certainly for a public purpose.

Re: 2

21. For deciding the question whether public access to the beach was available through survey No.803 (new No.246/2) before its acquisition in the year 1980, it will be profitable to notice the pleadings of the parties and contents of the documents produced by them. In all the writ petitions, the petitioners claimed that there exists passage through survey No.803 which is being used by the public for many years for going to the beach. In para 6 of his writ petition, Minguel Martins referred to the affidavit of Avdhut Kamat filed by appellant No.2 in civil suit for a decree of pre- emption instituted by Gustavo Renato da Cruz Pinto and two others. In other two petitions, the writ petitioners relied on the averments contained in the written statement filed on behalf of appellant

No.2 in Special Civil Suit No.313/1978/A to support their assertion regarding existence of access to the beach through survey No.803. Gustavo Renato da Cruz Pinto also placed on record a copy of the affidavit of Avdhut Kamat and plan prepared by him showing access to the beach from point `A' to `B' in survey No.803. In that plan starting point of access from the beach was at point `B' in survey No.803 and it ended at point `A' touching northern boundary of that survey number towards Machado's Cove.

22. In paragraphs 2F to 2O, 2R, 2S, 3E and 3H of the written statement filed on behalf of appellant No.2 in Special Civil Suit No.313/1978/A, the following averments were made:

"2F. As shown before, the properties 803, 804, 787, 788, 789 and 805 are bounded on the South by seashore beyond which the river zuari lies. A part of this shore which forms the boundary to the said properties is used as public way. This public way after passing through the seashore and some private road goes upto Dona Paula jotty. This, public way is used by the members of the public including the fisher folk to go from th said seashore upto Dona Paula jetty and vice-versa, from time immemorial, without objection whosoever, openly, peacefully and continuously and as a matter of right.

2G. The beach existing at the south of property 803 and 787 is a public resort and it is visited by members of the public from all parts of llhas Taluka. For this purpose there is a ramp (stone construction) built on the ground in property 803 as a means of access to the beach. There is also a similar ramp in the property 787. The existence of the ramps and the date of their construction is lost in antiquity but has been known to exist at least for the last seventy years.

2H. In order to have access to the portion of the beach existing in the property 803, there is a footpath starting from the ramp and going towards North upto the culvert linking property 803 with property 792 of Machado therefrom after crossing the property of Machado in the same direction, it touches the public footpath going from Dona Paula to Calapur. At present, the said footpath touches the Panaji-Dona Paula-Bambolim road and crosses the property of Machado.

2I. The way mentioned in the proceeding para 2H is being used by members of the public living in the village Calapur and also by other members of the public coming from different parts of Taluka llhas. This way is clearly visible on site. 2J. The Plaintiffs family have access to the properties 803, 804, 788 and 789 through the said way mentioned in para 2H and they have been using this access for the last fifty years. The family of the Plaintiffs have their residential house at St. Cruz village and this way in the nearest way for them.

2K. The access to the property 788 and 789 of the Plaintiff's family is through the property 803 and through the portion of the beach used as a public way and standing on the Southern side.

2L. The access to the property 804 is through the property 803 and for that purpose there exists a culvert.

2M. The access to the property 806 is in the continuation of the way leading from 803 and 804 and then going to the beach and to property 806. 806 has also direct access to the seashore which is used as public way.

2N. It is not true that that the way to 806 goes from property 805 as represented in the map annexed to the Plaint.

2O. The access to the property 807 is through the property of Machadio Survey No. 792 and more particularly the way which goes just in line with the Eastern boundary of property of Machado. This latter was given access also to property 806 after passing through properties which stand at the East of property 807 and 805. As represented in the map annexed to the Plaint, 807 has access through 804 and 803.

.....

2R. The members of the public coming through the way mentioned in Para 2P were using either the portion of beach in property 787 or portion of beach in property 803. Whenever they were using the ramp existing in the property 803, they used the way which connects the footpath mentioned in Para 2P with the footpath stated in Para 2H and thereafter they were going to the ramp through the way to 2 (H).

2S. The ways mentioned in Para 2F, 2H and 2P have been used by the members of the public and villagers from immemorial times, openly, peacefully, continuously in order to come to the beach and they are public ways and have been so dedicated as is evidenced by the long and continuous user.

.....

"3E. From this parking place a footpath is maintained alongside the Eastern boundary of property 787 and Western boundary of property 803 going to the south upto the Sea Shore.

3H. The Plaintiffs have not come to the Court with clean hands and hence deliberately omitted to represent in the map annexed to the plaint the ramps existing in the properties 787 and 803 and giving access to the beach. Similarly the Plaintiffs have deliberately omitted to represent in the map the public way mentioned in Para 2H and 3E, the Plaintiffs have further deliberately, in order to snatch injunction, wrongly represented the way mentioned in 2(k)."

[Emphasis added]

23. Along with the written statement, appellant No.2 filed affidavit of Shri Avdhut Kamat, who was engaged as consulting engineer for the hotel project. In paragraph 2 of his affidavit, Shri Kamat stated as under:

"2. I say that under instructions from said Fomento, I have prepared a plan of property bearing survey No. 787 to 807. The properties with survey No.787, 790, 798, 800, 801, 802 and 805 have

been purchased by said Fomento from Defendants No.2 to

5. The plan has been drawn by me taking into consideration the old survey, new survey and present position on the site. The new numbers of the survey are also shown in the plan. On the said plan, I have shown existing public pathways by red pencil lines. From the said plan it appears that none of the Defendant's lands (all of which are hatched on the plan) are, in fact, enclosed property, since all of them have access to public ways. The pathways marked red in the plan have been personally checked by me with the assistance of my assistants Engineers and can be verified on the site."

[Emphasis added] The affidavit of Shri Kamat was accompanied by the plan marked as Exhibit-A which depicted various pathways including the one going from the beach to Dona-Paola-Bambolim Road through survey Nos.803 and 792.

24. In the reply affidavit filed in Writ Petition No.141/1992, appellant No.1 did not dispute the correctness of the written statement filed in Special Civil Suit No.313/1978/A or the affidavit of Shri Avdhut Kamat and plan prepared by him after personally inspecting the site. The High Court relied on the averments contained in the written statement and held that the existence of public access to the beach/pathway leading to the beach through survey No.803 cannot be doubted.

25. Shri Anil Divan, learned senior counsel appearing for the appellants heavily relied on judgment dated 13.3.2006 passed by Civil Judge, Panaji in Special Civil Suit No.67/1986 - Alvaro De Souza Machado and another v. Sociedade De Fomento Industrial Pvt. Ltd. and another and argued that the finding recorded by the High Court on the issue of existence of public access to the beach through survey No.803 should be treated as redundant because the same is entirely based on admissions made in the written statement filed on behalf of appellant No.2 in Special Civil Suit No.313/1978/A and the competent court has found that the same are not binding on the appellants (who were defendants in Special Civil Suit No.67/1986). He pointed out that learned Civil Judge, Panaji has found that written statement was not verified by the concerned person on personal knowledge and, therefore, admissions made therein cannot be made basis for recording an adverse finding against the defendants in the suit. In the first blush, this argument of the learned senior counsel appears attractive but on a closure scrutiny, we do not find any merit in it. The learned Civil Judge who decided the suit filed by Alvaro De Souza Machado and another relied upon the judgments of this Court in Nagubai Ammal & others v. B. Shama Rao & others (supra) and of the Allahabad High Court in Anurag Misra vs. Ravindra Singh and another (supra) and held that the admissions made in the earlier suit in paragraphs 2A, 2C, 2E, 2F to 2S, etc. cannot be treated as binding on the defendants because contents of the written statement were verified by using the words "true to the best of my information which I believe as true" and not on personal knowledge. This approach of the learned Civil Judge was clearly contrary to Order VI Rule 15 of the Code of Civil Procedure, which provides for verification of pleadings. Sub-rule (1) of Rule 15 lays down that save as otherwise provided, by any law for the time being in force, every pleading shall be verified at the foot by the party or by one of parties pleading or by some other person proved to the satisfaction of the court to be acquainted with the facts of the case. Sub-rule (2) lays down that the person verifying shall satisfy, by reference to the numbered paragraphs of the pleadings, what he verifies of his own knowledge and what he verifies upon the information received and believed to be true. Sub-rule (3)

requires that the verification shall be signed by the person making it and shall state the date on which and the place at which it was signed. By amending Act No. 46/1999 the requirement of filing an affidavit by the person verifying the pleadings was incorporated but that provision does not have any bearing on this case.

26. The plain language of Order VI Rule 15(2) makes it clear that the pleadings can be verified by the concerned person on his own knowledge or upon the information received and believed to be true by him/her. The written statement filed on behalf of appellant No.2 in Special Civil Suit No.313/1978/A was verified by Smt. Anju Timblo who represented the appellants cause before various functionaries of the State Government and its instrumentalities and also filed reply affidavits in different writ petitions. Smt. Anju Timblo did not claim that she is acquainted with the topography/geography of the area which included survey Nos.792 and 803. Therefore, she could not have verified the written statement containing the admission regarding existence of passage/pathway to beach through survey No.803 on her own knowledge. Therefore, verification of the written statement containing admission about the existence of passage through Machado's Cove and survey No.803 on the basis of information which she believed to be true was in consonance with Order VI Rule 15(2) and the learned Civil Judge committed an error in holding that the admissions contained in the written statement of the earlier suit were not binding on the defendants. Another error committed by the learned Civil Judge was that he altogether overlooked the statement made by Smt. Anju Timblo, who appeared as a witness on behalf of the defendants in Special Civil Suit No.67/1986 and candidly accepted in the cross-examination that the written statement filed in Special Civil Suit No.313/1978/A contained admissions about existence of access to the beach through survey No.803. It is also significant to note that neither the writ petitioners nor the State of Goa were parties to the second suit and, therefore, they did not get opportunity to show that admissions contained in the written statement of appellant No.2 in Special Civil Suit No.313/1978/A were rightly relied upon by the High Court and the learned Civil Judge could not have taken a contrary view.

27. It was neither the pleaded case of the appellants before the High Court nor it was argued on their behalf that the admissions contained in the written statement filed in the previous suit about existence of access to the beach from Dona-Paola- Bambolim Road through survey Nos.792 (Machado's Cove) and 803 were made under a bonafide mistake and the affidavit of Shri Avdhut Kamat and the sketch prepared by him were contrary to the actual physical status of various survey numbers mentioned therein. Therefore, the High Court cannot be said to have erred in relying upon the admissions made in the written statement of appellant No.2 in Special Civil Suit No. 313/1978/A that there existed access to the beach through survey Nos.792 and 803 before its acquisition by the State Government.

28. The propositions of law laid down in Nagubai Ammal's case and Nusserwanji Rattanji Mistri's case on which reliance has been placed by Shri Divan do not have any bearing on the cases in hand. In Nagubai Ammal's case, this Court considered the legality of the sale made in execution of decree passed on a mortgage deed. The appellants, who were defendants in the suit for declaration of title to certain building sites, resisted the respondents' claim based on the purchase made in execution of mortgage decree. That suit was decreed in 1921 and the lands were purchased by the decree holder in 1928. The mortgager was adjudged an insolvent in 1926. Suit to enforce the mortgage deed was

brought in 1933 impleading the official receiver and the purchaser in execution of the maintenance and charge decree, but the appellants were not impleaded as parties. In execution of the decree passed in the second suit, the lands were sold to a third party. The respondents' father purchased the land in 1938 from the said third party. The learned District Judge held that the appellants' title acquired by the purchase of 1920 stood extinguished by the sale held in execution of the charge decree by operation of Section 52 of the Transfer of Property Act. Before the Supreme Court, the appellants relied on the admission made by Abdul Huq (predecessors of respondents), and the respondents themselves that the decree and sale in the suit instituted in 1920 were collusive. While rejecting the argument, this Court observed:

"An admission is not conclusive as to the truth of the matters stated therein. It is only a piece of evidence, the weight to be attached to which must depend on the circumstances under which it is made. It can be shown to be erroneous or untrue, so long as the person to whom it was made has not acted upon it to his detriment, when it might become conclusive by way of estoppel. In the present case, there is no question of estoppel, as the title of Dr. Nanjunda Rao arose under a purchase which was longer prior to the admissions made in 1932 and in the subsequent years. It is argued for the appellants that these admissions at the least shifted the burden on to the plaintiff of proving that the proceedings were not collusive, and that as he gave no evidence worth the name that these statements were made under a mistake or for a purpose and were, in fact, not true, full effect must be given to them. Reliance was placed on the well-known observations of Baron Park in Slatterie v. Pooley [[1840] 6 M. & W. 664, 669; 151 E.R. 579, 581], that "what a party himself admits to be true may reasonably be presumed to be so", and on the decision in Rani Chandra Kunwar v. Chaudhri Narpat Singh : Rani Chandra Kunwar v. Rajah Makund Singh [[1906- 07] L.R. 34 I.A. 27], where this statement of the law was adopted. No exception can be taken to this proposition. But before it can be invoked, it must be shown that there is a clear and unambiguous statement by the opponent, such as will be conclusive unless explained. It has been a already pointed out that the tenor of the statements made by Abdul Huq, his legal representatives and the plaintiff was to suggest that the proceedings in O. S. No. 100 of 1919-20 were fraudulent and not collusive in character. Those statements would not, in our opinion, be sufficient, without more, to sustain a finding that the proceedings were collusive."

In Anurag Misra's case (supra), the learned Single Judge of the Allahabad High Court held that vague allegations about the ownership of the premises made by the tenant in his written statement filed in a suit for eviction cannot be treated as admission about the contract of tenancy with the plaintiff/landlord and the tenant cannot be estopped from subsequently disputing the relationship of landlord and tenant by pleading that somebody else is the owner of the premises in question.

29. In neither of the afore-mentioned cases, this Court or Allahabad High Court considered whether unequivocal admission made by a party in a contemporaneous litigation can be ignored on the ground of so-called defect in verification. That apart, as we have already found, verification of the written statement filed on behalf of appellant No.2 in Special Civil Suit No. 313/1978/A was in conformity with Order VI Rule 15 of the Code of Civil Procedure and the High Court rightly relied upon the same for holding that existence of public access to the beach through survey No.803 (new No.246/2) cannot be doubted.

30. The appellants attempt to confuse the existence of access to the beach from point `A' to `B' in survey No.803 with the so-called access running along side nallah deserves to be discarded because no such case was projected before the High Court and no argument was advanced on that score. It is also worth mentioning that in his letter dated 1.12.1978 the Sarpanch of the Gram Panchayat had made a specific mention of public footpath which runs on survey No.787 and forms the boundary of survey No.803 and the parking area which was shown as situated on the Northeast corner of survey No.787 adjacent to survey No.803. There is no mention in any of the documents of the so-called access along side the nallah dividing survey No.803 (new No.246/2) on the one hand and survey Nos.804 and 805 on the other hand.

31. Once it is held that there existed public access to the beach through survey No.803 (new No.246/2) before its acquisition by the State Government in 1980, the appellants are duty bound to act in accordance with Clause 4(ix) of the agreement, which has the force of law by virtue of Section 42 of the 1894 Act. That clause casts a duty on appellant No.1 to maintain access to the beach without obstruction of any kind whatsoever. The argument of Shri Anil Divan and Shri Pallav Shishodia, learned senior counsel appearing for the appellants and the State of Goa respectively, that the Court may relieve the appellants of the obligation to maintain access to the beach through survey No.803 (new No.246/2) because an alternative access has been provided by constructing road, parking area and public footpath, in furtherance of the permission accorded by the Gram Panchayat for construction of hotel in survey No. 787, cannot be accepted for the simple reason that the agreement was executed between the President of India and appellant No.1 in the backdrop of acquisition of survey No.803 (new No.246/2) and 804 (new No.245/2) and survey No.787 on which the hotel was constructed has nothing to do with the acquisition proceedings. Therefore, the alternative road, parking and public footpath provided by appellant No.1 in lieu of the access available through survey No.787 cannot be made basis for depriving members of the public of their age old right to go to the beach through survey No.803 (new No. 246/2).

32. The matter deserves to be considered from another angle. The public trust doctrine which has been invoked by Ms. Indira Jaising in support of her argument that the beach in question is a public beach and the appellants cannot privatize the same by blocking/obstructing traditional access available through survey No.803 (new No.246/2) is implicitly engrafted by the State Government in Clause 4(ix) of the agreement. That doctrine primarily rests on the principle that certain resources like air, sea, waters and the forests have such a great importance to the people as a whole that it would be wholly unjustified to make them a subject of private ownership. These resources are gift of nature, therefore, they should be freely available to everyone irrespective of one's status in life. The public trust doctrine enjoins upon the Government to protect the resources for the enjoyment of the general public rather than to permit their use for private ownership or commercial purposes. This doctrine puts an implicit embargo on the right of the State to transfer public properties to private party if such transfer affects public interest, mandates affirmative State action for effective management of natural resources and empowers the citizens to question ineffective management thereof. The heart of the public trust doctrine is that it imposes limits and obligations upon government agencies and their administrators on behalf of all the people and especially future generations. For example, renewable and non-renewable resources, associated uses, ecological values or objects in which the public has a special interest (i.e. public lands, waters, etc.) are held

subject to the duty of the State not to impair such resources, uses or values, even if private interests are involved. The same obligations apply to managers of forests, monuments, parks, the public domain and other public assets. Professor Joseph L. Sax in his classic article "The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention" (1970), indicates that the Public Trust Doctrine, of all concepts known to law, constitutes the best practical and philosophical premise and legal tool for protecting public rights and for protecting and managing resources, ecological values or objects held in trust. The Public Trust Doctrine is a tool for exerting long-established public rights over short-term public rights and private gain. Today, every person exercising his or her right to use the air, water, or land and associated natural ecosystems has the obligation to secure for the rest of us the right to live or otherwise use that same resource or property for the long term and enjoyment by future generations. To say it another way, a landowner or lessee and a water right holder has an obligation to use such resources in a manner as not to impair or diminish the people's rights and the people's long term interest in that property or resource, including down-slope lands, waters and resources.

33. In Illinois Central Railraod Co. vs. People of the State of Illinois [146 US 387], the United States Supreme Court considered whether the State could abdicate its general control over the sub-merged land. In the year 1869, the Illonois legislature made a substantial grant of sub-merged land - a mile strip along the shores of Lake Michigan extending one mile out from the shoreline - to the Illinois Central Railroad. This was repealed in 1869. The State of Illinois sued to quit title. The Supreme Court while accepting the stand of the State of Illinois held that the title of the State in the land in dispute was a title different in character from that which the State held in lands intended for sale. It was different from the title which the United States held in public lands which were open to pre-emption and sale. It was a title held in trust

-- for the people of the State that they may enjoy the navigation of the water, carry on commerce over them and have liberty of fishing therein free from obstruction or interference of private parties. The abdication of the general control of the State over lands in dispute was not consistent with the exercise of the trust which required the Government of the State to preserve such waters for the use of the public.

34. In Robbins vs. Deptt. of Public Works [244 NE 2d 577], the Supreme Judicial Court of Massachusetts restrained the Public Works Department from acquiring Fowl Meadows, "wetlands of considerable natural beauty ... often used for nature study and recreation" for highway use.

35. In National Audubon Society vs. Superior Court of Alpine County [33 Cal 3d 419], the Supreme Court of California considered whether a permit can be granted to the Department of Water and Power of the City of Los Angeles to appropriate water of four of the five streams flowing into Mono Lake, which is the second largest lake in California. Some environmentalists, using the public trust doctrine, brought law suit against Los Angeles Water Diversions. The Supreme Court of California explained the concept of public trust doctrine in the following words:

" `By the law of nature these things are common to mankind -- the air, running water, the sea and consequently the shores of the sea.' (Institutes of Justinian 2.1.1) From this origin in Roman law, the

English common law evolved the concept of the public trust, under which the sovereign owns `all of its navigable waterways and the lands lying beneath them as trustee of a public trust for the benefit of the people.' "

While dealing with the State's power as a trustee of public property, the Court observed:-

"Thus, the public trust is more than an affirmation of State power to use public property for public purposes. It is an affirmation of the duty of the State to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust...."

The Court recorded its conclusion in the following words:-

"The State has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible. Just as the history of this State shows that appropriation may be necessary for efficient use of water despite unavoidable harm to public trust values, it demonstrates that an appropriative water rights system administered without consideration of the public trust may cause unnecessary and unjustified harm to trust interests. (See Johnson, 14 U.C. Davis L. Rev. 233, 256-57/; Robie, Some Reflections on Environmental Considerations in Water Rights Administration, 2 Ecology L.Q. 695, 710-711 (1972); Comment, 33 Hastings L.J. 653, 654.) As a matter of practical necessity the State may have to approve appropriations despite foreseeable harm to public trust uses. In so doing, however, the State must bear in mind its duty as trustee to consider the effect of the taking on the public trust (see United Plainsmen v. N.D. State Water Cons. Comm'n [247 NW 2d 457 (ND 1976)] at pp.462-463, and to preserve, so far as consistent with the public interest, the uses protected by the trust."

36. The Indian society has, since time immemorial, been conscious of the necessity of protecting environment and ecology. The main moto of social life has been "to live in harmony with nature". Sages and Saints of India lived in forests. Their preachings contained in Vedas, Upanishadas, Smritis etc. are ample evidence of the society's respect for plants, trees, earth, sky, air, water and every form of life. It was regarded as a sacred duty of every one to protect them. In those days, people worshipped trees, rivers and sea which were treated as belonging to all living creatures. The children were educated by their parents and grandparents about the necessity of keeping the environment clean and protecting earth, rivers, sea, forests, trees, flora fauna and every species of life.

The Constitution of India, which was enforced on 26th January, 1950 did not contain any provision obligating the State to protect environment and ecology, but the people continued to treat it as their social duty to respect the nature, natural resources and protect environment and ecology. After almost three decades of independence, the legislature recognized the importance of protecting and improving environment and safeguarding forests and wild life and Article 48A was inserted in Part IV of the Constitution by the Constitution (Forty-second Amendment) Act, 1976 whereby a duty was imposed on the State to endeavour to protect and improve the environment and safeguard forests and wild life of the country. By the same amendment Article 51A was inserted in the form of Part

IVA which enumerates fundamental duties of every citizen. Article 51A(g) declares that it shall be the duty of every citizen of India to protect and improve the natural environment including forests, lakes, rivers and wild life and to have compassion for living creatures. Thereafter, the Courts repeatedly invoked Articles 48A and 51A for protecting environment and ecology and several orders were passed in public interest litigation mandating the State to take action for protecting forests, rivers and anti pollution measures. The importance of the public trust doctrine was also recognized by this Court and the same was applied for protecting natural resources which have been treated as public properties and are held by the government as trustee of the people. In M.C. Mehta v. Kamal Nath and others [(1997) 1 SCC 388], this Court considered whether a private company running tourists resort in Kullu-Manali valley could block the flow of Beas river and create a new channel to divert the river to at least 1 kilometer down stream. After adverting to the theoretical and philosophical basis of the public trust doctrine and some judgments on the subject, this Court observed:

"We are fully aware that the issues presented in this case illustrate the classic struggle between those members of the public who would preserve our rivers, forests, parks and open lands in their pristine purity and those charged with administrative responsibilities who, under the pressures of the changing needs of an increasingly complex society, find it necessary to encroach to some extent upon open lands heretofore considered inviolate to change. The resolution of this conflict in any given case is for the legislature and not the courts. If there is a law made by Parliament or the State Legislatures the courts can serve as an instrument of determining legislative intent in the exercise of its powers of judicial review under the Constitution. But in the absence of any legislation, the executive acting under the doctrine of public trust cannot abdicate the natural resources and convert them into private ownership, or for commercial use. The aesthetic use and the pristine glory of the natural resources, the environment and the ecosystems of our country cannot be permitted to be eroded for private, commercial or any other use unless the courts find it necessary, in good faith, for the public good and in public interest to encroach upon the said resources.

37. In M.I. Builders Pvt. Ltd. v. Radhey Shyam Sahu and others [(1999) 6 SCC 464], the Court applied public trust doctrine for upholding the order of Allahabad High Court which quashed the decision of Lucknow Nagar Mahapalika permitting appellant - M.I. Builders Pvt. Ltd. to construct an underground shopping complex in Jhandewala Park, Aminabad Market, Lucknow, and directed demolition of the construction made on the park land. The High Court noted that Lucknow Nagar Mahapalika had entered into an agreement with the appellant for construction of shopping complex and given it full freedom to lease out the shops and also to sign agreement on its behalf and held that this was impermissible. On appeal by the builders, this Court held that the terms of agreement were unreasonable, unfair and atrocious. The Court then invoked the public trust doctrine and held that being a trustee of the park on behalf of the public, the Nagar Mahapalika could not have transferred the same to the private builder and thereby deprived the residents of the area of the quality of life to which they were entitled under the Constitution and Municipal Laws.

38. In Intellectuals Forum, Tirupathi vs. State of A.P. and others [(2006) 3 SCC 549], this Court again invoked the public trust doctrine in a matter involving the challenge to the systematic destruction of percolation, irrigation and drinking water tanks in Tirupati town, referred to some

judicial precedents including M.C. Mehta vs. Kamal Nath (supra), M.I. Builders Pvt. Ltd. (supra), National Audubon Society (supra), and observed:

"This is an articulation of the doctrine from the angle of the affirmative duties of the State with regard to public trust. Formulated from a negatory angle, the doctrine does not exactly prohibit the alienation of the property held as a public trust. However, when the State holds a resource that is freely available for the use of the public, it provides for a high degree of judicial scrutiny on any action of the Government, no matter how consistent with the existing legislations, that attempts to restrict such free use. To properly scrutinise such actions of the Government, the courts must make a distinction between the Government's general obligation to act for the public benefit, and the special, more demanding obligation which it may have as a trustee of certain public resources [Joseph L. Sax "The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention", Michigan Law Review, Vol. 68, No. 3 (Jan. 1970) pp.471-566]. According to Prof. Sax, whose article on this subject is considered to be an authority, three types of restrictions on governmental authority are often thought to be imposed by the public trust doctrine [ibid]:

1. the property subject to the trust must not only be used for a public purpose, but it must be held available for use by the general public;

2. the property may not be sold, even for fair cash equivalent;

3. the property must be maintained for particular types of use (i) either traditional uses, or (ii) some uses particular to that form of resources."

39. The Court then held that the government orders are violative of principle Nos.1 to 3, mentioned in the article of Professor Joseph L. Sax and directed that no further construction be made in Peruru and Avilala tanks and corrective measures be taken for recharging them.

40. We reiterate that natural resources including forests, water bodies, rivers, sea shores, etc. are held by the State as a trustee on behalf of the people and especially the future generations. These constitute common properties and people are entitled to uninterrupted use thereof. The State cannot transfer public trust properties to a private party, if such a transfer interferes with the right of the public and the Court can invoke the public trust doctrine and take affirmative action for protecting the right of people to have access to light, air and water and also for protecting rivers, sea, tanks, trees, forests and associated natural eco-systems.

41. As a sequel to the above discussion, we hold that Clause 4(ix) of the agreement is binding on the appellants and appellant No.1 is under a statutory obligation to maintain access/road to the beach through survey No.803 (new No.246/2) without any obstruction of any kind and the High Court did not commit any error by issuing a mandamus in that regard.

Re:3

42. Section 16 of the 1894 Act which constitute the foundation of the arguments of the appellants and State that the public access to the beach, if any available, through survey No.803 (new No.246/2) stood extinguished with the vesting of land in the State Government, reads as under:-

"16. Power to take possession. - When the Collector has made an award under Section 11, he may take possession of the land, which shall thereupon vest absolutely in the Government, free from all encumbrances."

43. The argument of Shri Anil Divan, learned senior counsel appearing for the appellants is that even though access to the beach may have been available through survey No.803 before its acquisition and the general public may have been using the same as of right for going to the beach, the said right got terminated as soon as possession of the land was taken by the government. His further argument is that public access to the beach through survey No.803 was in the nature of encumbrance on the land which stood extinguished on vesting of the land in the Government in terms of Section 16 of the 1894 Act. Shri Pallav Shishodia, learned senior counsel appearing for the State adopted this argument and emphatically submitted that access to the beach available to the public through survey No.803 (new No.246/2) before its acquisition was obliterated once the acquired land vested in the Government.

44. Although, no exception can be taken to the appellants coming forward with such an argument despite the fact that in terms of Clause 4(ix) of the agreement which has, by virtue of Section 42 of the 1894 Act, the force of law, they are required to maintain public access to the beach, we are quite surprised with the stance adopted by the State Government. Admittedly, the agreement was executed by appellant No.1 under Section 41 of the 1894 Act in the backdrop of acquisition of survey No.803 (new No.246/2) and survey No.804 (new No.245/2). It is also not in dispute that in terms of Clause 4(ix), appellant No.1 is required to maintain access to the beach without any obstruction. This shows that despite Section 16 of the 1894 Act, the parties had consciously decided to protect the traditional right of the members of public to go to the beach by using the existing pathway through the acquired land. Both, the appellants and State functionaries knew that there exist public access to the beach through survey No.803 (new No.246/2), that members of public were using the same since time immemorial and that it was necessary to protect that right. Therefore, it is not possible to find any fault with the view taken by the High Court that access to the beach is not an encumbrance and in any case, the traditional pathway available to the public for going to the beach through survey No.803 (new No.246/2) cannot be treated as having been extinguished in the face of specific provision contained in the agreement which is statutory in character.

45. In Collector of Bombay vs. Nusserwanji Rattanji Mistri [AIR 1955 SC 298], a bench of three Judges considered whether right of the State to levy assessment on the land can be treated to have been extinguished in view of Section 16 of the 1894 Act. The Court answered the question in negative and observed:- "Under Section 16, when the Collector makes an award `he may take possession of the land which shall thereupon vest absolutely in the Government free from all encumbrances'. The word `encumbrances' in this section can only mean interests in respect of which a compensation was made under Section 11, or could have been claimed. It cannot include the right of the government to levy assessment on the land".

46. In State of H.P. vs. Tarsem Singh [(2001) 8 SCC 104], a two-Judge bench interpreted Section 3 of H.P. Village Common Lands Vesting and Utilization Act, 1973 and held that the common right of grazing available to the people of the area stood extinguished with the vesting of land in the State. The respondents who were residents of the village brought a suit in representative capacity for declaration that the land in dispute is being used for grazing cattle, cutting fuel wood and for other common purposes and the defendant cannot interfere with their easementary right to enjoy the land. The trial Court decreed the suit. The appeal preferred by the state was substantially dismissed by the first appellate Court. The High Court dismissed the second appeal and held that easementary right of grazing cannot be treated to have vested in the State under Section 3. This Court reversed the judgment of the High Court and dismissed the suit. After noticing the non obstante clause used in Section 3(1) of the Act, the Court held that all interests, title and rights in the land vested in the Gram Panchayat stood extinguished and came to be vested in the State free from all encumbrances including the easementary right. In the course of the judgment, two-Judges bench referred to the judgments of Allahabad and Calcutta High Courts wherein it was held that the word `encumbrance' means burden or charge upon property for a claim or lien upon State or land and it would include easementary right over the land.

47. The last mentioned judgment was considered by another bench of two- Judges in H.P. State Electricity Board and others vs. Shiv K. Sharma and others [(2005) 2 SCC 164]. The facts of that case were that appellant-board purchased 10.10. bighas out of the holding of one Rikhi Ram. The sale deed specifically mentioned that respondent Nos.1 to 3 shall have access to their land from the land of the seller. Thereafter, the State Government acquired an area of 41.06 bighas of land for construction of 60 KW Sub-Station. The acquired land included the remaining land of Rikhi Ram from whom respondent Nos.1 to 3 had purchased the land. After acquisition, the entire property was fenced of by barbed wire and electric sub-station and living quarters of the employees of appellant were also constructed thereupon. In the process, the appellant blocked off the passage being used as access to the land of the respondents. Respondent Nos.1 to 3 unsuccessfully sued the appellant-board for mandatory injunction to remove the barbed wire fence blocking access to their land. On appeal, the learned District Judge reversed the judgment of the trial Court and decreed the suit. The High Court confirmed the appellate judgment. Before this Court, reliance was placed on the judgment in Tarsem Singh's case and it was argued that even if respondent Nos.1 to 3 had a right of way by easement over the land of Rikhi Ram, the said land having been acquired stood vested in the State Government under Section 16 absolutely free from all encumbrances including such easementary right. The High Court drew a distinction between easement of an ordinary nature in respect of which compensation could have been claimed in the land acquisition proceedings and an easement of necessity like a right of passage and held that such right was not extinguished by reason of acquisition. For this purpose, the High Court relied on the observations made in Nusserwanji Rattanji Mistri's case. While confirming the High Court's verdict, the two-Judges bench observed: "This judgment of Collector of Bombay was a judgment by a Bench of three learned Judges of this Court. Learned counsel for the appellants drew our attention to the judgment in State of H.P. rendered by a Bench of two learned Judges and contended that this judgment clearly holds that the phrase "free from all encumbrances" used in Section 16 of the Act is wholly unqualified and would include in its compass every right including an easementary right which affects the land. He particularly drew our attention to para 10 of the judgment where the Court took the view: "All rights,

title and interests including the easementary rights stood extinguished and all such rights, title and interests vested in the State free from all encumbrances." In the first place, it is difficult for us to read the judgment in Tarsem Singh case as taking a view contrary to and differing from the law laid down by a larger Bench in Collector of Bombay. Secondly, we notice that the decision in Tarsem Singh is not in respect of an easementary right arising out of necessity. There does not seem to be any discussion on the said aspect of the matter in this judgment. The view taken in Collector of Bombay therefore, appears to hold the field, particularly where the nature of easementary right claimed is not capable of being evaluated in terms of compensation and arises out of sheer necessity."

48. By applying the ratio of the judgments in Nusserwanji Rattanji Mistri's case and H.P. State Electricity Board's case to the facts of this case, we hold that when the State volunteered to take possession of the land subject to the right of the members of public to access the beach through the acquired land and a specific provision to that effect was incorporated in the agreement executed under Section 41 (5), Section 16 of the 1894 Act cannot be invoked for nullifying the right of the public to access the beach through survey No.803 (new No.246/2).

49. We also do not find any substance in the argument of Shri Anil Divan that Court should not insist on continuance of public access to the beach through survey No.803 (new No.246/2) because the pathway going to Dona Paula-Bambolim Road which was available through survey No.792 (new No.242/1) (Machado's Cove) does not exist any more. The premise on which Shri Divan has made this argument, namely, non-availability of pathway through survey No.792 does not find support from the record of these appeals. Therefore, it is neither proper nor justified for this Court to deny the people of their traditional right of access to the beach through survey No.803 (new No.246/2) which goes to Dona-Paola-Bambolim Road by using the roads provided in survey No.792 (new No.242/1) (Machado's Cove). Re: 4

50. For deciding this question, we shall have to again advert to the factual matrix of the case. Appellant No.2 purchased survey Nos.787 and 805 from Dr. Alvaro Remiojo Binto and leased out the same to appellant No.1. The latter obtained permission from the Gram Panchayat for constructing hotel building in survey No.787. The construction commenced in 1978 and was completed in May 1983. Alongside construction of the hotel building, appellant No.1 approached the State Government for acquisition of land in various survey numbers including survey Nos.803 and 804 (new Nos.246/2 and 245/2). In paragraph 3 of the application addressed to Shri Shankar Laad, Minister of Revenue, Government of Goa, appellant No.1 gave out that in the first phase of the project hotel building was proposed to be constructed in survey No. 787 and in the second phase, yoga centre, health club and water sports facilities were proposed to be put up in survey No.805 for promoting tourism. In paragraph 5, appellant No.1 offered justification for acquisition of survey Nos.788 and 789 which abut the beach. In paragraph 6, appellant No.1 pointed out that for second phase of the hotel complex, it would be desirable to acquire survey Nos.803 and 804 which will make the entire area one composite unit. It is thus evident that at the time of making application to the State Government for acquisition of land, appellant No.1 did not have any proposal for construction and/or extension of hotel building in survey No.803. The State Government initiated acquisition proceedings by issuing notification dated 29.10.1980 under Section 4(1) of 1894 Act,

which were finalized in 1983. After Government took possession of the acquired land, appellant No.1 entered into an agreement as per the requirement of Section 41. Clauses 3, 4 (ii), (iv), (v) and (vii) of the agreement enumerate affirmative actions required to be taken by appellant No.1 for achieving the object of acquisition, whereas Clause 4(i), (vi), (viii) and (ix) contain various negative covenants including the one against the use of land for any purpose other than for which it was acquired. A conjoint reading of these clauses unmistakably shows that appellant No.1 was to use the acquired land only in furtherance of and for the purpose for which it was acquired, namely, creation of sports and other recreational facilities/amenities and to maintain the same in good order and condition and was not to use the land for any other purpose. The first part of Clause 4(viii) contains an express embargo against construction of any building or structure on the acquired land by appellant No.1. The second part of that clause envisages that prior approval of EDC of the Government of Goa will be obtained before undertaking activities for its development, besides other statutory requirements under the existing laws. The management of appellant No.1 was very much aware of the embargo contained in first part of Clause 4(viii) against construction of any building or structure on the acquired land and this is the reason why in the application made by Smt. Anju Timblo to the Development Authority under Section 44(1) read with Section 49 of Town and Country Planning Act for grant of permission for extension of the existing hotel building, survey No.246/2 was not mentioned. The EEC and EDC considered that application and approved extension of the existing hotel building on land in survey Nos.246/1, 246/3 and 246/4 (old Nos.787, 788 and 789) subject, of course, to the condition of maintaining pedestrian path. The order issued by the Development Authority on 15.4.1988 was also for extension of the existing hotel building on land bearing survey No.246/1, 3 and 4. Neither in the minutes of EEC or EDC nor in the order issued by the Development Authority under Section 44(3)(c) read with Section 49(2) of the Town and Country Planning Act, there was any mention of survey No.246/2. This shows that till that stage, appellant No.1 had consciously refrained from putting up even a proposal for constructing any building or structure on the acquired land. For the first time a request to that effect was made in the garb of making an application for renewal of permission granted by order dated 15.4.1988 with a deviation. A mention of four sub-divisions of survey No. 246 (1, 2, 3 and 4) was made instead of three sub-divisions, i.e., 1, 3 and 4. With a view to avoid scrutiny by the EEC and EDC, the appellants managed consideration of the application for extension and deviation of hotel building by the Board constituted under Section 4 of the Town and Country Planning Act. The Board considered and approved extension/deviation albeit in violation of the negative covenant contained in first part of Clause 4(viii) of the statutory agreement. While doing that, the Board was fully cognizant of the fact that in view of Clause 4 (viii), appellant No.1 cannot use the land for constructing any structure and also that even for undertaking any activity relating to development, approval of the EDC will be necessary. That is why the State Government forwarded the decision of the Board to the Development Authority for its consideration. Unfortunately, the Development Authority without even bringing the matter to the notice of the EDC, passed order dated 20.4.1992 and permitted appellant No.1 to carry out construction on plot bearing survey No.246/2. In our considered view, neither the State Government nor the Board could allow extension of the hotel building on the acquired land in violation of first part of Clause 4(viii) of agreement dated 26.10.1983 which, at the cost of repetition, we would like to emphasise, has the force of law by virtue of Section 42 of the 1894 Act. Section 8 of the Town and Country Planning Act, which enumerates functions and powers of the Board reads as under:

"8. Functions and powers of Board.--(1) Subject to the provisions of this Act and the rules made thereunder, the functions of the Board shall be to guide, direct and assist the Planning and Development Authorities, to advise the Government in matters relating to the planning, development and use of rural and urban land in the Union Territory, and to perform such other functions as the Government may, from time to time, assign to the Board.

(2) In particular, and without prejudice to the generality of the foregoing provisions, the Board may, and shall if required by the Government so to do--

(a) direct the preparation of development plans by the Planning and Development Authorities;

(b) undertake, assist and encourage the collection, maintenance and publication of statistics, bulletins and monographs on planning and its methodology; (c) co-ordinate and advise on the planning and implementation of physical development programmes within the Union Territory;

(d) prepare and furnish reports relating to the working of this Act; and

(e) perform such other functions as are incidental, supplemental or consequential to any of the functions aforesaid or which may be prescribed. (3) The Board may exercise all such powers as may be necessary or expedient for the purpose of carrying out its functions under this Act."

51. A reading of the above reproduced section makes it clear that the Board is required to guide, direct and assist the Planning and Development Authorities; to advise the Government in matters relating to the planning, development and use of rural and urban land in the Union Territory, and to perform other functions assigned to it by the Government. In terms of Section 8(2), the Board can direct the preparation of development plans by the Planning and Development Authorities; undertake, assist and encourage the collection, maintenance and publication of statistics, bulletins and monographs on planning and its methodology; co-ordinate and advise on the planning and implementation of physical development programmes and perform such other functions which are incidental to the enumerated functions. The role of the State Government primarily relates to approval of regional plan (S.44), revision of regional plan (S.17), declaration of planning areas, their amalgamation, sub-divisions, etc. (S.18), power to withdraw planning area from operation of the Act (S.19) and constitution of Planning and Development Authorities for the planning area (S.20). Section 22, which enumerates functions and powers of Planning and Development Authority reads as under:

"22. Functions and powers of Planning and Development Authorities.--Subject to the provisions of this Act and the rules framed thereunder and subject to any directions which the Government may give, the functions of every Planning and Development Authority shall be -

(a) to prepare an existing Land Use Map;

(b) to prepare an Outline Development Plan;

(c) to prepare a Comprehensive Development plan;

(d) to prepare and prescribe uses of land within its area; and

(e) to prepare schemes of development and undertake their implementation, and for these purposes, it may carry out or cause to be carried out, surveys of the planning area and prepare report or reports of such surveys, and to perform such other functions as may be prescribed."

52. Chapter VII of the Town and Country Planning Act contains provisions relating to control of development and use of land. Section 44 lays down that any person intending to carry out any development in respect of, or change of use of, any land shall make an application in writing to the Planning and Development Authority for permission in such form containing such particulars and accompanied by such documents and plans as may be prescribed. Section 44(2)(b) and (c) deal with the situation in which the Development Authority objects to the proposal for development, in which case the matter has to be placed before the Government for its decision. Section 44(3) lays down that the Development Authority can grant permission, conditionally or unconditionally for carrying out any development or change of use of the land. While doing so, the Development Authority is required to take note of the provisions of the development plan, if any, in force, relevant bye- laws, regulations, etc.

53. None of the above noted provisions of the Town and Country Planning Act empowers the Board and/or the Development Authority to modify, amend, alter or change an agreement entered into as per the requirement of Section 41 of the 1894 Act or allow violation thereof by the company. Therefore, the decision taken by the Board in its meeting held on 20th June, 1991 and order dated 20th April, 1992 issued by the Development Authority were non est and the High Court rightly did not give any credence to those decisions while adjudicating the issue relating to legality of construction made on survey No.803 (new No.246/2).

54. We are also of the opinion that even the EDC which was empowered under second part of Clause 4(viii) of the agreement to grant approval to the activities relating to development could not have permitted construction/extension of the hotel building on a portion of survey No.803 (new No.246/2). Any such decision by the EDC would also have been declared nullity on the ground of violation of the mandate of first part of Clause 4(viii) of the statutory agreement.

55. The argument of Shri Divan that extension of the hotel building on 1000 sq. mts. of survey No.803 (new No.246/2) falls within the definition of "development" contained in Section 2(10) of the Town and Country Planning Act which comprehends carrying out of building activities and, therefore, the High Court should not have ordered demolition of the extended portion of the hotel, but we are unable to agree with him and reiterate that neither the Board nor the Development Authority could sanction violation of agreement dated 26.10.1983.

56. For the reasons stated above, we hold that the High Court did not commit any error by declaring that extension of the hotel building on 1000 sq. mts. of survey No.803 (new No.246/2) is illegal and directed its demolition after following the procedure prescribed under Clause 6 of agreement dated

26.10.1983. Re: 5.

57. This question deserves to be answered in favour of the appellants. A reading of application dated 15.11.1978 made by appellant No.1 makes it clear that it had no intention of making available the facilities of yoga centre, health club and amenities like water sports to the general public. Rather in paragraph 6 of its application, appellant No.1 made it clear that the facilities provided by the hotel will be open for use by non-residents also on membership basis. Agreement dated 26.10.1983 is totally silent on the issue of making the facilities created by the appellants open for public use without permission and payment of fees. Therefore, it is not possible to agree with Ms. Jaising that the facilities and amenities created by the appellant should be made available to the general public free of costs.

58. In the result, the appeals are dismissed. Since execution of most of the directions given by the High Court remained stayed during the pendency of these appeals, we deem it proper to issue the following directions:-

(i) The appellants are allowed three months' time to demolish the extended portion of the hotel building which was constructed on 1000 sq. mts. of survey No.803 (new No.246/2) and, thereafter report the matter to the Development Authority which shall, in turn, submit a report to that effect to Goa Bench of the Bombay High Court.

(ii) If the appellants fail to demolish the building and report the matter to the Development Authority within the time specified in direction No.(i) above, the concerned authority shall take action in accordance with paragraphs

(a) and (b) of the operative part of the High Court's order.

(iii) The access shown in plan Exhibit-A attached to Writ Petition No.141/1992 shall be kept open without any obstruction of any kind from point `A' to `B' in order to come from Machado's Cove and then go to the beach beyond point `B'. If during pendency of the litigation, appellant No.1 has put up any obstruction or made construction to block or hinder access to the beach through survey No.803 (new No.246/2), then the same shall be removed within one month from today.

.....J.

[B.N. AGRAWAL] .....J.

[G.S. SINGHVI] New Delhi, January 20, 2009.

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 6074 OF 2000

Goa Foundation and another ... Appellants

Versus

Fomento Resorts and Hotels Ltd. and others ... Respondents

JUDGMENT

SINGHVI, J.

1. This is an appeal for setting aside order dated 25.4.2000 passed by Goa Bench of the High Court of Bombay in Writ Petition Nos. 284 of 1991 and 37 of 1992 whereby the appellants' prayer for issue of a direction to the respondents for restoration of public access to the Vainguinim beach and the car parking area through survey No. 787 (new no. 246/1) and for demolition of the construction made in the open area of the property bearing survey No. 789 (new No. 246/4) was rejected, but directions were given for ensuring that the alternative access to the beach is kept open for public and the same is extended up to the beach along the retaining wall so that it may directly lead to the beach and not to the rocks or some other place. BACKGROUND FACTS:

(i) Dr. Alvaro Remiojo Binto owned several parcels of land in Village Taleigao, District Tiswadi, Goa. He sold plots bearing survey Nos.803 and 804 (new Nos.246/2 and 245/2) to Gustavo Renato da Cruz Pinto and plots bearing survey Nos.787 and 805 (new Nos.246/1 and 245/1) to M/s. Sociedade e Fomento Industries Pvt. Ltd. (respondent No.2 herein).

(ii) After purchasing the land, respondent No.2 leased out the same to respondent No.1. The latter submitted an application to Gram Panchayat Taleigao (for short `the Gram Panchayat') for grant of permission to construct hotel complex near Vainguinim beach. On a reference made by the Gram Panchayat, Chief Town Planner, Government of Goa, Daman and Diu vide his letter dated 1.8.1978 informed that the plans submitted by respondent No.1 are in conformity with the regulations in force in the area but observed that right of the public to access the beach must be maintained by providing necessary footpath. Paragraph 2 of that letter reads as under:-

"The road leading to the hotel complex is at present used by general public to approach the Vainguinim Beach which is popular picnic spot for the people of Panaji, as well as other parts of Goa. It will need to be ensured that the right of access to the beach is maintained by the applicant by providing the necessary footpath to the beach at an appropriate place. The parking facilities provided will also have to take care of the parking of vehicles of such members of the public in an appropriate manner. This will ensure that the beach remains open to public as it is at present and that the public is not deprived of this beautiful and frequently used beach."

[emphasis added]

(iii) Thereafter, the Gram Panchayat issued letter dated 22.8.1978, whereby respondent No.1 was permitted to lay access road linking Dona-Paola-Bambolim Road to the construction site and construct the hotel subject to the conditions specified in the letter including the one relating to public access to the beach. This was reiterated by the Sarpanch of the Gram Panchayat in his letter dated 1.12.1978, which reads as under:

"VILLAGE PANCHAYAT OF TALEIGAO Your ref. No. Our Ref. no.VT/TLG/329/78 Dated:1.12.1978 To M/s. Gomantak land Development Pvt. Ltd., Velho Building, Panaji - Goa.

Dear Sir, I have inspected the site for the proposed hotel building and I am satisfied that the licence holder bearing licence No.195/78 dated 22.9.1978 has complied with the condition imposed by the letter dated 1st August, 1978 from the department of Town Planning to the Panchayat by constructing a road as required. The said road runs up to the parking area on the spot No.787, from west to east. The parking area is situated on the north east corner of survey No.787 adjacent to Survey no.803. The public footpath runs on survey No.787 and forms the boundary to survey No.803.

The interest of the public as per the condition in the letter of the Department of Town Planning of 1.8.1978 are satisfied. The road parking area and the public footpath will be open to public use and will not be altered without our permission.

Thanking you, Yours faithfully,

-sd-

(Somnath D. Zraukar) Sarpanch Village Panchayat of Taleigao Tiswadi - Goa.

Copy: Department of Town Planning.

Sd/- Sd/-
(A.A. Noronha) (Somnath D. Zuarker)
Secretary Sarpanch"

(iv) In furtherance of the permission granted by the Gram Panchayat,

respondent No.1 commenced construction of the hotel, which is now known as Hotel Cidade de Goa on the land forming part of survey No.787 (new No.246/1) and completed the same by May, 1983.

(v) During construction of the hotel building, respondent No.1 made an application dated 29.9.1979 to the Sarpanch of the Gram Panchayat, for permission to change the location of the footpath and parking area by stating that in view of installation of 10,000 kg gas tank (poisonous gas at high pressure), high pressure water tank and high voltage electric transformer near the hotel building, it

will not be in public interest to locate the footpath and parking area at the sanctioned site.

(vi) The Sarpanch of the Gram Panchayat neither forwarded the application of respondent No.1 to the Town and Planning Department nor placed the same before the Gram Panchayat. Instead, he wrote letter dated 29.9.1979 to respondent No.1 giving an impression that the Gram Panchayat does not have any objection to the change of location of the footpath and parking area. Thereafter, respondent No.1 shifted access to the beach to the new site.

(vii) In the meanwhile, Shri Gustavo Renato Da Cruz Pinto, Smt. Surana Pepfira Pinto and Miss Befta Sara Da Costa Pinto filed Special Civil Suit No.313/1978/A in the Court of Civil Judge, Senior Division, at Panaji against respondent No.2, Dr. Alvaro Remiojo Binto and four others for a decree of possession by pre-emption in respect of the land comprised in survey Nos.787 and 805 and also to restrain the defendants, their agents, servants, etc. from changing, alienating or raising any construction on the suit land by alleging that they were owners of property bearing survey Nos.803, 804, 806, 807, 788 and 789 situated at Taleigao and since time immemorial they and their predecessors were using footpath passing through survey Nos.787, 805 and 769 for going to Panaji-Dona Paula- Bambolim road, which was sought to be obstructed. Defendant No.1 in the suit (appellant No.2 herein) filed written statement to contest the suit. After some time, the parties compromised the matter in terms of which the plaintiffs gave up their claim for pre-emption in respect of plot bearing survey Nos.787 and 805 and defendant No.1 agreed to exchange the plot bearing survey No.790 with plots bearing survey Nos.788 and 789 belonging to the plaintiffs and also that it will have no right of access through any of the properties of the plaintiffs. As a sequel to this, the plaintiffs applied for withdrawal of the suit. By an order dated 20.12.1978, the Civil Judge permitted them to do so.

(viii) Soon after withdrawal of the pre-emption suit, Respondent No. 1 represented to Shri Shankar Laad, Minister of Revenue, Government of Goa for acquisition of land comprised in survey Nos. 788, 789, 803, 804, 806 and 807 of village Taleigao, Dona-Paola for construction of Beach Resort-Hotel complex. The State Government partially accepted the request of respondent No. 1 and issued notification dated 29.10.1980 under Section 4 (1) of Land Acquisition Act, 1894 for acquiring survey Nos. 803 and 804. After holding an enquiry under Section 5A of the Act, the State Government issued declaration under Section 6, which was published in Gazette dated 27.10.1983.

(ix) Gustavo Renato da Cruz Pinto and some others filed Writ Petition No. 8/1984 for quashing the aforementioned notifications on various grounds including the one that before acquiring the land, government did not make enquiry as per the requirement of Rule 4 of the Land Acquisition (Companies) Rules, 1963 (for short `the Rules'). The writ petitioners also highlighted discrepancies in different notifications issued by the State Government. Respondent No. 2 in the writ petition (respondent No. 1 herein) filed reply affidavit stating therein that Rule 4 of the Rules is not mandatory and non compliance thereof did not affect legality of the acquisition. In paragraphs 67 and 76 of the reply affidavit, it was averred that part of the project, i.e., hotel is complete and has started functioning. In paragraph 79, it was averred that besides the hotel project, cottages were proposed to be constructed on plot bearing survey No. 805 and the acquired land in survey Nos. 803 and 804 will be used for putting up health club, yoga centre, water sports and other recreational

facilities, which are integral part of the project.

(x) By an order dated 26.06.1984, Goa Bench of the High Court of Bombay allowed the writ petition and quashed the impugned notifications only on the ground of non compliance of Rule 4 of the Rules. That order was reversed by this Court in M/s Fomento Resorts and Hotels Ltd. vs. Gustavo Renato Da Cruz Pinto and Others [(1985) 2 SCC 152] and the case was remitted to the High Court for deciding other grounds of challenge. It, however, appears that after the judgment of this Court, the parties compromised the matter and the writ petition was withdrawn on 26.3.1985.

(xi) In the meanwhile, respondent No. 1 entered into an agreement with the Government as per the requirement of Section 41 of the 1894 Act.

(xii) After taking possession of the acquired land, Respondent No. 1 extended the hotel building on survey Nos. 787, 788, 789 and 803 in the garb of permission granted by the Development Authority under the Goa, Daman and Diu Town and Country Planning Act, 1974. Respondent No. 1 also closed public access to the beach available through survey No. 803 (new No. 246/2). The same was challenged in Writ Petition No.330 of 1991 Shri Minguel Martins vs. M/s Sociedade e Fomento Industries Pvt. Ltd. and others, Writ Petition No.36 of 1992 Goa Foundation and another vs. Fomento Hotels and Resorts Limited and others and Writ Petition No.141 of 1992 Shri Gustavo Renato da Cruz Pinto vs. State of Goa and others. By an order dated 25.4.2000 the Division Bench of the High Court allowed the writ petitions and issued directions for demolition of the construction made in survey No. 803 (new No. 246/2) after complying with Clause 6 of agreement dated 26.10.1983. The High Court further directed that access to the beach shown in plan Exhibit-A filed along with Writ Petition No.141/1992 shall be kept open without obstruction of any kind.

(xiii) Shri Victor Albuquerque and the appellants herein filed another set of Writ Petition Nos. 284 of 1991 and 37 of 1992 for issue of a direction to the respondents (including respondent Nos. 1 and 2 herein) for restoration of public access to Vainguinim beach and the car parking area through survey No. 787 (new no. 246/1) and for demolition of the construction made in the open area of survey No. 789 (new No. 246/4).

(xiv) In their writ petition, the appellants claimed that while approving the plan for construction of hotel project in survey No. 787 (new No. 246/1), the Chief Town Planner had directed respondent Nos. 1 and 2 to maintain access to the beach through that survey number by providing necessary footpath and also provide facility for parking of the vehicles and this was reiterated by the Gram Panchayat, but respondent Nos. 1 and 2 have shifted access to the beach to another location on the basis of permission allegedly granted by the Sarpanch who had no authority to do so. According to the appellants, respondent Nos. 1 and 2 were and are not entitled to shift the public access to some other location and, as a matter of fact, instead of ending at the beach, new road leads to the rocks through which public cannot go to the beach. It was also the appellants' case that the location of new road is extremely dangerous because it is adjacent to 10,000 Kg. poisonous gas tank.

(xv) In their counter-affidavit, respondent Nos. 1 and 2 pleaded that the sanction accorded by the Chief Town Planner was subject to the condition that public access to the beach should be

maintained by providing necessary footpath at appropriate place and facilities should be provided for parking of the vehicles but no particular location was identified for that purpose. It was further their case that in the first instance, car parking was identified at North-East corner of property bearing survey No. 787 and the footpath alongside its Eastern boundary, but during execution of the project, it was found that existence of road near 10,000 Kg. poisonous gas tank, high pressure water tank, electric transformer will be dangerous to the public and, therefore, application was made to the Sarpanch of the Gram Panchayat for shifting the location of public road, car parking and footpath and construction thereof at the new site was undertaken after seeking permission from the Sarpanch. Respondent Nos. 1 and 2 also pleaded that since 1979 members of the public are using access to the beach through alternative road and footpath.

(xvi) The High Court referred to letter dated 1.8.1978 of the Chief Town Planner, letter dated 1.12.1978 of the Sarpanch, two letters dated 29th September, 1979, one of which was written by respondent No. 1 to the Sarpanch, and the other by the Sarpanch and held that even though access provided by respondent Nos. 1 and 2 is not at the site initially approved by the Gram Panchayat, the same is being maintained at the new location since 1979. The High Court noted that while approving the plan prepared by respondent No.1 for construction of hotel complex, the Chief Town Planner did not identify the particular location at which public road, car parking and footpath were to be constructed and even when inspection was carried out on 16th October, no objection was raised to the change of alignment of the public road etc. and, therefore, it cannot be said that respondents have violated the conditions of sanction. The High Court also took cognizance of the photographs produced by the writ petitioners and observed that the access to the beach is not maintained in proper manner and that the same leads to rocks and is inaccessible during high tide. Accordingly, directions were issued to the respondents to maintain tarred road of three meters width throughout, proper area for parking of cars and ensure that the access goes up to beach. However, the prayer of the writ petitioners for demolition of the construction made in survey No. 789 (new No. 246/4) was rejected by observing that the so-called construction is in the form of road and there is no legal prohibition against such construction. The relevant extracts of paragraphs 12 and 13 of the impugned order which also contain the directions given by the High Court read as under:

"All said and done, once, it is not in dispute that the members of the public are entitled to have their access through the property bearing survey no. 787, it cannot be disputed the Respondents are duty bound to maintain a proper access for the public to the said beach and sufficient area for parking of cars. Both these things are to be maintained through and in the property bearing survey no. 787. It is the contention of the Respondents that they have already provided such access and that the same is being used by the public. However, the photographs of such access which are placed on record by the Petitioners and not disputed by the Respondents clearly disclose that such access is not maintained in proper manner and/or as is otherwise required to be maintained in terms of the directions given by the Chief Town Planner. It is the contention of the Petitioners that the said access leads not to the beach but to the rocks and the beach is absolutely unaccessable during the hightide by the said access. The fact that members of the public cannot have access to the beach during the high tide is also admitted by the respondents in the Affidavit-in-replies filed in both the Petitions. In Writ Petition No. 37/92, it has been clearly stated in Affidavit-in-reply in para 20 "and that the Respondents state that in compliance with the said condition from the point of steps, where

also there is a jetty the Respondents built retaining wall with access over it to the extent of 60 metres giving access over it to the public through the beach even during the high tide". Similarly, in Writ Petition No. 284/91 in the Affidavit-in-reply it is stated in para 13(d) that "the Respondents state that in compliance with the said condition from the point of steps where also there was a jetty, the Respondents have built a retaining wall with access over it giving access to the public through the beach even during the high tide." The Affidavit-in-reply in Writ Petition No. 284/91 was filed in September, 1991 whereas the Affidavit-in-reply in Writ Petition No. 37/92 was filed in January, 1992. This clearly shows that the Respondents are fully aware that the access which has been stated to have been maintained by the Respondents as it stands today is not at all convenient for free access to the public to the said beach. Once, it is not disputed that the public have right to free access to the beach through the said property and the project of construction of hotel was approved with the condition that such access is to be maintained, it is the duty of the Respondents to maintain a proper access through the property to the beach. It has been stated across the bar and delineated in a sketch produced by the Petitioners and not disputed by the Respondents that alternative access as exists at present provided by the Respondents for the public is through the western half of the property bearing old survey no. 787. It leads to the steps constructed near the retaining wall by the side of the jetty leading to the sea situated on the said Vainguinim Beach. Once, it is clear that the said access does not lead to the beach directly but to the steps and further to the rocks, it is necessary to give appropriate directions to the Respondents to extend the said access upto the beach along the retaining wall referred to in para 20 of the Affidavit-in-reply in Writ Petition No. 37/92 to such an extent that the said access directly leads to the said beach and not to the rocks or some other place. It is also necessary that such road should be maintained of 3 metres in width all throughout, and also that the said road to be tarred and maintained in proper condition. The Respondents shall also maintain proper area for parking of the cars and the area should be maintained in a usable condition for the members of the public and the responsibility in that regard shall also be of the Respondent Nos. 1 and 2. There shall not be any obstruction caused on the said access or car park area either by construction of any fencing or any gate or otherwise and the same should be kept open all 24 hours of day and night.

13. Considering the fact that neither of the parties have bothered to place on record a proper plan with dimension and to scale, a further direction in that regard is necessary to the Respondent Nos. 1 and 2 who shall file a proper plan drawn by a recognized surveyor showing the location of the access and car park maintained in accordance with directions of this Court and such plan should be filed along with the Affidavit regarding the compliance of maintenance of such access within a period of four weeks from today. The said access shall be at the location corresponding to the one disclosed in the sketch produced by the Respondents and placed on record and marked at `X' for identification. However, an alteration in the location of the access shall be made as regards the space near the gas tank shown in the said sketch and sufficient space should be maintained from the location of the gas tank so as to avoid hardship or injury to the members of the public using the said access and the distance between the gas tank and the access shall not be less than 20 metres under any circumstances. It shall also be the responsibility of the Respondent No.5 in Writ Petition No. 37/92 as well as other authorities to have periodical checks and to ensure the maintenance of the said access and the car park area in the said property."

[underlining is ours]

2. Ms. Indira Jaising, learned senior counsel appearing for the appellants argued that even though the letter dated 1.8.1978 of the Chief Town Planner did not identify the location where footpath and parking facilities were required to be provided by respondent Nos. 1 and 2 for access to the beach, but if the same is read in conjunction with permission granted by the Gram Panchayat vide letter dated 22.8.1978 and letter dated 1.12.1978 of the Sarpanch, it becomes clear that respondent Nos. 1 and 2 were required to provide parking area, on the north- east corner of survey No. 787 adjacent to survey No. 803 and public footpath was to be provided in a manner that it would run on survey No. 787 and form the boundary of survey No. 803 but they manipulated the so-called permission from the Sarpanch of the Gram Panchayat and changed the location of public road and car parking. She vehemently argued that access provided at the new site ends on the rocks and it is impossible for the public to go to the beach even during the normal period what to say of high tide period and the High Court committed grave error by declining the appellants' prayer for issue of mandamus to respondent Nos. 1 and 2 to provide access to the beach through survey No. 787 in terms of the approval accorded by the Chief Town Planner vide his letter dated 1.8.1978 read with the permission granted by the Gram Panchyat on 22.8.1978. Shri Anil B. Divan, learned senior counsel appearing for the respondents, submitted that the directions given by the High Court are just and proper and do not call for interference, because public road, car parking and access to the beach had been constructed in 1979 after obtaining permission from the Sarpanch of the Gram Panchayat and public has been using the same for last almost 20 years. Learned senior counsel produced some photographs to show that tarred road has been constructed and access provided through footpath goes right up to the beach.

3. We have considered the respective submissions. Since it is not in dispute that respondent Nos. 1 and 2 have provided access to the beach at the alternative site in 1979 and the same is in existence for last almost 20 years and is being used by the public, it is not possible to agree with Ms. Indira Jaising that the High Court committed an error by not taking cognizance of the approval accorded by the Chief Town Planner and the permission granted by the Gram Panchayat on 22.8.1978. It is true that Sarpanch did not place before the Gram Panchayat letter dated 29.9.1979 written by respondent No.1 for permission to change the location of the footpath and parking area from the site originally sanctioned and the Gram Panchayat did not pass any resolution sanctioning such change, but the fact remains that pursuant to letter dated 29.9.1979 written by the Sarpanch of the Gram Panchayat, respondent No.1 laid access to the beach at alternative site and made it operational sometime in 1979 and the same is being used by the public since then. The photographs produced during the hearing of the appeal also prima facie show that access to the beach is available at the alternative site. It is not the appellants' pleaded case that they were unaware of the change of location of public access to the beach and construction of road, parking area, etc. at the alternative site in 1979. Therefore, the writ petition filed by them in 2000 was highly belated, and the High Court may have been justified in non-suiting them only on the ground of delay. However, as the High Court has dealt with the matter on merits, we do not consider it necessary to deal with this issue in detail, more so because we are convinced that the directions given by the High Court to respondent Nos. 1 and 2 for ensuring that public road is shifted from the site near 10,000 Kg. poisonous gas tank and access to the beach ends on the beach and not on the rocks are just and

proper and are in consonance with public interest.

4. In the result appeal is dismissed. Needless to say that if respondent Nos. 1 and 2 have not carried out the directions given by the High Court in toto and access to the beach still ends at the rock or there is any other deficiency in the implementation of the order impugned in this appeal, then the appellants or any other interested person shall be free to bring this to the notice of the High Court for appropriate order and action.

.....J.

[B.N. AGRAWAL] .....J.

[G.S. SINGHVI] New Delhi, January 20, 2009.