Supreme Court of India
Sri Ram Builders vs State Of M.P. & Ors on 25 April, 1947
Author: .....J.
Bench: Surinder Singh Nijjar, A.K. Sikri

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 4896 OF 2014
(Arising out of S.L.P. (C) No. 35001 of 2012)

Sri Ram Builders
…Appellant

VERSUS

State of M.P. & Ors.
...Respondents

WITH

CIVIL APPEAL NO. 4897 OF 2014
(Arising out of S.L.P. (C) No. 35017 of 2012)

WITH

CIVIL APPEAL NOS.4898-4899 OF 2014
(Arising out of S.L.P. (C) Nos. 35027-35028 of 2012)

WITH

CIVIL APPEAL NO. 4900 OF 2014
(Arising out of S.L.P. (C) No. 36887 of 2012)

J U D G M E N T

SURINDER SINGH NIJJAR, J.

1. Leave granted.

2. The Civil Appeal .....of 2014 arising out of S.L.P. (C) No. 35001 of 2012 impugning the judgment of the M.P. High Court at Jabalpur rendered in Writ Petition No. 2937 of 2009. The Writ Petition has been disposed of along with Review Application MCC No. 99 of 2009 and MCC No. 893 of 2008 as well as Contempt Petition No. 469 of 2008. The writ petition has been disposed of with certain directions. Whereas the aforesaid Contempt Petition and the two Review Petitions have been disposed of in view of the order passed in Writ Petition No. 2937 of 2009.

3. The relevant facts leading to the filing of the aforesaid SLP are as follows:-

4. In 1979, Respondent No.2 / Madhya Pradesh Road Transport Corporation (hereinafter referred to as "MPRTC") proposed to construct a bus stand at Vijay Nagar, Indore. To this end, an Agreement for Lease dated 2nd November, 1981 was entered into between the Transport Corporation and Respondent No.5/ Indore Development Authority (hereinafter referred to as "IDA"), by which the land belonging to IDA, admeasuring 10 acres situated at Vijay Nagar, Indore (hereinafter referred to as "proposed site") was agreed to be allotted to the Transport Corporation, initially, for 30 years. In pursuance of the Lease Agreement, possession of the proposed site was handed over to the MPRTC.

5. The Council of Ministers, State of Madhya Pradesh, vide order dated 8th November, 2001, authorised the Transport Corporation to construct a commercial complex on the land owned by it or allotted to it on lease, under a Build, Own-Operate and Transfer ("BOT") Scheme through open tenders. The revenue generated from the said project(s) was to be used to discharge the liability of the MPRTC. On 13th April, 2003, a notice inviting bids for selection of a developer under the BOT Scheme was issued and published in the leading newspapers. In response to this notice, a total number of ten applications were received; and out of those ten applications, five were found to have satisfied the eligibility criteria. Appellant was placed at Sr. No.1 in the list of the candidates satisfying the eligibility criteria. Thereafter, a Special Committee was constituted for the scrutiny of tenders received for construction of the bus stand/commercial premises under the B.O.T. Scheme. On 3rd July, 2003, the Special Committee recommended that since the premium amount offered by the bidders was less, further negotiations be held with all the qualified bidders. Accordingly, the Special Committee held negotiations with the qualified bidders on 7th July, 2003, wherein the Appellant's bid for the B.O.T. Scheme was found to be the highest.

6. MPRTC, after scrutiny of the financial bid and the proposal submitted by the Appellant for B.O.T. scheme, approved its bid vide Acceptance Letter dated 3rd October, 2003. In the Acceptance Letter, the Appellant was directed to deposit 25 per cent amount of the total premium amount of Rupees One Crore Sixteen Lac Thirty Seven Thousand Seven Hundred and Fifty (Rs.1,16,37,750/-) within 15 days of the issuance of the Acceptance Letter. Accordingly, Appellant deposited the first installment of Rs.1,16,37,750/-. The appellant also have to pay a further sum of Rs.7,33,320/- demanded by MPRTC as consultancy fees.

7. In pursuance of the Acceptance Letter, an Agreement dated 4th February, 2004 was entered into between the Appellant and the MPRTC. This agreement inter alia provided that the tender

document with scope of work general conditions, special conditions, general specifications, list of brands and offer price bid shall form part of the agreement.

8. The MPRTC issued a work order dated 16th March, 2004 to the Appellant for demolishing the existing structure on the land; to be replaced by the commercial complex. On 11th May, 2004, the State Government issued a notification, in exercise of powers under Sections 35(2) and 35(3) of the Madhya Pradesh Nagar Tatha Gram Nivesh Adhiniyam, 1973 (hereinafter referred to as "Adhiniyam"), by which out of 10 acres of land at Vijay Nagar which had been earmarked for the bus stand (proposed site), 3.59 acres of land was permitted to be used for commercial purposes.

9. On 14th May, 2004, the Appellant requested the MPRTC to hand over the possession of the proposed site, so that the structure existing thereon could be demolished and new bus stand-cum-commercial complex could be constructed, in accordance with the terms and conditions of the tender/agreement.

10. On 27TH May, 2004, a lease deed was executed in favour of MPRTC by the IDA upon payment of Rs. 24,27,052/- by the Appellant. This payment was made by the Appellant in order to let the Transport Corporation pay its arrears to IDA. Subsequently on 24th June, 2004, IDA gave a No Objection Certificate ("NOC") to the MPRTC for the proposed BOT project. Also, the Deputy Director, Town and Country Planning granted approval to the MPRTC for the construction of the Bus Stand and Commercial Complex.

11. On 28th June, 2004, Writ Petition No. 801 of 2004 came to be filed by one Suresh Seth, before the Indore Bench of the High Court of Madhya Pradesh, assailing the Notification dated 11th May, 2004. By this notification, as observed earlier, reservation of land use of 3.59 acres was changed by the State Government. The High Court, vide order dated 9th September, 2004, sought reports from the State Government as well as the MPRTC and IDA. In their respective reports, the State Government, MPRTC and IDA stated that the said BOT project was in public interest and justified the Notification dated 11th May, 2004.

12. Meanwhile on 6th January, 2005, the Joint Director, Town and Country Planning sanctioned the detailed site plan of proposed BOT project. The Appellant also applied the Municipal Corporation, Indore for sanction of the building plan, but the same was not granted on the ground that Writ Petition No. 801 of 2004 was pending before the High Court.

13. On 23rd February, 2005, IDA issued a certificate indicating therein that in respect of the proposed B.O.T. Project, premium as well as 15 years' lease rent had already been deposited. On the basis of the above, the IDA indicated that there shall be no objection, if land in question is mortgaged with any bank, financial institution or the Government.

14. In the meanwhile, there was a move by the State Government for closure of the MPRTC. In this context, the Government of India granted no objection to the State Government on 23rd March, 2005, subject to the condition that the State Government shall ensure and be fully responsible for ensuring compliance of any existing/future order(s) passed by various Courts, including Tribunals,

in any/all matters relating to MPRTC.

15. The Appellant filed Writ Petition No. 636 of 2005 in the High Court seeking a direction to the MPRTC to immediately hand over possession of the land in question to the Appellant and grant permission to demolish the existing structure. On 5th August, 2005, the Writ Petition No. 636 of 2005 was disposed of by the High Court with the following directions:

i. "That petitioner shall deposit the entire balance amount within a period of one month alongwith interest @ 18% per annum, w.e.f. July 2004 when the 2nd installment became due ii. Upon depositing entire amount the respondent shall handover the vacant possession to the petitioner, within two weeks, with a permission, to demolish the structure as per the agreement. Respondent shall also pursue the matter with the Municipal Corporation to handover all part of the premises, which is in their occupation. iii. Respondent shall deposit the map for sanction before the competent authorities immediately, if not submitted, so far. In case the map has already been submitted the respondent shall give the authority to the petitioner, to pursue the matter before the competent authorities for obtaining the permission and shall extend all the assistance for the purpose of obtaining permission. iv. After taking possession, the petitioner shall construct and hand over the construction property to the respondent as per terms of the tender notice/agreement. v. The competent authorities shall consider the application of the respondent for permission and shall grant the permission in accordance with law." The Appellant deposited Rs.2,95,03,752/- towards premium and a further sum of Rs.27,53,536/- towards interest to the MPRTC, in terms of the aforesaid order. Thereafter, again, the Appellant requested the Respondents herein to hand over the possession of the proposed site to the appellant. A Notice was issued by the appellant to the MPRTC dated 12th September, 2005, requesting to hand over possession of the land, in terms of the directions of the High Court dated 5th August, 2005.

16. At that stage, the Principal Secretary, Transport Department/Respondent No. 2 herein, recorded a note dated 15th September, 2005, questioning the justification for constructing bus stand and observed that the construction was not in public interest particularly when a decision had been taken by the State Government to wind up the MPRTC. Soon thereafter, the MPRTC filed Special Leave Petition No. 20038 of 2005 before this Court challenging the order dated 5th August, 2005 passed by the High Court. This SLP was dismissed by this Court vide order dated 7th October, 2005.

17. Possession of the proposed site still not having been delivered, the Appellant filed Contempt Petition No. 466 of 2005 (renumbered as Contempt Petition No. 469 of 2008) before the High Court of Madhya Pradesh. In this Contempt Petition, the Appellant moved an application for injunction on 11th November, 2005 (I.A. No. 1060 of 2005) restraining the MPRTC from handing over the possession of the proposed site to the State Government for establishing the Regional Transport Office. The High Court on 14th November, 2005, directed MPRTC to maintain status quo and not to handover the possession of the proposed site or to create any 3rd party interest. In spite of the aforesaid order, the possession of the proposed site was handed over by the MPRTC to the Transport Department on 16th November, 2005, for opening the R.T.O. A test centre for driving licences has been established on the land meant for the commercial complex.

18. In the meantime, State of Madhya Pradesh moved an application, MCC No. 1072 of 2005, before the High Court, seeking recall of the order dated 5th August, 2005 passed in Writ Petition No. 636 of 2005. The MPRTC also filed MCC No. 5 of 2006, seeking identical relief, i.e. recall of order dated 5th August, 2005. It was claimed that a decision had been taken by the M.P. State Government to wind up MPRTC. On 23rd March, 2005, MPRTC had been issued a notice of demand for recovery of Rs.2387/- crores as Tax dues. The property earmarked for the commercial complex, was one of the properties seized by the State Authorities on 19th July, 2005. Since the possession was already taken by the State, no direction for delivery of possession to the Appellant could have been issued on 5th August, 2005. These facts could not be placed before the High Court, as the State was not impleaded as a party in Writ Petition No. 636 of 2005.

19. Thereafter, Appellant moved I.A. No. 7064 of 2006 in the Contempt Petition before the High Court to implead the Transport Department - Respondent No. 2 herein, as a respondent in the Contempt Petition. This I.A. was allowed by the High Court by order dated 6th October, 2006. During the course of hearing of this Contempt Petition, Appellant moved another I.A. No. 6906 of 2007, seeking a direction to the respondents to place on record the following:

"1(a) On what date and which inward number the order of the government directing the RTO, Indore to attach the MPSRTC Property at Indore was received by RTO, Indore pursuant to which the so called attachment dated 9.7.2005 was made.

1(b) On what date, by which letter number and under what dispatch number the fact of attachment and acquisition of property/land was sent by RTO, Indore to the State Government (Original Letters, original dispatch register). And on what date, by which the inward number this information was received." According to the Appellant, the respondents could not furnish the said information to the Court, despite having sought a number of opportunities in that regard.

20. Meanwhile on 2nd November, 2007, the IDA cancelled the lease of the MPRTC for violation of the lease terms by running the RTO. Cancellation of the lease was challenged by the MPRTC through Writ Petition No. 6770 of 2007 in the High Court of Madhya Pradesh. On 11th December, 2007, the High Court without issuing notice to the Appellant, who was impleaded as Respondent No.3, disposed of the Writ Petition with the following observations:-

"When two instrumentalities of the State, such as in the present case, choose to bring their disputes in open court, the loss is of the general public. The public confidence in the credibility of the State Govt. and its various wings/functionaries and its instrumentalities comes at stake.

In these circumstances, I do not find that this Court should continue with the proceedings in the present Petition. I deem it appropriate to request the Chief Secretary, State of Madhya Pradesh, to take up the matter at his level and after holding a meeting with the Principal Secretary, Transport Department, Principal Secretary, Housing and Environment Department and the Managing Director of the M.P. Road Transport Corporation Ltd. take such further action, as may be deemed appropriate, in the facts and circumstances of the case. However, the Chief Secretary shall ensure that the officers of the State Government and various other instrumentalities of the State

Government are not allowed to bring out their inter se disputes in public in future".

21. On 17th November, 2008, the Central Government, Department of Transport & Highways informed the State Government of Madhya Pradesh that the request for permission for closure of MPRTC under the provisions of the Road Transport Corporation Act, for which earlier no-objection had been given, was being declined keeping in view the decision of Ministry of Labour & Employment, and that it would now have to continue its current operations.

22. The Appellant submitted representation dated 20th February, 2009, wherein attention of the Chief Secretary was drawn to the pendency of the review petitions filed by the State of Madhya Pradesh and the MPRTC; and the Contempt Petition filed by the Appellant and the order passed therein, whereby status quo was ordered to be maintained.

23. In spite of the aforesaid representation, Respondent No. 1 held the meeting on 4th March, 2009 as directed by the High Court, wherein it was inter alia decided as under: "I. Order dated 02.11.2007 and notice dated 30.06.07 for cancellation of lease of the land in question of the Transport Corporation by the I.D.A. be cancelled.

II. R.T.O. be ordered for releasing the land by the Transport Department for attachment.

III. The M.P. Road Transport Corporation shall hand over land in question to I.D.A.

IV. The amount which has been received by the Transport Corporation from Sh. Ram Builders shall be returned along with interest to Sh. Ram Builder.

V. Decision with respect to further use and management of the land shall be taken by I.D.A."

24. Aggrieved by Clause (III), (IV) and (V) of the aforesaid decision, Appellant preferred Writ Petition No. 2937 of 2009 before the High Court of Madhya Pradesh. It was inter alia contended that the directions in aforesaid clauses were in violation of order dated 5th August, 2005 of the High Court and in violation of the principles of natural justice.

25. The High Court disposed of the Writ Petition on 27th September, 2012 with the following observations:-

"15. The order dated 5.8.2005 passed in Writ Petition No. 636/2005 directing the corporation to deliver possession of site to the petitioner cannot be implemented after the lease deed was cancelled by the IDA. It is this cancellation which became the subject matter of writ petition No.6770/2007 and the writ petition was decided vide order dated 11.12.2007 by another Single Judge Bench directing the Chief Secretary for resolving the dispute. As already mentioned above, the petitioner did not challenge the order dated 11.12.2007 and submitted a detailed representation dated 20.02.2009 to the Chief Secretary. The impugned decision taken by the Chief Secretary is in pursuance of the directions given by the High Court in Writ petition No. 6770/2007 in which the petitioner was also a party. There is, thus, no violation of the principles of natural justice. The

decision reached by the Chief Secretary directs that the entire amount paid by the petitioner be returned to it with interest. The decision does not fix the rate of interest but we feel that 9% will be the proper interest having regard to all the circumstances. In view of the direction to return the amount with interest, as decided by us, there would be apparently no loss to the petitioner. The respondents are directed to return the amount with interest within four months from today. If the petitioner still feels that there has been a breach of contract, it can pursue the remedy of specific performance or damages before a competent civil court. We, therefore, decline to interfere with the decision of the Chief Secretary except fixing the rate of interest, as indicated above."

26. In view of the aforesaid directions, the High Court also disposed of the Contempt Petition No. 469 of 2008, Review Application Nos. MCC No. 99 of 2009 and MCC No. 893 of 2008 without any further directions.

27. We have heard the learned counsel for the parties.

28. Mr. R.F. Nariman and Mr. P.S. Patwalia, learned senior counsel, appearing for the appellant submitted that the reasoning adopted by the High Court in Paragraph 15 of the impugned judgment, which has been reproduced above, was not even supported by the respondents. The first reason given by the High Court is that the Order dated 5th August, 2005 in Writ Petition No. 636 of 2005 can not be implemented after cancellation of lease deed by the IDA. This, according to the learned senior counsel, is without any basis as by the order dated 22nd February, 2009, the Chief Secretary had cancelled the lease deed. Therefore, the order dated 2nd November, 2007 having been nullified, the lease in favour of MPRTC revived. This would also revive the application of MPRTC to cull the agreement with the appellant. The second reason given by the High Court, according to Mr. Nariman and Mr. Patwalia is that the order dated 11th December, 2007 passed in Writ Petition No. 6770 of 2007 was not challenged by the appellant, can not be supported in law. It is pointed out by the learned senior counsel that the aforesaid writ petition was filed by MPRTC challenging the order of cancelling the deed in its favour by the IDA. The appellant was not at all involved in the aforesaid lis. In any event, the High Court had not passed any order on merits. It had merely left it for the Chief Secretary to decide the issue. Therefore, no cause had arisen to the appellant to challenge the order dated 11th December, 2007. It is further pointed out that the Chief Secretary in fact decided the substance of the writ petition. Substance of the grievance raised in the writ petition was decided in favour of MPRTC by setting aside the order of cancellation of the lease by the IDA. It is pointed out by the learned senior counsel that IDA has not challenged the order of the Chief Secretary cancelling the direction of IDA with regard to the cancellation of the lease.

29. Learned senior counsel further submitted that the Chief Secretary was expected to take a decision in accordance with law, i.e., in accordance with the order of the High Court that has become final and binding and not contrary to that. Furthermore, the order of the Chief Secretary on directions (III), (IV) and (V), which affect the rights of the appellant was challenged in the writ petition in which the impugned judgment has been passed. According to the appellant, the decision Nos. (I) and (II) were correct and, therefore, there were no occasion to challenge the same. The directions (III), (IV) and (V) are contrary to Directions (I) and (II) and were beyond the scope of the controversy raised in Writ Petition No. 6770 of 2007, which had been referred to the Chief Secretary

by the High Court. The order of the Secretary has been passed without issuing any notice to the appellant, even though in the writ petition, the appellant was impleaded as Respondent No. 3. It is pointed out by the learned senior counsel that by way of abundant caution, the appellant has challenged the order dated 11th December, 2007, passed in Writ Petition No. 6770 of 2007 in S.L.P.(C) No. 36887 of 2012.

30. Next it was submitted by the learned senior counsel that the actions of Madhya Pradesh Road Transport Corporation (Respondent No.3) are in gross contempt of the orders dated 5th August, 2005, which have not been purged till date. The aforesaid order has become final after the dismissal of SLP (C) No. 20038 of 2005 on 7th October, 2005. It is submitted that the Review Petition MCC No. 99 of 2009 filed on 2nd January, 2006 after dismissal of the aforesaid SLP on 7th October, 2005 is an abuse of process and not maintainable. In support of this submission, learned senior counsel relies on Meghmala & Ors. Vs. G. Narasimha Reddy & Ors.[1] (Paras 25 and 26). Similarly, the Review Petition MCC No. 893 of 2008 is not maintainable for the same reason. In any event, the Review Petition was not decided on merits, which was disposed of in view of the impugned order passed in the Writ Petition with regard to the cancellation of the lease.

31. Thereafter, very detailed submissions have been made on the construction of the lease deed. However, it must be noticed here that the manner in which these submissions have been advanced before us bear no resemblance to the manner in which these submissions were made before the High Court.

32. Mr. R.F. Nariman has also submitted that the term of lease has to be understood to have commenced from 26.05.2004, when the IDA executed a formal lease in favour of MPRTC. Further, learned senior counsel submitted that the possession of the site in terms of the lease cannot be held to be given on 22.1.1982, when the agreement to lease was executed. It was further submitted that where a literal reading of the lease leads to an absurdity, the court has the power to read it reasonably. Such a reasonable reading, according to Mr. Nariman, would support the aforesaid submission, i.e. the lease commences from 26.05.2004. In this context, learned senior counsel rely upon the following cases: DDA vs. Durga Chand Kaushish[2]; Ramkishore Lal vs. Kamal Narian[3] and Sahebzada Mohammad Kamgar Shah vs. Jagdish Chandra Deo Dabhal Deo[4]. These cases reiterate the well established principles of law relating to the construction of deeds, which are as follows: first, that the intention of the parties to a grant must be ascertained first and foremost from the disposition clause. Second, clear disposition by an earlier clause will not be allowed to be cut down by a later clause; and third, that a deed, being a grantor's document, has to be interpreted strictly against him and in the favour of the grantee.

33. Mr. Nariman also submitted that the Respondents cannot rely upon Clause 5E of the Agreement to Lease, after the execution of the Lease Deed. Substantiating this, it was submitted that the Renewal Clause in the Agreement to Lease stood superseded by the express terms of the Lease Deed dated 26.05.2004. In this context, he relied upon Provash Chandra Dalui vs. Biswanath Banerjee[5] and State of U.P. vs. Lalji Tandon.[6]

34. Further according to Mr. Nariman, the terms of the Agreement to Lease cannot be relied upon when a specific provision has been provided in the Lease Deed itself, which provides for extension of the lease. Clause (1) of the Lease enables the IDA to extend the lease for which neither the renewal nor permission of the State Government is necessary.

35. The argument of the Respondents that the Agreement of the MPRTC with the Appellant has been frustrated was sought to be countered by Mr. Nariman. It was submitted that self induced frustration cannot be a basis to frustrate a valid agreement. In this context, it was contended that the submission of the Respondents that MPRTC is being wound up is not tenable since such winding up is the result of an act of the Party itself. Reliance placed upon Boothlinga Agencies vs. V.T.C. Poriaswami Nadar[7], wherein it was inter alia held that "the doctrine of frustration of contract cannot apply where the event which is alleged to have frustrated the contract arises from the act or election of a party." It was also contended that commercial exigencies can never lead to frustration. Reliance was placed upon Pollock and Mulla, 14th Ed. Pgs. 887-889.

36. Mr. Nariman also submitted that the submission of the IDA that the Appellant has no privity of contract with the Petitioner is not correct. Further, the submission of the IDA that the Agreement to Lease was only for a bus stand and no permission was granted by the IDA to MPRTC for constructing a commercial project has been submitted to be incorrect by Mr. Nariman. Another factual submission advanced by the Appellant is that the submission of the Respondents that MPRTC is being wound up is not correct.

37. Lastly, Mr. Nariman contended that on the balance of equity, the MPRTC ought to be directed to comply with the directions of the High Court contained in order dated 05.08.2005, and put the Appellant in possession of the plot.

38. Mr. J.P. Cama, learned senior counsel appearing for the 5th Respondent - Indore Development Authority has submitted that by an agreement dated 2nd November, 1981, IDA entered into a lease in respect of 10 acres of his property situated in its Scheme No. 54 at Indore in favour of MPRTC. Possession of the land was handed over on 22nd January, 1982. The first installment of the premium and leased rent was deposited on 3rd October, 1980. The lease was to be for a period of 30 years subject to renewal. The lease was to subsist in the first instance upto 21st January, 2012 but was terminated on 2nd July, 2007, i.e., before the expiry of the period of 30 years from the date of possession. MPRTC had challenged the aforesaid decision in Writ Petition No. 6770 of 2007. Since the appellant had no privity of contract with IDA, it could not have challenged the termination of the lease on 2nd July, 2007 and did not do so. Since the dispute was between two Government organizations, the High Court rightly remitted the matter to the Chief Secretary of the State of Madhya Pradesh for resolution. Even though, the appellant was not a party to the aforesaid writ petition filed by MPRTC, it had submitted a representation on 22nd February, 2009. The directions issued by the Chief Secretary were challenged in Writ Petition No. 2937 of 2009 in which the impugned judgment has been passed.

The submissions of Mr. Cama in brief are:-

(i) That there was no privity of contract between IDA and Sri Ram Builders, i.e., the appellant. Therefore, the High court has rightly granted liberty to the appellant to file a Civil Suit, if so advised.

(ii) The cancellation of the lease by IDA has become final. This has not been challenged by the appellant. Therefore, no Mandamus can be issued to IDA, to permit the appellant to construct the Bus Stand and commercial-cum-

> residential complex. Mr. Cama further submitted that the lease commences

from 22nd January, 1982 when possession was handed over and expired on 21st January, 2012 upon completion of 30 years period of the lease. It is further submitted that MPRTC can not claim automatic renewal of the lease. It would be subject to the consent of IDA and the State Government. No application had been filed for such extension. In any event, the lease has come to an end by the efflux of time. Mr. Cama further submitted that IDA had given a lease in favour of MPRTC. Under the said lease, MPRTC had no authority to create further third party rights. Wrongly, according to Mr. Cama, MPRTC under the tender conditions / contract entered into with the appellant had given it the right to sell proposed commercial premises, and to collect premium on such allotment from prospective buyers. The MPRTC had only been given NOC for completing the bus stand and the commercial-cum-residential complex on B.O.T. basis. MPRTC had no legal right, being a sub-lessee higher than the lessee. The next submission of Mr. Cama is that MPRTC has completely wound up its operations; they have sold all their buses. Therefore, it can not be compelled to get the bus stand constructed from the appellant.

Countering the submission of Mr. Nariman and Mr. Patwalia, he submits that the order of the High Court dated 5th August, 2005 directing MPRTC to hand over the possession to the appellant can not be relied upon by the appellant, the said order has not become final inasmuch as:-

> (i) IDA was not a party in the said proceedings;

(ii) The HC had not decided the matter in relating to lease of the IDA

(iii) State Govt had filed recall application – which was pending disposal before HC

(iv) Even MPRTC filed a recall application wherein they pleaded that the entire order was based on the statement made by their counsel that they are not in a position to pay Sri Ram builders, however they made a statement, in recall application that they are now willing to repay Sri Ram and hence prayed for recall of order dated. 5.8.05 – which was also pending;

(v) Where SLP is dismissed without giving reasons, there is no merger of the judgment of the HC with the order of SC.

Hence judgment of HC can be reviewed, even after dismissal of SLP. Reliance was placed upon Gangadhara Palo vs. The Revenue Divisional Officer & Anr. [2011 (4) SCC 602]

39. It is submitted that construction of bus terminal on B.O.T. basis was a commercial transaction between MPRTC and the appellant. Even if the cancellation is not legal, this Court will not interfere in this decision as it was purely contractual in nature. He relies on the judgments of this Court in the case of Rajasthan Housing Board & Anr. vs. G.S. Investments & Anr.[8] and Ramchandra Murarilal Bhattad & Ors. vs. State of Maharashtra & Ors.[9]

40. It is submitted that the arguments of the appellant that the lease, which was granted in the first instance for 30 years was intended to continue (automatically) for a further period of 30 years in terms of clause 1 of the aforesaid lease deed is untenable. Even otherwise the submission can not be considered as there were no pleadings to this effect either in the original petition or in the grounds of SLP. In any event, according to the respondents, the initial period of the lease was for 30 years. Furthermore, Paragraph/Clause 5(E) of the agreement to lease makes it clear that after termination of the lease period, it can be extended after renewal; that too only with the consent of MPRTC and IDA and further obtaining sanction of the State Government. According to Mr. Cama, two short questions would arise namely:-

(i) From what date, the period of 30 years is to be counted?

(ii) Whether there is an automatic extension of lease?

41. It is according to Mr. Cama, admittedly possession of the property was given to MPRTC on 21st January, 1982. This premium, as well as the first lease rent had been deposited on 3rd October, 1980. It is also an admitted position that the lease rent for the entire period of 1982 onwards has in fact been paid by deposit of premium plus 15 years lease rent. It is reiterated by Mr. Cama that admitted date of actual possession by the lesser is 22nd January, 1982. Therefore, the first period of lease expired by efflux of time on 21st January, 2012. With regard to the renewal of the lease, it is submitted that even such renewal is on specific sanction of the IDA and the State Government. He submits that the concept of extension of the lease is distinguishable from the concept of renewal. In support of this submission, Mr. Cama relies on Hardesh Ores (P) Ltd. Vs. Hede and Company[10] (Pages 627 & 628). He submitted that the agreement of lease used both words extension and renewal but extension is always made subject to renewal. Mr. Cama further pointed out that Order dated 5th August, 2005 has not become final and binding on all parties on the dismissal of the SLP filed by the MPRTC. The aforesaid SLP was dismissed in limine. Therefore, the judgment of the High Court can not be said to have merged with the order of this Court. In support of the submission, Mr. Cama relies on Kunhayammed & Ors. vs. State of Kerala & Anr.[11] and Gangadhara Palo vs. Revenue Divisional Officer & Anr.[12]

42. With regard to the submission relating to the order passed by the Chief Secretary, Mr. Cama submits that the appellant has to either accept or challenge the order in toto. If the complete order is accepted, the termination of the lease is set aside, the property would return to IDA with compensation to the appellant. In the event, the order is completely set aside, the termination of the lease remains in force and the property returns to the IDA. In either case, the land returns to the IDA. Mr. Cama submits that the order passed by the Chief Secretary is a comprehensive order and can not be permitted to be challenged in a truncated manner.

43. We have considered the submissions made by the learned counsel for the parties.

44. Before we proceed to examine the submission made by Mr. Nariman, it would be appropriate to cull out the bare essential facts for the determination of the controversy herein. A lease deed dated 2nd November, 1981 was entered into between MPRTC and IDA. The possession of the land was handed over to MPRTC on 22nd January, 1982. Initially, the lease was taken by the MPRTC for the purpose of a bus stand. It appears that no final decision was taken till 8th November, 2001 when the Council of Ministers of the State Government authorized the construction of a commercial complex on the land under BOT Scheme. A tender notice was issued on 13th April, 2002. On 7th July, 2003, the bid of the appellant was found to be the highest. The amount as mentioned in Para 6 earlier, was duly paid by the appellant. A separate agreement was entered into between MPRTC and the appellant on 4th February, 2004 which read alongwith the tender document provided as under: "The successful promoters/builders will have the right to market the saleable space made available to him on different floors in the commercial complex, collect premium on such allotment from prospective buyers."

45. On 25th May, 2004, MPRTC deposited the lease rental with IDA. A formal lease was executed on 26th May, 2004. As noticed earlier, the lease was for 30 years. The leased land (plot) was to be used only for the bus terminal. It was specifically provided that the plot cannot be divided. The possession of the plot had been received on 22nd January, 1982. The lease also provided that the Rules published in the gazette on 16th December, 1977 shall be binding on the lessee. Rule 40 of the aforesaid Niyam/Rules read as under : "The lessee may take possession of the plot on the date fixed or notified to him for taking over possession of the plot and the lease of the plot shall commence from the date irrespective of the fact "whatsoever, possession of the plot has been taken or not and the lessee shall pay all rates and taxes where leviable the owner or the lessee from the date."

46. On 24th June, 2004, IDA gave its no objection for bus terminal-cum-commercial complex to be constructed under the BOT Scheme. On 18th December, 2005, the State Government decided to wind up the MPRTC. The proposal of the State Government was not approved by the Ministry of Shipping and Road Transport, Government of India. On 17th November, 2008, a letter was issued informing the State Government that the Ministry of Labour had declined to grant permission for closure under Section 25-O of the Industrial Disputes Act, 1947. On 5th August, 2005, the directions were issued by the High Court in the writ petition filed by the appellant. SLP filed against these directions was dismissed by this Court on 7th October, 2005. In the contempt petition filed by the appellant for non compliance of the directions of the High Court dated 5th August, 2005, MPRTC was restrained from handing over the possession of the property or to create third party interest/rights. On 2nd November, 2007, the lease was cancelled by IDA on the ground that MPRTC had violated the prescribed conditions by handing over the possession to RTO. As noticed earlier, the cancellation of the lease was challenged by MPRTC, by way of a writ petition, which was disposed of by the High Court on 11th December, 2007 by referring the entire issue to the Chief Secretary. The appellant did not challenge the order dated 2nd November, 2007 but submitted to the jurisdiction of the Chief Secretary by filing a comprehensive representation. Even in the writ petition in which the impugned order had been passed, the appellant had only challenged Clauses III, IV and V of the order of the Chief Secretary.

47. We shall now consider the submission of Mr. Nariman, seriatim. Can the order dated 5th August, 2005 be implemented and should the appellant be permitted to go ahead with the construction of commercial complex-cum-bus stand. Undoubtedly, the SLP filed by MPRTC against the order dated 5th August, 2005 in Writ Petition No.363 of 2005 has been dismissed by this Court, but it was a dismissal in limine without recording any reason. Therefore, the judgment of the High Court cannot be said to have merged with the order of this Court. In Kunhayammed (supra), this Court considered the effect of the dismissal of the SLP in limine. This Court reiterated the ratio laid down by this Court in Indian Oil Corporation Ltd. vs. State of Bihar & Ors.[13] which considered the impact of the order dismissing the SLP with the following expression:

"The special leave petition is dismissed." Considering the aforesaid order of this Court in Indian Oil Corporation Ltd. (supra), it has been observed as follows:

> "The effect of a non-speaking order of dismissal of a special leave petition without anything more indicating the grounds or reasons of its dismissal must, by necessary implication, be taken to be that this Court had decided only that it was not a fit case where special leave should be granted. This conclusion may have been reached by this Court due to several reasons. When the order passed by this Court was not a speaking one, it is not correct to assume that this Court had necessarily decided implicitly all the questions in relation to the merits of the award, which was under challenge before this Court in the special leave petition. A writ proceeding is a wholly different and distinct proceeding. Questions which can be said to have been decided by this Court expressly, implicitly or even constructively while dismissing the special leave petition cannot, of course, be reopened in a subsequent writ proceeding before the High Court. But neither on the principle of res judicata nor on any principle of public policy analogous thereto, would the order of this Court dismissing the special leave petition operate to bar the trial of identical issues in a separate proceeding namely, the writ proceeding before the High Court merely on the basis of an uncertain assumption that the issues must have been decided by this Court at least by implication. It is not correct or safe to extend the principle of res judicata or constructive res judicata to such an extent so as to found it on mere guesswork.

48. In reiterating the aforesaid observation, this Court in Kunhayammed (supra) observed as follows: "27. A petition for leave to appeal to this Court may be dismissed by a non-speaking order or by a speaking order. Whatever be the phraseology employed in the order of dismissal, if it is a non-speaking order, i.e., it does not assign reasons for dismissing the special leave petition, it would neither attract the doctrine of merger so as to stand substituted in place of the order put in issue before it nor would it be a declaration of law by the Supreme Court under Article 141 of the Constitution for there is no law which has been declared."

49. The aforesaid ratio in Kunhayamed (supra) is reiterated by this Court in Gangadhara Palo (supra): "7. The situation is totally different where a special leave petition is dismissed without giving any reasons whatsoever. It is well settled that special leave under Article 136 of the Constitution of India is a discretionary remedy, and hence a special leave petition can be dismissed

for a variety of reasons and not necessarily on merits. We cannot say what was in the mind of the Court while dismissing the special leave petition without giving any reasons. Hence, when a special leave petition is dismissed without giving any reasons, there is no merger of the judgment of the High Court with the order of this Court."

50. Even though the order of the High Court had not merged with the order passed by this Court in dismissing the SLP, can the appellant be deprived of the benefit of the order passed by the High Court on 5th August, 2005? Mr. Nariman has submitted that the order passed by the Chief Secretary on 11th December, 2007 even though on directions issued by the High Court in Writ Petition No.6770 of 2007 cannot nullify the directions given by the High Court earlier. The order passed by the Chief Secretary in its executive capacity cannot have the effect of nullifying the order passed by the High Court on 5th August, 2005. On first blush, the submission made by Mr. Nariman seems to be very attractive, but factually it has to be noticed that much more water has flown under the bridge since the passing of the order dated 5th August, 2005. Subsequently, the lease to MPRTC was cancelled on 2nd November, 2007 by the IDA. The appellant did not challenge the order dated 2nd November, 2007 passed by the IDA. The aforesaid order was challenged by MPRTC in Writ Petition No.6770 of 2007. On 11th December, 2007, the High Court without issuing notice to the appellant, who was impleaded as respondent No.3, disposed of the writ petition. The High Court noticed that two instrumentalities of the State have chosen to bring their disputes in open court. In such circumstances, the High Court was of the opinion that the entire dispute ought to be decided by the Chief Secretary of the State of Madhya Pradesh by holding meetings between the Principal Secretary of the Transport Department, Principal Secretaries of Housing and Environment Department and the Managing Director of the MPRTC. The appellant accepted the aforesaid order passed by the High Court and submitted a detailed representation before the Chief Secretary on 20th February, 2009. The Chief Secretary in the meeting held on 4th March, 2009 took a comprehensive decision on all the issues involved in writ petition with regard to the cancellation of the lease deed in favour of MPRTC by IDA. The Chief Secretary revoked the order dated 2nd November, 2007 and notice dated 30th June, 2007 cancelling the lease of land in question granted to the MPRTC by IDA. RTO was directed to release the leased land from attachment. It is noteworthy that the appellant has not chosen to challenge the aforesaid two directions. However, as noticed earlier, the appellant challenged the directions issued in Clauses III, IV and V in Writ Petition No.2937 of 2009 in the High Court of Madhya Pradesh. It was, inter alia, contended that the directions in the aforesaid clauses were in violation of the order dated 5th August, 2005. It is noteworthy that even in this writ petition, challenging the direction Nos. III, IV and V issued by the Chief Secretary, the appellant had not challenged the competence of the Chief Secretary to decide the issues. The appellant cannot now be permitted to state that the aforesaid directions are without jurisdiction. Under the orders of the Chief Secretary dated 4th March, 2009, the possession of the land has already been delivered to IDA. Therefore, it would not be possible at this stage to direct that the mandamus granted on 4th August, 2005 in Writ Petition No.636 of 2005 shall be enforced.

51. In the ultimate analysis, the whole controversy boils down to a breach of contract by MPRTC entered into with the appellant. The scope of judicial review is very limited in contractual matters even where one of the contracting parties is the State or an instrumentality of the State. The parameters within which power of judicial review can be exercised, has been authoritatively laid

down by this Court in a number of cases.

In Tata Cellular vs. Union of India,[14] this court upon detailed consideration of the parameters within which judicial review could be exercised, has culled out the following principles:

> "70. It cannot be denied that the principles of judicial review would apply to the exercise of contractual powers by government bodies in order to prevent arbitrariness or favouritism. However, it must be clearly stated that there are inherent limitations in exercise of that power of judicial review. The Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the Government. But, the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down.
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> * * *
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> 77. The duty of the court is to confine itself to the question of legality. Its concern should be: (1) Whether a decision-making authority exceeded its powers?
>
> (2) committed an error of law, (3) committed a breach of the rules of natural justice, (4) reached a decision which no reasonable tribunal would have reached, or (5) abused its powers.
>
> Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfilment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under:
>
> (i) Illegality: This means the decision-maker must understand correctly the law that regulates his decision- making power and must give effect to it.
>
> (ii) Irrationality, namely, Wednesbury unreasonableness.
>
> (iii) Procedural impropriety.
>
> The above are only the broad grounds but it does not rule out addition of further grounds in course of time."

52. In our opinion, the case put forward by the appellant would not be covered by the aforesaid ratio of law laid down by this Court. The High Court, in our opinion, has rightly observed that the appellant can seek the appropriate relief by way of a civil suit. The High Court in exercise of its jurisdiction under Article 226 of the Constitution of India would not normally grant the relief of specific performance of a contract. This view is supported by Ramchandra Murarilal Bhattad vs. State of Maharashtra.[15] This Court relying upon the earlier decision in Noble Resources Limited vs. State of Orissa[16] held as under:

"50. ...this Court would not enforce specific performance of contract where damages would be adequate remedy. It was also held that conduct of the parties would also play an important role.

51. The expansive role of courts in exercising its power of judicial review is not in dispute. But as indicated hereinbefore, each case must be decided on its own facts."

53. At no stage, the appellant had any privity of contract with IDA. MPRTC entered into a BOT contract with the appellant contrary to the terms and conditions of the lease which provided specifically that the land shall be used for constructing a bus stand–cum commercial complex. MPRTC had no legal right to create any further right in favour of the appellant with regard to the receiving of the premium on the constructed units sold to third party(ies). Even otherwise, the appellant seems to be flogging a dead horse. Admittedly, the possession of the proposed site was delivered to MPRTC on 22nd January, 1982. The maximum lease period was for 30 years. By efflux of time the aforesaid lease period expired on 21st January, 2012. We do not accept the submission of Mr. Nariman that as the entire rent had been paid, MPRTC would be entitled to automatic renewal of the lease for 90 years. The renewal clause in the lease subsequently provides that the renewal shall be with the consent of IDA. This consent by the IDA is not a mere formality. We are, therefore, not inclined to accept the submission of Mr. Nariman that the term of the lease has to be understood to have commenced from 26.05.2004.

54. This apart, there is much substance in the submission of Mr. Cama that no application has been filed even for this formal renewal by MPRTC. In any event, MPRTC would not be in a position to continue with the lease as it is heavily indebted presently, to the tune of Rs. 3500 crores. The property of the corporation has been attached by the various creditors. Even the proposed site where the bus stand – cum – commercial complex was to be constructed is under attachment. The claim made by the appellant is in the nature of damages for breach of contract and/or the relief of specific performance of contract. So far as the breach of contract is concerned, the appellant will have no cause of action against IDA as there is no privity of contract between the parties. So far as the specific performance is concerned, it appears that the entire purpose of the contract has been frustrated by subsequent events.

55. We are also not much impressed by the submission of Mr. Nariman that the doctrine of frustration cannot be applied here since it is a "self induced frustration". In the case of Boothalinga Agencies (supra), this Court upon comparing and contrasting the English Law and the statement of Indian Law contained in Section 56 of the Indian Contract Act summed up the legal position with regard to frustration of contract as follows:- "The doctrine of frustration of contract is really an

aspect or part of the law of discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done and hence comes within the purview of Section 56 of the Indian Contract Act. It should be noticed that Section 56 lays down a rule of positive law and does not leave the matter to be determined according to the intention of the parties.

In English law therefore the question of frustration of contract has been treated by courts as a question of construction depending upon the true intention of the parties. In contrast, the statutory provisions contained in Section 56 of the Indian Contract Act lay down a positive rule of law and English authorities cannot therefore be of direct assistance, though they have persuasive value in showing how English courts have approached and decided cases under similar circumstances." We fail to see how the aforesaid observations are of any relevance in the facts and circumstances of this case.

56. We are also unable to accept the submission of Mr. Nariman that the Doctrine of Frustration would not apply in the facts of this case as it is a self induced frustration. The aforesaid expression seems to have been borrowed from certain observations made by the Judicial Committee in the case of Maritime National Fish, Limited vs. Ocean Trawlers, Limited[17]. The facts of that case, as narrated in Boothalinga Agencies (supra), would indicate that in that case, the respondents chartered to the appellants a steam trawler fitted with an otter trawl. Both the parties knew at the time of the contract that it was illegal to use an otter trawl without a licence from the Canadian government. Some months later the appellants applied for licences for five trawlers which they were operating, including the respondent's trawler. They were informed that only three licences would be granted, and were requested to state for which of the three trawlers they would like to have the licences. They named three trawlers other than the respondent's trawler, and then claimed that they would not be bound by the trawler of the respondent as it was frustrated. It was held by the Judicial Committee that the failure of the contract was the result of the appellant's own election, and, therefore, no frustration of the contract.

57. This Court distinguished the aforesaid judgment and observed as follows:-

"We think the principle of this case applies to the Indian law and the provisions of Section 56 of the Indian Contract Act cannot apply to a case of "self-induced frustration". In other words, the doctrine of frustration of contract cannot apply where the event which is alleged to have frustrated the contract arises from the act or election of a party. "

58. In our opinion, these observations are of no assistance to the appellant as in this case, the lease has come to an end by efflux of time. This apart, MPRTC is heavily indebted and had sought permission of the State and the Union of India to wind up. Furthermore, there was also a breach of the terms and conditions of the lease on the basis of which it has been terminated in accordance with law.

59. In any event, these are issues which would involve adjudication of disputed questions of fact which can only be suitably adjudicated in the civil suit as directed by the High Court in the impugned judgment. The appellant shall be at liberty to seek its remedies against MPRTC for breach

of contract. Our conclusion that the High Court was right in rejecting the contentions of the Appellant herein is also supported by the law laid in Rajasthan Housing Board vs. G.S. Investments (supra) which was relied upon by Mr. Cama. We may notice here the following excerpt:

"..the Court should exercise its discretionary power under Article 226 of the Constitution with great care and caution and should exercise it only in furtherance of public interest. The Court should always keep the larger public interest in mind in order to decide whether it should interfere with the decision of the authority."

60. Also, we are not much impressed by the submission of Mr. Nariman that the order passed by the High Court on 11th December, 2007 has been challenged by the companion SLP (C) No 36887 of 2012. The aforesaid SLP has been filed merely to get over the earlier lapse of not challenging the order of the High Court at the appropriate time. Having submitted to the jurisdiction of the Chief Secretary, it would not be open to the appellant to challenge the order dated 11th December, 2007.

61. For the aforesaid reasons, we see no merit in the appeals. The civil appeals are, therefore, dismissed.

.....J.

[Surinder Singh Nijjar] .....J.

[A.K.Sikri] New Delhi;

April 25, 2014.

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[1] (2010) 8 SCC 383

[2] (1973) 2 SCC 825

[3] (1963) Supp (2) SCR 417

[4] (1960) 3 SCR 604

[5] (1989) Supp (1) SCC 487(Para14)

[6] (2004) 1 SCC 1 (Para 13).

[7] (1969) 1 SCR 65, at Page79

[8] (2007) 1 SCC 477

[9] (2007) 2 SCC 588

[10] (2007) 5 SCC 614

[11] (2000) 6 SCC 359

[12] (2011) 4 SCC 602(Para 7)

[13] (1986) 4 SCC 146

[14] (1994) 6 SCC 651

[15] (2007) 2 SCC 588

[16] (2006) 10 SCC 236

[17] (1935) A.C. 524
