

Kerala High Court

K.M.Prasad vs Stateof Kerala on 1 November, 2010

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE ANTONY DOMINIC

&

THE HONOURABLE SMT. JUSTICE P.V.ASHA

WEDNESDAY, THE 23RD DAY OF DECEMBER 2015/2ND POUSHA, 1937

WP(C).No. 26435 of 2013 (S)

PETITIONER:

K.M.PRASAD, S/O.LATE MADHAVAN
RESIDING AT KALATHARA MANADATH HOUSE, ELOOR SOUTH
UDYOGAMANDAL P.O., PIN-683 501.

BY ADVS.SRI.K.K.ASHKAR
SMT.ASHIRA MOHAMED ASHROF
SRI.P.CHANDRASEKHAR

RESPONDENTS:

1. STATEOF KERALA
REPRESENTED BY ITS CHIEF SECRETARY
GOVERNMENT OF KERALA, THIRUVANANTHAPURAM-695 001.
2. PRINCIPAL SECRETARY,
LOCAL SELF GOVERNMENT DEPARTMENT
GOVERNMENT OF KERALA, THIRUVANANTHAPURAM-695 001.
3. M/S.LULU CONVENTION AND EXHIBITION CENTRE PRIVATE LTD.
50/2392, N.H.17, EDAPPALLY
KOCHI, KERALA-682 024
REPRESENTED BY ITS MANAGING DIRECTOR MR.M.A.YUSUF ALI.
4. RAMACHANDRAN N,
ARRIYANCHERI MADAM, WEST KADUNGALLUR P.O
ALUVA-683 110.
5. COCHIN PORT TRUST,
WILLINGTON ISLAND, COCHIN-682 009
REPRESENTED BY ITS CHAIRMAN.
6. MINISTRY OF SHIPPING,
GOVERNMENT OF INDIA, TRANSPORT BHAVAN, SANSAD MARG
NEW DELHI-110 001,
REPRESENTED ITS SECRETARY.
7. MINISTRY OF ENVIRONMENT AND FORESTS,

GOVERNMENT OF INDIA, PARYAVARAN BHAVAN, CGO COMPLEX
LODHI ROAD, NEW DELHI-110 003
REPRESENTED ITS SECRETARY.

8. KERALA COASTAL ZONE MANAGEMENT AUTHORITY,
SASTRA BHAVAN, PATTOM, THIRUVANANTHAPURAM-695 004
REPRESENTED BY ITS MEMBER SECRETARY.

WP(C).No. 26435 of 2013 (S)

:: 2 ::

9. CHIEF TOWN PLANNER
NEST, EXTRA POLICE ROAD, PANJAPURA JUNCTION
VIKAS BHAVAN.P.O., PIN -695 003.
10. DISTRICT COLLECTOR
ERNAKULAM, CIVIL STATION, KAKKANAD, PIN 682030.
11. MULAVUKAD GRAMA PANCHAYAT
MULAVUKAD.P.O., KOCHI -682 504
REPRESENTED BY ITS SECRETARY.
12. KERALA STATE POLLUTION CONTROL BOARD
PLAMOODU JUNCTION, PATTOM PALACE.P.O.
THIRUVANANTHAPURAM -695004
REPRESENTED BY ITS CHAIRMAN.
13. KERALA STATE ENVIRONMENT IMPACT ASSESSMENT AUTHORITY
DIRECTORATE OF ENVIRONMENT AND CLIMATE CHANGE
PALLIMUKKU, PETTAH.P.O., TRIVANDRUM -695024
REPRESENTED BY ITS CHAIRMAN.
14. SOUTHERN NAVAL COMMAND HEADQUARTERS
NAVAL BASE, WILLINGTON ISLAND, KOCHI -682 004
REPRESENTED BY ITS FLAG OFFICER COMMANDING-IN-CHIEF.

R-R1 & 2, R9, R10, R13 BY SPL. GOVERNMENT PLEADER SRI.VIJU ABRAHAM
R3 BY ADV. SRI.TPM.IBRAHIM KHAN (SR.)
R3 BY ADV. SRI.T.U.ZIYAD
R3 BY ADV. SRI.K.M.ABDUL MAJEED
R3 BY ADV. SMT.PRIYAEELIZABETH BABU
R3 BY ADV. SRI.K.G.MATHEWS
RADDL-RR-R4 BY ADV.SRI.P.K.IBRAHIM
RADDL-RR-R4 BY ADV.SMT.K.P.AMBIKA
RADDL-RR-R4 BY ADV.SMT.A.A.SHIBI
R-R5 BY ADV.SRI.V.ABRAHAM MARKOS
R-R5 BY ADV.SRI.ABRAHAM JOSEPH MARKOS
R-R5 BY ADV.SRI.ABRAHAM VARGHESE THARAKAN
R-R5 BY ADV.SRI.TOM THOMAS (KAKKUZHIYIL)
R3 BY ADV. SRI.K.RAMAKUMAR (SR.)

R11 BY ADV. SRI.K.BALACHANDRAN (PN)
R ADVOCATE GENERAL SRI.K.P.DANDAPANI
R8 BY ADV. SRI.K.R.SUNIL, KERALA COASTAL ZONE MANAGEMENT AUTHORITY
R-R6,R7 & 14 BY ADV. SRI.N.NAGARESH, ASSISTANT SOLICITOR GENERAL
R12,R13 BY ADV.SRI. M.AJAY,SC, KERALA STATE POLLUTION CONTROL BOARD

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ALONG WITH W.P.
(C)NO.31081/13, THE COURT ON 23.12.2015 DELIVERED THE FOLLOWING:

WP(C).No. 26435 of 2013 (S)

APPENDIX

PETITIONERS' EXHIBITS:

EXHIBIT P1 : TRUE COPY OF THE GOVERNMENT ORDER VIDE NO.G.O.(MS)
NO.269/2013/LSGD DT.27-7-2013.

EXHIBIT P1A: TRUE COPY OF THE RTI REQUEST MADE BY THE PETITIONER
BEFORE VILLAGE OFFICER, MULAVUKAD AND ITS REPLY ALONG WITH BTR
EXTRACT OF PROPERTY COMPRISED IN SY.31/4 AND 31/20 OF MULAVUKAD
VILLAGE.

EXHIBIT P1B: TRUE PRINT OUT OF THE GOOGLE EARTH IMAGE OF BOLGHATTY
ISLAND PRIOR TO RECLAMATION AS ON 7.11.2002 AND AFTER RECLAMATION AS
ON 26.12.2005.

EXHIBIT P1C: TRUE PRINTOUT OF THE LAY OUT MAP OF PORT AREA PREAPRED
BY COCHIN PORT TRUST DATED 1.11.2010.

EXHIBIT P1D: TRUE TYPED COPY OF THE GAZETTE NOTIFICATION VIDE SRO 58
PUBLISHED IN GAZETTE OF INDIA DATED 12.1.1952.

EXHIBIT P1E: TRUE COPY OF THE INDIA GAZETTE NOTIFICATION VIDE GSR 107
(E) DATED 26.2.2001.

EXHIBIT P1F: TRUE COPY OF THE INDIA GAZETTE NOTIFICATION VIDE GSR 376
(E) DATED 21.6.2006.

EXHIBIT P1G: TRUE COPY OF THE REQUEST DATED 28.10.2009 MADE BY THE 5TH
RESPONDENT TO MINISTRY OF SHIPPING SEEKING PERMISSION FOR LEASING
OUT 7 PLOTS OF LAND.

EXHIBIT P1H: TRUE COPY OF THE COMMUNICATION DATED 4.6.2010 MADE BY
MINISTRY OF SHIPPING TO 5TH RESPONDENT.

EXHIBIT P1I: TRUE COPY OF THE ALLOTMENT LETTED DATED 26.11.2010 ISSUED
BY 5TH RESPONDENT TO 3RD RESPONDENT.

EXHIBIT P1J: TRUE COPY OF THE NOTE DATED 18.7.2013 SUBMITTED TO 2ND
RESPONDENT BY THE CHIEF TOWN PLANNER.

EXHIBIT P2 : TRUE COPY OF THE G.O.(MS) NO.201/2007/LSGD DT.1-9-2007 ALONG
WITH ITS ENGLISH TRANSLATION.

EXHIBIT P3 : TRUE COPY OF THE CRZ CUM ENVIRONMENTAL CLEARANCE SANCTIONED BY STATE ENVIRONMENTAL IMPACT ASSESSMENT AUTHORITY VIDE NO.86/SEIAA/KL/379/2013 DT.23-8-2013.

EXHIBIT P4 : TRUE COPY OF THE LETTER NO.LULU/ DIRECTOR/ BOLGATTY/GOVT.2013-01 DATED 6.4.2013 MADE BY THE 3RD RESPONDENT PRODUCED ALONG WITH ADDITIONAL AFFIDAVIT DATED 15.11.2013.

EXHIBIT P5 : TRUE COPY OF THE NOTE FOR THE COUNCIL OF MINISTERS APPROVED BY RESPONDENTS 1 AND 2 AND MINISTER FOR TAKING DECISION IN THE CABINET VIDE FILE NO.28514/RB/2013/LSGD PRODUCED ALONG WITH ADDITIONAL AFFIDAVIT DATED 15.11.2013

WP(C).No. 26435 of 2013 (S)

:: 2 ::

EXHIBIT P6 : TRUE COPY OF THE MINUTES OF COUNCIL OF MINISTERS HELD ON 24.7.2013 REGARDING CONSTRUCTION PROJECT OF 3RD RESPONDENT VIDE FILE NO.28514/R.B.1/13/LSGD AND ITEM NO.3964 PRODUCED ALONG WITH ADDITIONAL AFFIDAVIT DATED 15.11.2013.

EXHIBIT P7: TRUE COPY OF THE GOVERNMENT ORDER VIDE G.O.(MS) NO.79/99/LAD DATED 13.4.1999 VARYING STRUCTURE PLAN FOR CENTRAL CITY OF KOCHI PRODUCED ALONG WITH ADDITIONAL AFFIDAVIT DATED 15.11.2013.

EXHIBIT P8: TRUE COPY OF THE FIRST TWO PAGES OF GOVERNMENT ORDER VIDE GO(MS)NO.10/07/LSGD DATED 8/1/2007 NOTIFYING THE DRAFT OF THE VARIED SCHEME OF STRUCTURE PLAN FOR CENTRAL CITY OF KOCHI PRODUCED ALONG WITH ADDITIONAL AFFIDAVIT DATED 15.11.2013.

EXHIBIT P9: TRUE COMPUTER PRINT OUT OF EXISTING LAND USE PLAN AS VARIED IN 2007 AS PER EXT.P8 AND UPDATED UPTO 2009 FOR CENTRAL CITY, KOCHI PRODUCED ALONG WITH ADDITIONAL AFFIDAVIT DATED 15.11.2013.

EXHIBIT P10: TRUE COMPUTER PRINTOUT OF THE HINDU DATED 20.1.2007 DAILY REPORTING THE PROPOSAL FOR ZONING REGULATION VARIATION IN STRUCTURAL PLAN OF KOCHI PRODUCED ALONG WITH REPLY AFFIDAVIT DATED 24.1.2014.

EXHIBIT P11: TRUE COMPUTER PRINTOUT OF THE HINDU DATED 8.6.2007 DAILY REPORTING THE FINAL NOTIFICATION OF VARIED STRUCTURE PLAN OF KOCHI PRODUCED ALONG WITH REPLY AFFIDAVIT DATED 24.1.2014.

EXHIBIT P12: TRUE COPY OF THE INTEGRATED CONSENT DATED 17.8.2012 ISSUED BY THE KERALA STATE POLLUTION CONTROL BOARD TO THIRD RESPONDENT.

EXHIBIT P13: TRUE COPY OF THE DOCUMENTATION PAGE OF CRZ STATUS REPORT OF THE PROJECT SITE PREPARED BY CENTRE FOR EARTH AND SCIENCE STUDIES, THIRUVANANTHAPURAM VIDE NO.CESS-CRZ-07-2012.

EXHIBIT P14: TRUE COPY OF THE TECHNICAL EVALUATION REPORT MADE BY JOINT DIRECTOR OF KERALA STATE COUNCIL FOR SCIENCE, TECHNOLOGY AND ENVIRONMENT VIDE FILE NO.073/ENV/12/CZMA DATED 13.6.2012.

EXHIBIT P15: TRUE COPY OF THE PLAN NO.34 OF CZMP OF KERALA CONTAINING MULAVUKAD VILLAGE.

EXHIBIT P16: TRUE COPY OF THE RELEVANT PAGES OF THE MINUTES OF THE 51ST MEETING OF THE KERALA COASTAL ZONE MANAGEMENT AUTHORITY.

EXHIBIT P17: TRUE COPY OF THE RELEVANT PAGES OF THE MINUTES OF 53RD MEETING OF KERALA COASTAL ZONE MANAGEMENT AUTHORITY HELD ON 27.12.2012 CONTAINING LIST OF PARTICIPANTS AND AGENDA ITEM 53.4.

EXHIBIT P18: TRUE COPY OF THE INDIA GAZETTE NOTIFICATION S.O.2843 (E) DATED 20.12.2011 CONSTITUTING KERALA COASTAL ZONE MANAGEMENT AUTHORITY.

WP(C).No. 26435 of 2013 (S)

:: 3 ::

EXHIBIT P19: TRUE COPY OF PAGE 1 AND 2 OF THE MINUTES OF 54TH MEETING OF KERALA COASTAL ZONE MANAGEMENT AUTHORITY HELD ON 15.4.2013 CONTAINING THE AGENDA ITEM NO.54.1.

EXHIBIT P20: TRUE COPY OF THE RECOMMENDATION LETTER NO.670/A2/12/KCZMA/S&TD DATED 29.1.2013 MADE BY KERALA COASTAL ZONE MANAGEMENT AUTHORITY.

EXHIBIT P21: TRUE COPY OF THE APPLICATION DATED 20.3.2011 SUBMITTED BY THE THIRD RESPONDENT BEFORE KERALA STATE ENVIRONMENT IMPACT ASSESSMENT AUTHORITY FOR ENVIRONMENT CLEARANCE.

EXHIBIT P22: TRUE COPY OF THE CHECKLIST OF DOCUMENTS SUBMITTED ALONG WITH THE APPLICATION DATED 20.3.2011 FOR ENVIRONMENTAL CLEARANCE BY THIRD RESPONDENT.

EXHIBIT P23: TRUE COPY OF THE GOOGLE IMAGE SHOWING THE DISTANCE FROM MANGALAVANAM BIRD SANCTUARY TO THE PROJECT SITE AT BOLGHATTY ISLAND.

EXHIBIT P24: TRUE COPY OF THE NOTIFICATION G.O.(MS)NO.42/04/F&WLD DATED 31.8.2004 NOTIFYING MANGALAVANAM BIRD SANCTUARY AS PROTECTED AREA.

EXHIBIT P25: TRUE COPY OF ANNEXURE 9 OF EIA GUIDANCE MANUAL FOR BUILDING AND CONSTRUCTION PROJECTS PUBLISHED BY MINISTRY OF ENVIRONMENT AND FORESTS SHOWING THE LIST OF CRITICALLY POLLUTED AREAS IN INDIA.

EXHIBIT P26: TRUE COPY OF THE GOOGLE IMAGE SHOWING DISTANCE FROM PROJECT SITE AT BOLGHATTY ISLAND TO ELOOR INDUSTRIAL CLUSTER.

EXHIBIT P27: TRUE COPY OF THE RELEVANT PAGES 1 AND 9 OF THE MINUTES OF 17TH MEETING OF STATE ENVIRONMENT EXPERT APPRAISAL COMMITTEE HELD ON 6.7.2013.

EXHIBIT P28: TRUE COPY OF THE GOOGLE IMAGE SHOWING PROJECT SITE AT BOLGHATTY ISLAND AND OUTER SEA.

EXHIBIT P29: TRUE COMPUTER PRINTOUT OF THE NEWS ITEM APPEARED IN THE ONLINE EDITION OF INDIA TODAY DATED 10.4.2012.

EXHIBIT P30: TRUE COMPUTER PRINTOUT OF THE NEWS ITEM APPEARED IN ONLINE EDITION OF HINDUSTAN TIMES DATED 14.8.2013.

RESPONDENTS' EXHIBITS:

EXT.R3(a): TRUE COPY OF THE TENDER NO.EM/T/16/BOLGHATTY/2010 OF COCHIN PORT TRUST.

EXT.R3(b): TRUE COPY OF THE BUILDING PERMIT DATED 11.10.2013 ISSUED BY THE MULAVUKADU PANCHAYAT.

WP(C).No. 26435 of 2013 (S)

:: 4 ::

EXT.R3(c): TRUE COPY OF ORDER DATED 29.1.2013 ISSUED BY THE KERALA COASTAL ZONE MANAGEMENT AUTHORITY.

EXT.R3(d): TRUE COPY OF ORDER DATED 2.9.2013 ISSUED BY DEPARTMENT OF ENVIRONMENT AND CLIMATE CHANGE.

EXT.R3(e): TRUE COPY OF THE INFORMATION REGARDING EXPERIENCE IN the TRADE OF TENDERER.

EXT.R3(f): TRUE COPY OF THE AUDITED FINANCIAL STATEMENT FOR THE LAST THREE YEARS OF THE TENDERER.

EXT.R3(g): COPIES OF ORIGINAL DOCUMENTS DEFINING THE CONSTITUTION OR LEGAL STATUS.

EXT.R3(h): TRUE COPY OF THE OFFICE MEMORANDUM DATED 23.5.2011 ISSUED BY MINISTRY OF ENVIRONMENT AND FOREST, GOVERNMENT OF INDIA.

EXT.R3(i): TRUE COPY OF THE OFFICE MEMORANDUM DATED 24.5.2011 ISSUED BY MINISTRY OF ENVIRONMENT AND FOREST, GOVERNMENT OF INDIA.

EXT.R4(a): TRUE COPY OF THE AGENDA ITEM NO.B2 OF THE BOARD OF TRUSTEE MEETING AND THE RESOLUTION NO.64 (AGENDA ITEM NO.B2) AT SERIAL NO.33 REGARDING RECLAMATION MADE BY THE COCHIN PORT TRUST DATED 9.3.2005.

EXT.R4(b): TRUE COPY OF THE CERTIFICATE ISSUED BY THE VILLAGE OFFICER,

MULAVUKAD, DATED 18.4.2012 DISCLOSING THESE FACTS.

EXT.R4(c): TRUE COPY OF THE RELEVANT PAGES OF THE MINUTES OF THE PROCEEDINGS OF THE 5TH RESPONDENT HELD ON 6.9.2010.

EXT.R4(d): TRUE COPY OF THE PRINTOUT TAKEN FROM THE WEBSITE OF THE MINISTRY OF CORPORATE AFFAIRS SHOWING THE DATE OF REGISTRATION OF THE 3RD RESPONDENT COMPANY.

EXT.R4(e): TRUE COPY OF THE RELEVANT PAGES OF THE LEASE DEED NO.3742 OF 2011 DATED 28.6.2011 REGISTERED AT THE SUB REGISTRAR'S OFFICE, ERNAKULAM. (PAGES 1 TO 3 AND 13 TO 16).

EXT.R4(f): TRUE COPY OF THE EXTRACT OF THE REPORT OF THE SUB COMMITTEE SUBMITTED TO THE KCZMA.

EXT.R4(g): PHOTOCOPY OF THE GOOGLE MAP OF THE BOLGATTY ISLAND TO SHOW THE LAND FORM BEFORE AND AFTER RECLAMATION.

EXT.R5(a): TRUE COPY OF JUDGMENT OF THE DIVISION BENCH OF THIS HON'BLE COURT DATED 25.1.2011 IN W.P.CN0.36882/10.

EXT.R5(b): TRUE COPY OF THE NOTIFICATION NO.G.S.R.376 (E) DATED 21.6.2006.

EXT.R5(c): TRUE COPY OF AGENDA ITEM NO.B2 OF 9.3.2005.

EXT.R5(d): TRUE COPY OF THE MINISTRY OF SHIPPING'S LETTER NO.PT-11033/4/2009-PT) CONTAINING GUIDELINES FOR LAND POLICY.

WP(C).No. 26435 of 2013 (S)

:: 5 ::

EXT.R5(e): TRUE COPY OF THE ORDER DATED 18.2.2012 ISSUED BY THE KERALA GOVERNMENT.

EXT.R5(f): TRUE COPY OF THE NOTIFICATION DATED 26.2.2001 ISSUED BY THE GOVERNMENT OF INDIA, MINISTRY OF SHIPPING PURSUANT TO SECTION 2(q) OF THE MAJOR PORT TRUSTS ACT, 1963.

EXT.R5(g): TRUE COPY OF THE LETTER DATED 18.5.1999 ISSUED BY the GOVERNMENT OF KERALA TO THIS RESPONDENT.

EXT.R5(h): TRUE COPY OF THE GOVERNMENT NOTIFICATION DATED 22.8.2001 ISSUED BY THE GOVERNMENT OF KERALA.

EXT.R5(i): TRUE COPY OF THE TRIPARTITE AGREEMENT BETWEEN COCHIN PORT TRUST, GIDA AND GOVERNMENT OF KERALA DATED 21.4.2002.

// TRUE COPY //

ANTONY DOMINIC & P.V.ASHA, JJ.

W.P(C).Nos.26435 & 31081 of 2013

Dated this the 23rd day of December, 2015

JUDGMENT

Antony Dominic, J.

1. Issues raised in these Public Interest Litigations are intrinsically connected. Therefore, these cases were heard together and are being disposed of by this common judgment, treating W.P(C).31081/13 as the leading case and referring to the pleadings and documents therein, unless otherwise expressly stated hereafter.

2.The first respondent is the Cochin Port Trust, a major port governed by the provisions of the Major Port Trusts Act, 1963. In the meeting of the Board of Trustees of the Port Trust held on 9.3.2005, as per Ext.P1 agenda item, a proposal was placed for reclamation of about 8 hectares of land on the western side of Bolgatty Island. The purposes of such reclamation were the need for availability of sufficient area at Vallarpadam for the development of Port based Special Economic Zone and also for streamlining of the flow in the area and that the

WPC.26435/13 & 31081/13

2

better appearance for the shoreline. Ext.P1(a) resolution shows that after detailed discussions, the Board of Trustees resolved to approve the proposal for implementation of the reclamation project at an estimated cost of `3.93 crores. Accordingly, land was reclaimed in 2005.

3. The land thus reclaimed was remaining unutilized and by Ext.P3 letter dated 28.10.2009, the Cochin Port Trust sought permission of the Government of India for long term leasing of the plots of land mentioned therein, for a period of 99 years for commercial and other non-port related activities. Among the different plots of land that were mentioned in Ext.P3, one of the plots was the one reclaimed in 2005 and this was shown as located in Bolgatty (Mulavukadu Island) and the area thereof was shown as 31.05 Acres (12.5657 hectares). Ext.P3 was considered and by Ext.P4 order dated 4.6.2010, the Government of India conveyed its decision permitting the Port Trust to lease out the lands for 30 years, with option for renewal after 30 years at the then prevailing rates.

WPC.26435/13 & 31081/13

3

4. On the strength of the permission thus obtained by it, on 23.6.2010, the Cochin Port Trust issued Ext.P5 notice inviting tenders, inter alia, for leasing of 10 hectares of land at Bolgatty for 30 years on upfront basis, with an option for renewal after 30 years at the then prevailing scale of rates for a maximum period of 30 years, for setting up of hotels/resorts/ Convention Center/shopping mall/ commercial /office Complex, and allied facilities at Bolgatty Island near Marina in Ernakulam.

5. In response to Ext.P5, the only bid received was from Sri.Yusuff Ali M.A. Ext.R10(a) is the bid submitted by him and Ext.P6 is Annexure II thereof. The bid submitted by Sri.Yusuff Ali M.A. was placed for the consideration of the Board of Trustees in their meeting held on 6.9.2010 and Ext.P7 minutes of the meeting show that the Board resolved to approve the proposal to accept the single offer of Sri.Yusuff Ali M.A. for leasing out the 10 hectares of land at Bolgatty for a period of 30 years, with an option for renewal for a further period of 30 years. The

WPC.26435/13 & 31081/13

4

conditions subject to which the resolution was passed are also incorporated in the resolution.

6.Ext.P8 is the lease deed executed in pursuance of

Ext.P7. However, that lease deed is executed between the Board of Trustees of Cochin Port Trust and the lessee therein, M/s.Lulu Convention and Exhibition Centre Private Ltd., a company incorporated under the Companies Act, which is the 10th respondent herein. Subsequently, Ext.P9 letter was issued by the 10th respondent on 6.4.2013 to the Secretary to the Local Self Government Department, Government of Kerala for obtaining building permit, stating that their proposed project consisted of hotel, convention centre and service apartments and would have a built up area of 147198 sq.ft with an anticipated project cost of over 400 crores, generating more than 500 employment opportunities. In this letter, describing their project as a large scale developmental one, they requested the Secretary to the Government to do the needful in the matter.

WPC.26435/13 & 31081/13

7.The request of the 10th respondent was placed before

the Cabinet and Ext.P10 is the Note to the Council of Ministers.

In this note, the point framed for decision was whether special permission may be given to the 10th respondent for construction in the land having an extent of 10.59 hectares, relaxing the zoning provisions of the Structure Plan for Central City, Kochi and special town planning schemes subject to the condition that the construction should satisfy the conditions stipulated in the prevailing Building Rules and all other statutory provisions. Ext.P11

proceedings of the cabinet meeting held on 24.7.2013 shows that the proposal as contained in Ext.P10 was approved.

On that basis, on 27.7.2013, the Government issued Ext.P12 order according special permission to the 10th respondent for construction in the land, relaxing the zoning provisions of the Structure Plan for Central City, Kochi and special town planning schemes subject to the condition that the construction should satisfy the conditions stipulated in the prevailing Building Rules and all other statutory provisions. It was also ordered that further necessary action in the matter would be taken

WPC.26435/13 & 31081/13

by the Secretary, Mulavukadu Grama Panchayat, before whom, an application for building permit was pending.

Subsequently, on 11.10.2013, the Mulavukadu Grama Panchayat issued Ext.P14 building permit to the 10th respondent.

8.It was in the aforesaid background, these writ petitions were filed as public interest litigations and in W.P(C).31081/13, the prayers made are to quash Ext.P7, the minutes of the meeting of the Board of Trustees; Ext.P8, the lease deed executed between the Board of Trustees of the Port Trust and the 10th respondent, the Company; Ext.P12, the Government Order relaxing the zoning provisions and Ext.P14, the building permit issued by the Mulavukadu Grama Panchayat. In so far as W.P(C).26435/13 is concerned, the reliefs include those sought for in W.P(C).31081/13 and reference will be made to those prayers in the latter part of this judgment.

9.On behalf of the respondents, the maintainability of the writ petitions was questioned, contending that this Court has already upheld the lease in a WPC.26435/13 & 31081/13

7

public interest litigation as per Ext.R10(b) judgment and that therefore, further public

interest litigations challenging the grant of lease

to the 10th respondent is not maintainable. In

support of this contention, learned counsel for the

Cochin Port Trust placed reliance on the Apex Court

judgment in Forward Construction Co. v. Prabhat

Mandal (Regd), Andheri [AIR 1986 SC 391], while

the learned senior counsel appearing for the 10th

respondent relied on the judgment in State of

Karnataka v. All India Manufacturers Organisation

[(2006) 4 SCC 683].

10. This contention was mainly on the basis of

Ext.R10(b) judgment in W.P(C).36882/10, which was

filed by one Dijo Kappen, Managing Trustee, Centre

for Consumer Education (Reg.No.497/88), Main Road,

Pala, Kottayam District. The prayers in this writ

petition, which are extracted in Ext.R10(b) reads

thus:

WPC.26435/13 & 31081/13

8

"i) To call for the records leading to Exhibit P9 and issue a writ of certiorari or other appropriate writ order or direction quashing the same.

ii) To issue a writ of mandamus or any other appropriate writ order or direction commanding the Port Trust to retender the land in question by inviting fresh tenderers desirably a global tender process giving publicity in all leading National dailies.

iii) To issue a writ of mandamus declaring that the lease granted in favour of the 5th respondent is in violation of the provisions of Sections 82 & 83 of the Kerala Land Reforms Act and therefore the grant is void in law."

11.By Ext.R10(b), the writ petition was dismissed by

this Court at the admission stage.

In paragraph 6

of that judgment, this Court recorded thus:

"6. The 3rd respondent is a statutory body. It may have its own reasons for deciding to lease out the property held by it. The legality or the wisdom of the 3rd respondent in taking such a decision to lease out its property is not the subject matter of challenge in this writ petition. The challenge is only to the choice of

WPC.26435/13 & 31081/13

9

the 5th respondent. Whether the procedure followed by the 3rd respondent in choosing the 5th respondent as the lessee is strictly in accordance with the requirement of law is only one aspect of the matter which is required to be kept in mind in deciding the question whether this Court should interfere with the decision of the 3rd respondent. Assuming for the sake of argument that there is some lacuna in the procedure followed in making the choice of the 5th respondent, the same by itself, in our opinion, does not warrant interference. By interfering with the decision of the 3rd respondent, in the absence of any other prospective bidder who is willing to offer an amount higher than what is offered by the 5th respondent, this Court would only be scuttling the decision of the 3rd respondent without any benefit either to the 3rd respondent or to the public in general."

12.Law is settled that to proceedings under Article

226 of the Constitution of India, the principles of section 11 of the Code of Civil Procedure providing for res judicata are equally applicable.

As per

this provision, no court shall try any suit or

issue in which the matter directly and substantially in issue has been directly and

WPC.26435/13 & 31081/13

10

substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been substantially raised, and has been heard and finally decided by such Court.

Explanation IV thereof provides that any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation

VI provides that where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of section 11, be deemed to claim under the persons so litigating.

13.It was extending the principles contained in section 11 of the Code of Civil Procedure that the Apex Court in Forward Construction Co. (supra) held in paragraphs 19 to 22 thus:

WPC.26435/13 & 31081/13

11

"19. The second question for consideration is whether the present writ petition is barred by res judicata. This plea has been negatived by the High Court for two reasons : (1) that in the earlier writ petition the validity of the permission granted under R. 4(a)(i) of the Development Control Rules was not in issue; and (2) that the earlier writ petition filed by Shri Thakkar was not a bona fide one inasmuch as he was put up by some disgruntled builder, namely M/s. Western Builders.

20. So far as the first reason is concerned, the High Court in our opinion was not right in holding that the earlier judgment would not operate as res judicata as one of the grounds taken in the present petition was conspicuous by its absence in the earlier petition. Explanation IV to S. 11, C.P.C. provides that any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit. An adjudication is conclusive and final not only as to the actual matter determined but as to every other matter which the parties might and ought to have litigated and have had it decided as incidental to or essentially connected with the subject-matter of the litigation and every matter coming within the legitimate purview of the original action both in respect of the matters of claim or defence. The principle underlying Explanation IV is that where the parties have had an opportunity of controverting a matter that should be taken to be

WPC.26435/13 & 31081/13

12

the same thing as if the matter had been actually controverted and decided. It is true that where a matter has been constructively in issue it cannot be said to have been actually heard and decided. It could only be deemed to have been heard and decided. The first reason, therefore, has absolutely no force.

21. The second reason given by the High Court, however, holds good. Explanation VI to S. 11 provides

"Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section be deemed to claim under the persons so litigating."

But it is only when the conditions of Explanation VI are satisfied that a decision in the litigation will bind all persons interested in the right litigated and the onus of proving the want of bona fide in respect of the previous litigation is on the party seeking to avoid the decision. The words "public right" have been added in Explanation VI in view of the new S. 91, C.P.C. and to prevent multiplicity of litigation in respect of public right. In view of Explanation VI it cannot be disputed that S. 11 applies to public interest litigation as well but it must be proved that the previous litigation was the public interest litigation, not by way of a private grievance. It has to be a bona fide litigation in

WPC.26435/13 & 31081/13

13

respect of a right which is common and is agitated in common with others.

22. The High Court in the earlier writ petition had recorded a finding that it was not a bona fide litigation and that Shri Thakkar, the petitioner in that case, had been put up by M/s. Western Builders. This finding excludes the application of S. 11, C.P.C. in the present case. The possibility of litigation to foreclose any further enquiry into a matter in which an enquiry is necessary in the interest of public cannot be overruled. In view of the finding of the High Court that the previous writ petition was not a bona fide one, the present

writ petition would not be barred by S. 11 of the C.P.C. and the High Court was justified in so holding but not because of the first reason but because of the second reason."

14. This contention was supported by the learned senior counsel appearing for the 10th respondent who placed reliance on the Apex Court judgment in State of Karnataka v. All India Manufacturers Organisation [(2006) 4 SCC 683], where, the issue of res judicata in so far as public interest litigations are concerned, was considered by the Apex Court in detail and it was held thus in paragraphs 32 to 50:

WPC.26435/13 & 31081/13

14

32. Res judicata is a doctrine based on the larger public interest and is founded on two grounds: one being the maxim *nemo debet bis vexari pro una et eadem causa* (no one ought to be twice vexed for one and the same cause) and second, public policy that there ought to be an end to the same litigation. It is well settled that Section 11 of the Civil Procedure Code, 1908 (hereinafter "CPC") is not the foundation of the principle of res judicata, but merely statutory recognition thereof and hence, the section is not to be considered exhaustive of the general principle of law. The main purpose of the doctrine is that once a matter has been determined in a former proceeding, it should not be open to parties to reagitate the matter again and again. Section 11 CPC recognises this principle and forbids a court from trying any suit or issue, which is res judicata, recognising both "cause of action estoppel" and "issue estoppel". There are two issues that we need to consider, one, whether the doctrine of res judicata, as a matter of principle, can be applied to public interest litigations and second, whether the issues and findings in Somashekar Reddy [(1999) 1

KLD 500] constitute res judicata for the present litigation.

33. Explanation VI to Section 11 states:

"Explanation VI.--Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the

WPC.26435/13 & 31081/13

15

purposes of this section, be deemed to claim under the persons so litigating."

34. Explanation VI came up for consideration before this Court in *Forward Construction Co. v. Prabhat Mandal (Regd.)* (hereinafter "*Forward Construction Co.*"). This Court held that in view of Explanation VI, it could not be disputed that Section 11 applies to public interest litigation, as long as it is shown that the previous litigation was in public interest and not by way of private grievance. Further, the previous litigation has to be a bona fide litigation in respect of a right which is common and is agitated in common with others.

35. As a matter of fact, in a public interest litigation, the petitioner is not agitating his individual rights but represents the public at large. As long as the litigation is bona fide, a judgment in a previous public interest litigation would be a judgment in rem. It binds the public at large and bars any member of the public from coming forward before the court and raising any connected issue or an issue, which had been raised should have been raised on an earlier occasion by way of a public interest litigation. It cannot be doubted that the petitioner in *Somashekar Reddy* was acting bona fide. Further, we may note that, as a retired Chief Engineer, *Somashekar Reddy* had the special technical expertise to impugn the Project on the grounds that he did and so, he cannot be dismissed as a busybody. Thus, we are

WPC.26435/13 & 31081/13

16

satisfied in principle that Somashekar Reddy, as a public interest litigation, could bar the present litigation.

36. We will presently consider whether the issues and findings in Somashekar Reddy actually constitute res judicata for the present litigation. Section 11 CPC undoubtedly provides that only those matters that were "directly and substantially in issue" in the previous proceeding will constitute res judicata in the subsequent proceeding. Explanation III to Section 11 provides that for an issue to be res judicata it should have been raised by one party and expressly denied by the other:

"Explanation III.--The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other."

37. Further, Explanation IV to Section 11, states:

"Explanation IV.--Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit."

38. The spirit behind Explanation IV is brought out in the pithy words of Wigram, V.C. in *Henderson v. Henderson* as follows: (All ER pp. 381 I-382 A)

WPC.26435/13 & 31081/13

"The plea of res judicata applies, except in special case (sic), not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time."

39. In *Greenhalgh v. Mallard* [(1947) 2 All ER 255 (CA)] (hereinafter "Greenhalgh"), Somervell, L.J. observed thus:

"I think that on the authorities to which I will refer it would be accurate to say that *res judicata* for this purpose is not confined to the issues which the court is actually asked to decide, but that it covers issues or facts which are so clearly part of the subject-matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them."

40. The judgment in *Greenhalgh* was approvingly referred to by this Court in *State of U.P. v. Nawab Hussain* [(1977) 2 SCC 806]. Combining all these principles, a Constitution Bench of this Court in *Direct Recruit Class II Engg. Officers' Assn. v. State of Maharashtra* expounded on the principle laid down in *Forward Construction Co.* by holding that:

"[A]n adjudication is conclusive and final not only

WPC.26435/13 & 31081/13

18

as to the actual matter determined but as to every other matter which the parties might and ought to have litigated and have had (sic) decided as incidental to or essentially connected with (sic) subject-matter of the litigation and every matter coming into the legitimate purview of the original action both in respect of the matters of claim and defence. Thus, the principle of constructive *res judicata* underlying Explanation IV of Section 11 of the Code of Civil Procedure was applied to writ case. We, accordingly hold that the writ case is fit to be dismissed on the ground of *res judicata*."

41. With these legal principles in mind, the question, therefore, arises as to what exactly was sought in *Somashekar Reddy*, how it was decided by the High Court in the first round of litigation, and what has been sought in the present litigation arising at the instance of Mr J.C. Madhuswamy and others. In order to show that the issue of excess

land was "directly and substantially in issue" in Somashekar Reddy we will first examine the prayers of the parties, the cause of action, the averments of parties and the findings of the High Court in Somashekar Reddy.

42. First, learned counsel for the respondents has pointedly drawn our attention to the identity of the prayers made in the previous public interest litigation by Somashekar Reddy as compared to the prayers made in the present case of Mr Madhuswamy and others. The prayers in

WPC.26435/13 & 31081/13

19

Somashekar Reddy's petition were: (a) for quashing the FWA, and (b) for directing an inquiry by the CBI in the matter and to prosecute the offenders. In Mr Madhuswamy's petition, the prayers were: (a) to direct the CBI to conduct inquiries to various acts as enumerated by Items 1 to 16 (specifically the issue of excess land), and (b) for quashing the various agreements, and acts done in pursuance of the Project and consequently, to denotify the land of all farmers situated away from the peripheral road and link road. We are therefore, satisfied that the prayers made in Somashekar Reddy and in Mr Madhuswamy's writ petitions are substantially the same.

43. Second, the cause of action in both Somashekar Reddy and the present cases is the FWA, which includes the provisions for acquiring 20,193 acres of land for the Project (comprising 13,237 acres of private land and 6956 acres of government land). Indeed, it was stated in Somashekar Reddy's writ petition that the land requirement in Schedule I of the FWA was "highly exaggerated" and would illegally create "huge profits" for Nandi. Somashekar Reddy thus prayed that the FWA be quashed--this prayer was, however, specifically rejected. The very same FWA that was upheld earlier has now been impugned in the present case.

44. Third, in both Somashekar Reddy and

Madhuswamy's petitions, the averment was that

WPC.26435/13 & 31081/13

20

excess land than required for the implementation of the Project was being acquired by the State Government at the behest of Nandi and that the Project was nothing but a camouflage to carry out a real estate business by Nandi. The High Court records the following contention of Somashekar Reddy's counsel: (Kant LJ p. 254, para 47)

"47. The next submission of the counsel for the petitioner is that Government of Karnataka though ostensible (sic ostensibly) purported to form an Express Highway has in reality allowed the 2nd respondent to develop the townships as a developer by conferring a huge largess (sic largesse) by way of giving 20,000 acres of land.... According to petitioner, the land required for the construction of four-lane highway is only 2775 acres, whereas the remaining land would be utilised for the purpose of development of the towns thereby permitting Respondent 2 to develop townships as a developer and earn huge profits."

45. The averment of Somashekar Reddy regarding excess land came to be considered by the High Court which records some of the opposing contentions of the respondent State, in the following terms:
"As a mega project like the Expressway involves considerable extent of land, answering respondent [the State] has agreed to provide the minimum extent of land required for the Project partly out of the land owned by the State and by acquiring

WPC.26435/13 & 31081/13

21

the balance. The second respondent will not only construct the proposed Expressway but also link roads, peripheral road, interchanges, service roads, toll plazas and maintenance area, etc. in

addition to the townships." (Kant LJ p. 235, para 15)

"It is stated that the project by its very nature requires considerable extent of land and that is why the respondent has agreed to provide the land to the extent available with it and acquire the balance and make available the same to the replying respondent. There are mutual obligations on both the parties under the impugned agreement and Respondent 1 is only facilitating the acquisition of land for which the replying respondent has to pay at the existing market rates." (Kant LJ p. 240, para 25)

46. Crucially, two very striking findings have been made by the High Court in Somashekar Reddy as follows:

"So out of 20,193 acres land required for the Expressway would be 6999 acres leaving 13,000 acres for development of townships. Government of Karnataka in its written statement has said that it has agreed to provide minimum extent of land for the Project partly out of the land owned by the Government and by acquiring the balance. Permission has been given to develop the five townships instead of 7, proposed by Respondent 2 to make the project viable." (Kant LJ p. 256, para 52)

WPC.26435/13 & 31081/13

22

"46. The submission that the contract was entered in a clandestine manner also cannot be accepted.... Respondents in their statement of objections have admitted that this point was raised on the floor of the House and the respondent made detailed presentation on this subject in the House.... Every minute detail was explained including the scientific method adopted by the respondent for identification of the land for the project." (Kant LJ p. 254, para 46)

47. All of these unequivocally show that the issue of excess land (and connected issues) was specifically raised by the petitioner in Somashekar Reddy and was also forcefully denied by the State. In fact, the decision in Somashekar

Reddy, went further with the High Court according to its imprimatur to the land requirements under the FWA amounting to 20,193 acres, which in no small measure, resulted from the State's successful defence that it had provided the "bare minimum of land" for the Project calculated by a "scientific method". The judgment also contains copious references to the issue of land (including the acreage), the types of land to be acquired, the land requirement for different aspects of the Project, the scientific techniques involved in identifying the land and road alignment, etc. In these circumstances, it cannot be doubted that Explanation III to Section 11 squarely applies. It is clear that the issue of excess land under the FWA was "directly and substantially in issue" in

WPC.26435/13 & 31081/13

23

Somashekar Reddy and hence, the findings recorded therein having reached finality, cannot be reopened in this case.

48. The principle and philosophy behind Explanation IV, namely, to prevent "the abuse of the process of the court" (as stated in Greenhalgh) through reagitation of settled issues, provides yet another ground to reject the appellants' contentions. For instance, the High Court specifically records (vide para 29) of the impugned judgment that:

"It is common case of the parties that the validity of the FWA had earlier been challenged in Somashekar Reddy case on all conceivable grounds including the one that land in excess of what is required for the Project had been acquired by the State Government."

49. In the face of such a finding by the High Court, Explanation IV to Section 11 squarely applies as, admittedly, the litigation in Somashekar Reddy exhausted all possible challenges to the validity of the FWA, including the issue of excess land. Merely because the present petitioners draw semantic distinctions and claim that the excess land not having been identified at the stage of the litigation in Somashekar Reddy, the Project should

be reviewed, the issue does not cease to be res judicata or covered by principles analogous thereto. If we were to re-examine the issues that had been raised/ought to have been raised in

WPC.26435/13 & 31081/13

24

Somashekar Reddy it would simply be an abuse of the process of the court, which we cannot allow.

50. As we have pointed out, the cause of action, the issues raised, the prayers made, the relief sought in Somashekar Reddy's petition and the findings in Somashekar Reddy and the claims and arguments in the present petitions were substantially the same. Therefore, it is not possible to accept the contention of the appellants before us that the judgment in Somashekar Reddy does not operate as res judicata for the questions raised in the present petitions."

15. However, the learned counsel appearing for the petitioners attempted to distinguish the aforesaid judgments by placing reliance on the judgment of the Apex Court in V. Purushotham Rao v. Union of India [(2001) 10 SCC 305], where, in paragraphs 19 and 20, the Apex Court has relaxed the applicability of the principles of res judicata in so far as public interest litigations relating to issues of grave concern to the general public are concerned, by holding thus:

WPC.26435/13 & 31081/13

25

"19. Coming to the second question, Explanation IV to Section 11 of the Civil Procedure Code postulates that any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit. Order 2 Rule 2 of the Code of Civil Procedure provides that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action and if he omits to sue in respect of, or intentionally relinquishes, any portion of his claim, then he shall not afterwards sue in respect of the portion, so omitted or relinquished. By virtue of Explanation to Section 141 of the Code of Civil Procedure, since proceedings under Article 226 of the Constitution are excluded from the expression "proceedings", therefore, the Civil Procedure Code is not required to be followed in a proceeding under Article 226 unless the High Court itself has made the provisions of the Civil Procedure Code applicable to a proceeding under Article 226. Then again, the principles of Section 11 as well as Order 2 Rule 2, undoubtedly contemplate an adversarial system of litigation, where the court adjudicates the rights of the parties and determines the issues arising in a given case. The public interest litigation or a petition filed for public interest cannot be held to be an adversarial system of adjudication and the petitioner in such case, merely brings it to the notice of the court, as to how and in what manner the public interest is

WPC.26435/13 & 31081/13

26

being jeopardised by arbitrary and capricious action of the authorities. In the case of Rural Litigation and Entitlement Kendra v. State of U.P. [1989 Supp (1) SCC 504] which is commonly known as Doon Valley case, such a contention had been raised, as is apparent from para 14 of the judgment viz. the decision of the Court dated 12-3-1985 (Rural Litigation and Entitlement Kendra v. State of U.P. [(1985) 2 SCC 431] was final in certain aspects, including the release of A category mines outside the city limits of Mussoorie from the proceedings and in view of such finality it was not open to this Court in the

same proceedings at a later stage to direct differently in regard to what had been decided earlier. The Court repelled the same by holding that the writ petitions are not inter partes disputes and have been raised by way of public interest litigation and the controversy before the Court is as to whether for social safety and for creating a hazardless environment for the people to live in, mining in the area should be permitted or stopped. The Court hastened to add: (SCC p. 515, para 16)

"We may not be taken to have said that for public interest litigations, procedural laws do not apply. At the same time it has to be remembered that every technicality in the procedural law is not available as a defence when a matter of grave public importance is for consideration before the court. Even if it is said that there was a final order, in a dispute of this type it would be

WPC.26435/13 & 31081/13

27

difficult to entertain the plea of res judicata." Thus even in the selfsame proceedings, the earlier order though final, was treated not to create a bar inasmuch as the controversy before the Court was of grave public interest. The learned counsel appearing for the appellants drew our attention to the decision of this Court in the case of Forward Construction Co. v. Prabhat Mandal [(1986) 1 SCC 100] whereunder the Court did record a conclusion that Section 11 of the Civil Procedure Code applied to public interest litigation. In our considered opinion, therefore, the principle of constructive res judicata cannot be made applicable in each and every public interest litigation, irrespective of the nature of litigation itself and its impact on the society and the larger public interest which is being served. There cannot be any dispute that in competing rights between the public interest and individual interest, the public interest would override. In Centre for Public Interest Litigation case [1995 Supp (3) SCC 382] which had been filed in this Court, the prayer that had been made was to lay down the guidelines for the discretion being exercised in the matter of allotment of gas agencies, petroleum dealership and others. It is no doubt true that the applicant therein could have made a prayer for examining the legality of the

allotments already made but as the applicant states in the writ petition filed in the Delhi High Court that he had no knowledge about the persons to whom such allotments had been made and in fact the Delhi High Court itself on a petition being

WPC.26435/13 & 31081/13

28

filed, called upon the respondents to submit the list of such allottees, whereafter notices could be issued to the allottees. That apart, when this Court entertained another public interest litigation, filed by Common Cause in respect of 15 discretionary allotments made in favour of 15 persons, the Court did entertain the same and instead of treating the earlier decision to be a bar and applying the principle of constructive res judicata, the Court relied upon the same and cancelled the allotments made in favour of those 15 persons who had been arrayed as parties to the said petition filed under Article 32. That apart, the writ petitions, the judgments of which are the subject-matter of challenge in these appeals, had been filed in the Delhi High Court and were pending when Common Cause case was taken up by this Court. This Court initially stayed the proceedings and issued notice in the transfer petitions but ultimately, vacated the stay order and instead of bringing the writ petitions to this Court on transfer, directed the Registry of the Court to send the petitions along with the annexures to the High Court and required the High Court to examine the issues involved in the writ petitions and go into the validity of the allotments of petrol pumps/gas agencies to various persons. In view of the aforesaid positive direction in para 31 of the judgment of this Court in Common Cause case it is difficult for us to sustain the plea of bar of constructive res judicata, as urged by the counsel, appearing for

WPC.26435/13 & 31081/13

29

the appellants. In this connection, the counsel also brought to our notice, observation made in the

review petition judgment in Common Cause case, [(1999) 6 SCC 667] SCC in para 115, which is quoted hereinbelow in extenso: (SCC p. 733)
"115. It is contended that since the allotments made by the petitioner till the filing of the writ petition in this Court, in spite of a challenge having been raised therein, were not set aside and only guidelines were settled for future exercise of discretionary quota, tacit stamp of judicial approval shall be deemed to have been placed on the allotments made by the petitioner and consequently those allotments could not have been reopened on the principle of constructive res judicata. Normally, we would have accepted this argument, but in this case we cannot go to that extent."

According to the learned counsel, the three-Judge Bench accepted the contention of the applicability of principle of constructive res judicata and, therefore, this Bench being a two-Judge Bench must be bound by the said observations or in the alternative, may refer the matter to a larger Bench. We are not in a position to accept either of these submissions. It may be stated at the outset that the three-Judge Bench was concerned with the review petition that had been filed in relation to the order dated 4-11-1996 since reported in Common Cause. The learned Judges committed an error in the beginning in thinking that the review petition filed by Capt. Satish Sharma was in

WPC.26435/13 & 31081/13

30

relation to both the judgments viz. Common Cause as well as Common Cause. In the review petition, the Court was concerned with the correctness of the directions contained in the order dated 4-11-1996 to institute criminal prosecution against the Minister concerned and levy of penalty as exemplary damages to the tune of Rs 50 lakhs. It is in that context the Court made the aforesaid observations not noticing the fact that in Common Cause the Court had earlier directed the High Court to dispose of the two writ petitions pending in the High Court and decide the legality of the order of discretionary allotment made by the Minister concerned. It is indeed interesting to notice that in para 125 of the judgment of the three-Judge Bench, the Court itself had indicated

that the conduct of the Minister concerned in making allotments of petrol outlets was atrocious and reflects a wanton exercise of power by the Minister. But what the Court wanted to examine and ultimately held was that the said action fell short of "misfeasance in public office" which is a specific tort and the ingredients of that tort were not wholly met in the case, so that there was no occasion to award exemplary damages. It would indeed be a travesty of justice to accept the submission of the counsel for the appellants that the three-Judge Bench expressed an opinion that the principle of constructive res judicata would apply to the case in hand, so as to debar the High Court from entertaining the writ petitions and disposing of them on merits. As we have already

WPC.26435/13 & 31081/13

31

noted, prior to the three-Judge Bench judgment of this Court, the selfsame order of the Delhi High Court had been assailed in as many as 79 cases by approaching this Court by way of special leave petitions and all those petitions had been dismissed.

20. The extent to which corruption in the governing structure has corroded the very core of our democracy, the notoriety which the discretionary allotment of petroleum dealership and LPG gas agencies had acquired, the earlier petition under Article 32 entertained by this Court at the behest of Common Cause, the cancellation of 15 of such allotments and finally, the express direction therein to the High Court to dispose of the pending writ petitions after examining the individual cases, it is difficult for us to accept the bar of principle of constructive res judicata on the ground that the earlier judgment in the case of Centre for Public Interest Litigation has accorded any tacit approval or the subsequent so-called observation made in the three-Judge Bench decision of this Court in the review petition. We, therefore, unhesitatingly hold that the aforesaid contention is devoid of any substance."

16. But, as rightly pointed out by the learned senior

counsel appearing for the 10th respondent, the

WPC.26435/13 & 31081/13

32

aforesaid judgment of the Apex Court in V.

Purushotham Rao (supra) was distinguished by the

Apex Court in its subsequent judgment in Moumita

Poddar v. Indian Oil Corporation Limited [(2010) 9

SCC 291], where, it was held to have been rendered

in the peculiar facts of the case. The relevant

findings of the Apex Court contained in paragraph

43 reads thus:

"43. In our opinion, the aforesaid judgment in V. Purushotham Rao case was rendered under some very peculiar and exceptional circumstances. It was a case where allotment of retail outlets or petroleum products had been made by a Minister in violation of all norms while exercising his discretionary powers for making the allotments. These allotments had been made in the absence of any guidelines. The circumstances were such that this Court was constrained to make the observations relied upon by the learned Single Judge which are as under: (SCC pp. 334-35, para 23)

"23. So far as the fifth question is concerned, it is no doubt true that the appellants have invested considerable amount in the business and have operated it for about eight years but even on equitable considerations, we do not find any equity in favour of the appellants. The conduct of the

WPC.26435/13 & 31081/13

33

Minister in making the discretionary allotments has been found to be atrocious, in the very three-Judge Bench decision of this Court and in relation to similar allotments made by the said Minister in favour of 15 persons, who were respondents in Common Cause case. This Court came to hold that the allotments of the public property had been doled out in an arbitrary and discriminatory manner and the appellants had been held to be beneficiaries of such arbitrary orders of allotments. The question of granting the allottees relief on an equitable consideration did not arise at all, for the same reasons in a case like this, a sympathetic consideration on the ground of equity would be a case of misplaced sympathy and we refrain from granting any relief on any equitable consideration. In our view, the appellants do not deserve any equitable consideration."

The above observations make it abundantly clear that this Court was dealing with a situation where the Minister concerned had bestowed undue favour on the appellants in that case. Such is not a situation in the present case. Therefore, the aforesaid observations would be of little assistance to the appellant herein."

17.From the above principles laid down by the Apex

Court in the various judgments that were cited

before us, it is obvious that the principles

contained in section 11 of the Code of Civil

WPC.26435/13 & 31081/13

34

Procedure are equally applicable to public interest

litigations. This is all the more so in the light

of Explanation VI to section 11 of CPC.

18.Having thus seen the law on the subject, we shall

proceed to examine whether the present writ petitions are barred by any of these principles.

The prayers in W.P(C).26435/13 are the following:

"i) issue a writ of certiorari, any other appropriate writ or direction quashing Ext.P1 Government Order vide G.O.(Ms)No.269/2013/LSGD dated 27.07.2013 issued by the 2nd respondent in violation to the town planning statutes, Ext.P2 Government Order and law settled by this Honorable Court in Sayeesh Kumar and others v. State of Kerala and others (2005 KHC 1943);

ii) call for the records leading to Ext.P1, issued by the 2nd respondent;

iii) Issue a direction restraining the 3rd respondent from commencing and continuing construction work at the project site lies in Sy.No.31/4 and 31/20 of Mulavukad village at Bolghattty Island, by acting upon Ext.P1 government order, until the construction project of the 3rd respondent gets appropriate permission from town planning

WPC.26435/13 & 31081/13

35

department in accordance with law;

iv) to declare that property comprised in respondent-Sy.No.31/4 and 31/20 of Mulavukad Village is property belonging to and owned by Government of Kerala;

v) to declare that the reclamation of project site from backwater by 5th respondent Cochin Port Trust is illegal and void;

vi) issue writ of mandamus or any other appropriate writ or direction directing the 5th respondent to restore the kole wet land comprised in re-sy.31/4 and 31/20 of Mulavukad Village to its original position as it was prior to its reclamation;

vii) to call for the records leading to issuance of Ext.P12 Integrated Consent by 12th respondent and quash Ext.P12 issued under Water (Prevention and Control of Pollution) Act, 1974, Air (Prevention and Control of Pollution) Act, 1981 and Environment

Protection Act by issuing any appropriate writ or direction;

viii) to call for the records leading to Ext.P17 and Ext.P19 minutes of the meeting of 8th respondent and declare it as illegal, void and inoperative as it is vitiated by want of sufficient quorum prescribed by Ministry of Environment and Forest in its constituting notifications;

ix) to call for the records leading to Ext.P20 CRZ clearance recommendation made by 8th respondent

WPC.26435/13 & 31081/13

36

for the project proposed by the 3rd respondent and quash the same by issuing any appropriate writ of certiorari or any other writ order or direction;

x) to declare that the project proposed by the 3rd respondent before the 13th respondent attracts General Conditions specified in the schedule of EIA Notification 2006;

xi) to call for the records leading to Ext.P3 Environment by the 13th respondent and quash the same as without jurisdiction, null, void and inoperative, by issuing appropriate writ or direction;

xii) to direct the 14th respondent to examine the security aspects and threat vulnerability of the project and whether height of the proposed building would affect the operation of the naval commandment and its air port before issuing No Objection Certification to the project proposed by the 3rd respondent" and

xiii) pass such other orders as this Hon'ble Court may be pleased to grant on the facts and circumstances of the case."

19. Similarly, the prayers in W.P(C).31081/13 are

the following:

WPC.26435/13 & 31081/13

"i) Call for the records in Ext.P1 to P8 and quash Ext.P7 and P8 by issuing a Writ of Certiorari or any other appropriate Writ.

ii) Call for the records in Ext.P9 to P12 and quash Ext.P12 by issuing a Writ of Certiorari or any other appropriate Writ.

Iii) Call for the records in Ext.P14 and quash Ext.P14 by issuing a Writ of Certiorari or any other appropriate Writ.

vi) Pass such other orders that this Hon'ble Court may deem fit and proper in the facts and circumstances of the case."

20. Admittedly, W.P(C).36882/10 resulting in Ext.R10

(b) judgment was rendered at a time when Sri.Yusuff

Ali M.A. was chosen as the lessee and Ext.P19

letter of allotment was issued to him, describing

him as the Managing Director of the 10th respondent

company. In that writ petition, this Court upheld

the choice of the 5th respondent therein, viz.,

Sri.Yusuff Ali M.A. for the grant of lease in

pursuance of the tenders invited and declined the

reliefs sought for. In view of the issues that

WPC.26435/13 & 31081/13

were raised before this Court, though we have

accepted that the principles of res judicata are

applicable to proceedings under Article 226 of the Constitution of India, as contended by the learned counsel for the Port Trust and the 10th respondent, such application of the said principle cannot extend beyond Ext.P19 herein. Therefore, at best, the principles of res judicata can curtail the litigation only in so far as the choice of the lessee and the allotment to Sri.Yusuff Ali M.A., the Managing Director of the 10th respondent as per Ext.P19 herein. These principles cannot be further stretched to prevent the petitioners, who are not parties to the proceedings resulting in Ext.R10(b) judgment, from impugning the grant of lease in favour of the 10th respondent, a company incorporated under the provisions of the Company's Act or the clearances that were subsequently granted by the concerned authorities, including the environmental clearance, integrated consent, exemption from Town Planning Act or the building permit which are also subject matter of challenge

WPC.26435/13 & 31081/13

39

in these writ petitions. Therefore, we are not persuaded to reject these writ petitions in its totality, accepting the plea of res judicata raised by the learned counsel for the respondents.

21. The first issue raised by the counsel for the petitioners was that the Port Trust did not have ownership over the land leased out to the 10th respondent and therefore, it could not have leased out the land in question. According to the learned counsel, Ext.R1(b) dated 21.6.2006 is the notification issued by the Government of India in exercise of its powers under the provisions of the Indian Ports Act, 1908 and the Major Port Trusts Act, 1963, defining the port limits, which is subject to existing ownership of the land. He made reference to the provisions in the Kerala Land Assignment Act, 1960, Kerala Land Conservancy Act, 1957 and the Kerala Panchayat Raj Act, 1994 to contend that the land reclaimed is Government land. Counsel for the Petitioners also referred us to Ext.P2 possession certificate and Ext.P21 extract of the basic tax register issued by the Village Officer where the WPC.26435/13 & 31081/13

40

property in question has been shown as puramboke and Government owned. He also contended that the Mulavukadu Panchayat staked a claim over the land and referred to Ext.R5(a) letter dated 5.10.2011 issued

by the Port Trust, produced along with the counter affidavit filed by the Panchayat, denying the claim and asserting its ownership over the land in question. According to him, the provisions of the Major Port Trusts Act only indicate that the properties of the Government are vested in the Board of Trustees of the Cochin Port Trust and that such vesting is only for the limited purpose of administration and management and did not amount to vesting of ownership and title in the Board of Trustees.

22. On the other hand, this contention was strongly refuted by the Port Trust. They referred us to the provisions of the Indian Ports Act and the Major Port Trusts Act falling within entry 27 of list I to schedule VII of the Constitution of India and also Exts.R1(f) and R1(b) notifications issued by the Government of India in the year 2001 and 2006

WPC.26435/13 & 31081/13

41

respectively, to contend that the leased land is within the port limits, and that except those under existing ownership, rest of the lands are vested in the Board of Trustees and that it includes the land reclaimed by the port. Counsel referred us to the

provisions of Article 295 (1)(a) of the Constitution of India and Ext.R10(f) agreement between the Government of India and the Port Trust and also Ext.R1(g) and R1(i) settling ownership disputes between the Government of Kerala and other agencies which recognised the ownership of the Cochin Port Trust over the land vested in it and also on other lands reclaimed by it. Counsel also submitted that so far the Government of Kerala have not staked any ownership claim over the lands held by the Port, a dispute regarding title to the land could not be gone into in a writ proceedings instituted by strangers and much less in a Public Interest Litigation. This contention of the Cochin Port Trust was supported by the Government of Kerala and the senior counsel appearing for the 10th respondent.

WPC.26435/13 & 31081/13

42

23.The Port of Cochin was in existence even in the pre-constitution era and was a part of the State of Travancore-Cochin before the commencement of the Constitution of India. It is said to have been formed in 1341, when the heavy floods of that year silted up the mouths of the Musiris harbour and the surging waters forced a channel past the present

inlet into the sea. By virtue of Article 295 (1)(a) of the Constitution of India, all property and assets which immediately before its commencement were vested in any Indian State corresponding to a State specified in Part B of the First Schedule shall vest in the Union, if the purposes for which such property and assets were held immediately before such commencement will thereafter be purposes of the Union relating to any of the matters enumerated in the Union List. There cannot be any dispute that ports declared by or under law made by Parliament or existing law to be major ports, including their delimitation, and the constitution and powers of port authorities therein falls under entry 27 of the Union list under Schedule VII to the Constitution of India. Therefore, as a result of Article 295(1)(a), all

WPC.26435/13 & 31081/13

43

properties and assets of the Port of Cochin which were vested in the State of Travancore-Cochin before the commencement of the Constitution, vested in the Government of India. It was accordingly that the Port of Cochin was administered as a Department of the Government of India and was governed by the Indian Ports Act. This position continued till 29.2.1964 when the Major Port Trusts Act, 1963 was

made applicable to the Port of Cochin. It was thereafter that the Board of Trustees of the Cochin Port Trust came into existence.

24. Section 4 of the Indian Ports Act, 1908 conferred power on the Central Government to extend or withdraw the Act or certain provisions thereof to or from any port. Sub-section (2) of section 4 provided that any notification issued under clauses (a) or (b) of section 4(1) shall define the limits of the area to which it refers. Section 4(3) also provided that limits of the Port defined under sub section (2) may include piers, jetties, landing-places, wharves, quays, docks and other works made on behalf of the public for convenience of traffic, for safety of

WPC.26435/13 & 31081/13

44

vessels, or for the improvement, maintenance or good Government of the port and its approaches, whether within or without high-water-mark, and, subject to any rights of private property therein, any portion of the shore or bank within fifty yard of high-water-mark. Section 2(q) of the Major Port Trusts Act defines 'Port' as any major port to which the said Act applies within such limits as may, from time to

time, be defined by the Central Government for the purposes of the Act by notification in the official gazette. It is also provided that until a notification is so issued within such limits as may have been defined by the Central Government under the provisions of the Indian Ports Act.

25. In so far as it is relevant for the purposes of these cases, it is sufficient to notice that Ext.R1 (f) dated 26.2.2001 and Ext.R1(b) dated 21.6.2006 are the latest two notifications issued by the Central Government in exercise of its powers under section 5 of the Indian Ports Act, which empower the Central Government to alter the limits of any port, and section 2(q) of the Major Port Trusts Act. Clauses 1

WPC.26435/13 & 31081/13

45

to 4 in Ext.R1(b) notification dated 21.6.2006 defines the northern, southern, western and eastern boundaries of the Cochin port and clause 5 thereof provides the additional areas which are also included within the notified limits of the port. In so far as it is relevant, clause 5(a) reads thus:

"5. (a) all land belonging to the Cochin Port Trust and any areas reclaimed from the backwaters or the sea and that may be reclaimed within the limits specified above and accretion becoming

within these limits;

26.Ext.R1(b) notification dated 21.6.2006 was issued in

supercession of Ext.R1(f) notification dated

26.2.2001 and which reads thus:

MINISTRY OF SHIPPING, ROAD TRANSPORT AND HIGHWAYS
(Department of Shipping)
(PORTS WING)

NOTIFICATION

New Delhi, the 21st June, 2006

G.S.R.376(E)- In exercise of the powers conferred by section 5 of the Indian Ports Act, 1908 (15 of 1908) and clause (q) of section 2 of the Major Port Trusts Act, 1963 (38 of 1963) and in supersession of the notification of the

WPC.26435/13 & 31081/13

46

Government of India in the then Ministry of Shipping, (Ports Wing) number G.S.R. 107(E), dated the 26th February, 2001, except as respects things done or omitted to be done before such supersession, the Central Government hereby declares that the limits of the Port of Cochin shall be as follows:

The Port of Cochin shall comprise of all areas contained on land lying within 45.76 meters of High Water Line, Kerala backwaters and the sea bounded by lines joining of the following positions subject to the condition that the existing ownership rights of properties within the extended Port limits will not be affected and will remain as existing on the date of this notification:-

1. The northern boundary shall be from a point on the north western boundary of Cheranelloore in position Latitude 10° 04' 12'' N, Longitude 76°

16' 57'' E to a point on the eastern shore of Vypeen Island in position Latitude 10° 04' 12'' N, Longitude 76° 13' 37.2'' E and thence along the High Water mark on the eastern shore of Vypeen Island via Cochin Harbour entrance to a point on the western shore of Vypeen Island in position Latitude 10° 07' 24'' N, Longitude 76° 10' 36'' E and thereon to position "A" in the sea 12 nautical miles due west in Latitude 10° 07' 24'' N, Longitude 75° 58' 48'' E.

WPC.26435/13 & 31081/13

47

2. The southern boundary shall be from a point on the southern end of Thevara in position Latitude 9° 55' 30'' N, Longitude 76° 18' 15'' E to a point on the Edacochin shore in position Latitude 9° 55' 10'' N, Longitude 76° 17' 30'' E and thence along the High Water mark on the Mattancherry shore via Cochin Harbour entrance to a point on the western shore near Chellanam in position Latitude 9° 48' 12'' N, Longitude 76° 16' 24'' E and thence to a position "B" in the sea 12 nautical miles due West in Latitude 9° 48' 12'' N, Longitude 76° 04' 36'' E.
3. The western boundary shall be a straight line joining positions "A" and "B" as defined in paras 1 and 2 above.
4. The Eastern boundary shall be along the High Water mark along the foreshores from a point on the southern end of Thevara in position Latitude 9° 55' 30'' N, Longitude 76° 18' 15'' E to a point on Ernakulam foreshore in position Latitude 10° 00' 44.5'' N, Longitude 76° 16' 24.7'' E and thence to a point on the north western boundary of Cheranelloore in position Latitude 10° 04' 12'' N, Longitude 76° 16' 57'' E.
5. In addition to the above, the following shall also be included, namely:-
 - (a) all land belonging to the Cochin Port Trust and any areas reclaimed from the backwaters or the

WPC.26435/13 & 31081/13

48

sea and that may be reclaimed within the limits specified above and accretion becoming within these limits;

(b) all waterways connected to the backwaters within these limits;

(c) all existing Port installations and future constructions like wharves, jetties, bridges etc. made for Port purposes and for public convenience.

27. Reading of the above statutory notification issued

under the provisions of the Indian Ports Act and the

Major Port Trusts Act shows that the areas specified

within the boundaries mentioned in the notifications

and in addition to the above, the lands already

reclaimed and which may be reclaimed in future

together with accretions thereto mentioned in clause

5, are the properties vested in the Port Trust.

28. The leased land falls within the limits of the Port

as notified in Exts.R1(f) and R1(b) and it being

reclaimed by the Cochin Port Trust is owned by

itself. The contention raised by the

learned counsel for the petitioners is that the Port

WPC.26435/13 & 31081/13

Trust did not have ownership over the land in view of

the provisions contained in the Kerala Land

Assignment Act, 1960, Kerala Land Conservancy Act, 1957 and the Panchayat Raj Act, 1994. The Kerala Land Assignment Act, 1960 provides for assignment of Government lands and in section 2, the bed of the sea and harbours and creeks below high water mark are also included. In this Act, back-waters and water courses are also declared to be Government lands.

29. Similar is the case with Kerala Land Conservancy Act, 1957. In section 3, which defines property of the Government, all public roads, bed of the sea and the harbours and creeks below high water mark, the beds and banks of rivers, back waters and water courses are also included. It is also true that sections 169 and 218 of the Kerala Panchayat Raj Act provide for vesting of the public roads, water courses etc that are mentioned therein in the Panchayat. It is with reference to these statutory provisions, it was argued before us that the property leased out by the Port Trust was not owned by it and therefore, it had no right to lease it out also.

WPC.26435/13 & 31081/13

50

30. However, we are unable to accept this contention.

First of all, disputes relating to title and

ownership of immovable properties, it is trite, are not matters which are capable of resolution in writ petitions, much less in Public Interest Litigations. Secondly, the Government of Kerala have not staked any ownership claim over the land reclaimed by the Port and so long as such a dispute has not been raised by the Government, this Court should not venture into adjudication of such disputed factual controversies at the instance of strangers. Thirdly, from what we have already explained in the earlier paragraphs of this judgment, the Cochin Port was a part of the State of Travancore-Cochin which came to be vested in the Union of India in view of the provisions contained in Article 295(1)(a) of the Constitution of India. It continued as a Department of the Government of India and was governed by the Indian Ports Act, 1908 until the Major Port Trusts Act, 1963 was extended to the Port of Cochin with effect from 29.2.1964.

WPC.26435/13 & 31081/13

51

31. On the implementation of the Major Port Trusts Act, 1963, by virtue of the provisions contained in section 29 of the said Act, the assets and liabilities of the Central Government came to be transferred to the board of trustees and this

included all properties, assets and funds vested in the Central Government or any other authority for the purposes of the Port immediately before the appointed date.

32. The question whether vesting of the properties in the Board of Trustees is for the limited purpose of administration and management or whether with the vesting, the ownership of the properties is vested in the Board of Trustees, is to be decided with reference to the nature of the vesting as contemplated under section 29 of the Major Port Trusts Act. Section 29(1)(a) being relevant reads thus:

"29. Transfer of assets and liabilities of Central Government, etc., to Board- (1) As from the appointed day in relation to any port-

WPC.26435/13 & 31081/13

52

(a) all property, assets and funds and all rights to levy rates vested in the Central Government or, as the case may be, any other authority for the purposes of the port immediately before such day, shall vest in the Board;"

This provision shows that in relation to any port, as from the appointed day, all property, assets and funds and all rights to levy rates vested in the

Central Government for the purposes of the port
immediately before the appointed day shall vest in
the Board.

33. The Apex Court had occasion to consider the meaning
of the word 'vesting' in the context of a similar
provision contained in section 12(1)(a) of the
International Airport Authority Act, 1971 in its
judgment in Municipal Commissioner of Dum Dum
Municipality v. Indian Tourism Development
Corporation [(1995) 5 SCC 251], where, a claim for
the benefit of Article 285 was raised to resist the
demand made by the Municipal Corporation. In its
judgment, the Apex Court made reference to the
provisions contained in section 12 of the Act and

WPC.26435/13 & 31081/13

53

section 12(1)(a) alone being relevant, is extracted
below for reference:

"12.(1) Save as otherwise provided in sub-
section (2), as from such date as the Central
Government may appoint by notification in the
Official Gazette in relation to any airport, -
(a) all properties and other assets vested in the
Central Government for the purposes of the
airport and administered by the Director
General of Civil Aviation immediately before
such day shall vest in the Authority;"

34. Thereafter, the Apex Court examined the various provisions of the Act and answered the contention against the Authority by holding thus:

"For all the above reasons, we are of the opinion that the International Airports Authority of India is a statutory corporation distinct from the Central Government and that the properties vested in it by Section 12 of the Act cannot be said to have been vested in it only for proper management. After the date of vesting, the properties so vested are no longer the properties of the Union of India for the purpose of and within the meaning of Article 285. The vesting of the said properties in the Authority is with the

WPC.26435/13 & 31081/13

54

object of ensuring better management and more efficient operation of the airports covered by the Act. Indeed that is the object behind the very creation of the Authority. But that does not mean that it is a case of limited vesting for the purpose of better management."

35. Relying on the provisions of the Major Port Trusts

Act, a similar contention was raised by the Board of Trustees of the Visakhapatnam Port Trust. That was considered by the Apex Court in Board of Trustees for the Visakhapatnam Port Trust v. State of A.P. [(1996) 6 SCC 78]. In that judgment, relying on the judgment in Municipal Commissioner of Dum Dum Municipality (supra), the Apex Court negatived the claim of the Port Trust holding thus:

"4. We do not think that this argument has any basis. This Court in *Municipal Commr. of Dum Dum Municipality v. Indian Tourism Development Corporation* (1995) 5 SCC 251, considered the same argument in the case of *International Airport Authority* that the vesting of the properties was only for the purpose of managing those properties and ownership of the properties did not vest in the authority. In that case this Court was deliberating the provisions of the

WPC.26435/13 & 31081/13

55

International Airports Authority Act, 1971 under which International Airport Authority of India was constituted. The provisions of that Act are *pari materia* with the Major Port Trust Act, 1963 regarding the constitution, property and contracts and supersession. It is not necessary to quote the provisions of the International Airports Authority Act, 1971 to show that how they are similar to the provisions in the Major Port Trust Act, 1963. This Court negated the argument that the properties vested in the International Airport Authority of India for the purpose of managing those properties and that the ownership of these properties continued to be with the Central Government. The Court held that the properties vest in the International Airport Authority of India and it could not be said that the Central Government owned the properties. Board in the present case is not a department of the Central Government rather it has the attributes of a company. It is distinct from the Central Government. It cannot, therefore, claim exemption from taxation under Art. 285 of the Constitution."

36. It is therefore obvious that the vesting of the assets in the Board of Trustees by virtue of section 29(1)(a) of the Major Port Trusts Act is not a restricted vesting for the purpose of administration and management. Instead, with the vesting of the

properties in the Board of Trustees, the Government

WPC.26435/13 & 31081/13

56

of India has ceased to have ownership rights over the properties so vested and the Port Trust became the absolute owner of the property vested in it. In addition to this, the land reclaimed by it within the port limits that are notified from time to time, the last of which are Exts.R1(b) and R1(f), are also properties owned by the Port Trust.

37.The land leased out by the Port to the 10th respondent, admittedly, is reclaimed from out of back waters, which is within the port limits, notified by the Government of Kerala. Such a plot of land, on the materials produced, certainly is under the absolute ownership of the Port Trust and is governed by the provisions contained in the Major Port Trusts Act, 1963 enacted under entry 27 of list I of the VII Schedule of the Constitution of India. In respect of such a land, the provisions of the Kerala Land Assignment Act, 1960 or the Land Conservancy Act, 1957 cannot have any application. Similar is the situation with respect to the provisions of the Kerala Panchayat Raj Act, 1994, Sections 169 and

218 of which provide for vesting of the properties

WPC.26435/13 & 31081/13

57

mentioned therein in the panchayats. In any case, the legislative power to these enactments are to be traced to entries in list II to the VII Schedule of the Constitution of India, whereas the legislative power in respect of Indian Ports Act and Major Port Trusts Act are traceable to entry 27 of list I to VII Schedule. This means that acceptance of the contention raised by the petitioners would even lead to a situation of inconsistency between laws made by the Parliament and the laws made by the Legislature of States as contemplated in Article 254 of the Constitution of India. We, therefore, reject the contention of the learned counsel for the petitioners that the Port Trust did not have ownership over the property leased out and that the properties are under the ownership of the State Government.

38. The second contention raised was that the land in question could not have been leased out for the purposes mentioned in the tender notice and lease deed. This contention was raised on the basis that in Ext.P1, the agenda for the meeting of the Board of Trustees held on 9.3.2005, the proposal for

WPC.26435/13 & 31081/13

58

reclamation was placed on the basis that as per the agreement executed by DPI for ICTT, more land has to be provided to them at Vallarpadam than earlier contemplated at the time of preparation of the proposal for Special Economic Zone. It was stated that sufficient area will not be available at Vallarpadam and that in order to provide additional land area adjacent to Vallarpadam for the future development plan of Cochin Port Trust, it is proposed to reclaim about 8 hectares of land on the western side of Bolgatty Island and that the proposed reclamation will also enable streamlining of flow at this area and would give a better appearance for the shoreline. It was this proposal which was approved by the Board of Trustees vide Ext.P1(a) resolution No.64. It was contended that such a land reclaimed for specific purposes, which are mentioned in the proposal and the resolution, could not have been leased out for setting up of hotels/ resorts/ convention centres /shopping malls/commercial /office complexes and allied facilities, mentioned in the tender notice.

WPC.26435/13 & 31081/13

59

39.It is true that the land in question was reclaimed on the basis of the proposal contained in Ext.P1. However, it is a fact that till 2010, or even when the lease was executed, the land was remaining unutilized. Therefore, the Port Trust, by Ext.P3 letter, sought the permission of the Government of India to lease it out on long term basis. This request of the Port Trust was accepted and permission sought for was granted by the Government of India vide Ext.P4 letter. It was thereafter that the tender notice was published by the Port Trust. This means that the Port Trust had completed all necessary formalities before inviting tenders. Secondly, land policy guidelines issued by the Government of India, including the one dated 8.3.2004 and Ext.R1(d) dated 13.1.2011, permit leasing out unutilized lands. Therefore, the fact that land was reclaimed for a particular object does not mean that if the stated object is not achieved, the land should not be profitably utilized by the Port Trust in any other manner.

WPC.26435/13 & 31081/13

40.One another issue raised was as to whether the

project in question could be executed in the property leased out by the Cochin Port Trust. In this context, reference was made to clause 9 of Ext.P19, the letter of the Cochin Port Trust allotting the land to the 10th respondent, which states that it shall be the responsibility of the lessee to obtain necessary statutory clearances including that under the notification relating to Coastal Regulations Zone (CRZ for short). This provision is also incorporated in Ext.R10(a) tender document and the lease deed. The statutory clearances that are required are the clearances from the Coastal Zone Management Authority, under the Town Planning Act, the building permit under the relevant Building Rules and Consent from the Kerala State Pollution Control Board.

41. The main controversy in this context was with respect to Ext.P12, the Government Order dated 27.7.2013, granting special permission to the 10th respondent relaxing the structure plan for Central City, Kochi and the applicable town planning schemes.

WPC.26435/13 & 31081/13

61

This letter being important in this context is extracted below for reference:

GOVERNMENT OF KERALA
Abstract

Local Self Government Department - Mulavukad Grama Panchayath - Lulu Convention & Exhibition Centre Pvt Ltd, Kochi - construction of a new project in the land having an area of 10.59 hectare comprised in Survey No.31/4, 31/20 of Mulavukad Village in Mulavukad Grama Panchayat of Ernakulam - special permission granted - Orders issued.

LOCAL SELF GOVERNMENT (RB) DEPARTMENT
G.O.(Ms)No.269/2013/LSGD Dated, Thiruvananthapuram,
27/07/2013.

Read:- (1) Letter No.LULU/Director/Bolgtty/Govt.2013-01 dated 06-04-2013 from the Director Lulu Convention & Exhibition Centre Pvt Ltd Kochi.
(2) Minutes of the Structure Committee Meeting held on 18.6.2013.
(3) Letter No.E2/5555/13 dated 20.6.2013 from the Chief Town Planner Thiruvananthapuram
(4) Letter No.EM8/Lulu/2013/S dated 2.7.2013 from the Secretary, Cochin Port Trust, Willingdon Island, Cochin.

ORDER

As per the application read as 1st paper above, the Director, Lulu Convention & Exhibition Centre Pvt Ltd, Kochi has submitted a proposal for the construction of WPC.26435/13 & 31081/13 a new project in the land having an area of 10.59 hectare comprised in Survey No.31/4, 31/20 of Mulavukad Village in Mulavukad Grama Panchayat of Ernakulam District. As per the application, the land comprised in survey No.31/4, 31/20 of Mulavukad village belongs to Cochin Port Trust and M/s.Lulu Convention & Exhibition Centre Pvt Ltd has got the above mentioned land on lease and proposed to carry out construction there. It is requested to accord necessary sanction in terms of the special provision for the large scale development projects as per the Kerala Municipal Building (amendment) Rules 2013 vide G.O. (Ms)No.46/LSGD dated 01/2/2013. According to the project report submitted by the applicant the gist of the project is as follows:

1. Occupancy and (1) Hotel with 217 rooms (36930 M2) Area of the Building (2) convention centre (35536 M2) (3)416 Service Apartments (73500 M2) (4) Villas (3 numbers) (387x3=1161M2) (5) Shopping Arcade (713 M2) (6) Other uses (132M2) Total 147972 M2

2. Survey number of Survey number of Mulavukad Village the construction 31/4, 31/20

3. Maximum height of 44.05 meter the construction

4. Floor Area Ratio (FAR) 1.39

5. Coverage 37.25

6. Parking Facility Required - 1214, Provided 1392 WPC.26435/13 & 31081/13

2) As per the letter read as 3rd paper above, the Chief Town Planner has reported the area falls within the 'Structure Plan for Central City, Kochi' sanctioned vide G.O.(Ms)No.103/91/LAD dated 20/3/1991 and revised vide G.O.(Ms)No. 143/2007/LSGD dated 31/5/2007 and zoned as "Water Sheet" and permission can be accorded only subject to the provisions of the 'Structure Plan'. It is also reported that the proposal submitted by the applicant, is not conformity with the zoning regulations of the "Structure Plan for Central City of Kochi".

3) As advised by the Chief Town Planner, the matter was placed before the Special Committee constituted under the provisions contained in item No.(ix) under clause 4.13 of the Sanctioned Structure Plan for Central City of Kochi published by Notification under G.O.(MS) No.143/2007/LSGD dated 31.5.2007. The said Committee under the chairmanship of the Secretary to Government, Local Self Government Department met on 18.6.2013 and decided, among other things, to request the Government to take up the matter at Government level for appropriate decision as the proposed project falls in the Water Sheet Use Category as per the Sanctioned Structure Plan and as such it does not come under the purview of the Committee.

WPC.26435/13 & 31081/13

4) The Chief Town Planner has also stated that the said land is the property of Government of India as per section 29 of the Major Port Trusts Act 1963 and Cochin Port Trust is the custodian. Further the Chief Town Planner reports that the project cost amounts to Rs.500 crores with direct employment around 1500 persons and indirect employment to 2500 persons and purpose of allotment of the above land is for setting up of Hotel/Resort/Convention centre/ Shopping Mall/ Commercial / Office Complex and allied facilities and as per Port Trust this is also a port related activity which will enhance the arrival of tourist ships and thereby increasing the revenue to the port as well as the state at large. Therefore, the Chief Town Planner has requested to consider the project at Government level.

5) As per the letter read as 4th paper above the Cochin Port Trust has stated that the total extent of land is 10.59 hectare owned by it and leased to Shri.M.A.Yusuff Ali for 30 years from 09/2/2011 with an option for renewal after thirty years for setting up of Hotel/resorts/convention centre/shopping mall/ commercial /office complex and allied facilities through tender process. It is also reported that the land was reclaimed by the Cochin Port during the year 2005 with the approval of Port Trust Board vide its resolution No.64 of 09/3/2005.

WPC.26435/13 & 31081/13

6) Government have examined the matter in detail. It is noticed that there is material error in the averment of the applicant. The land for the proposed project lies in Mulavukad Grama Panchayath and as such Kerala Municipality Building Rules, 1999 is not applicable. The Kerala Panchayath

Building Rules 2011 doesn't have provision for such a committee. During the sanctioning of the structure plan the said land was categorized as "Water Sheet" since the area was part of the back waters at that time. The Port reclaimed this area in 2005 with permission from Government of India. Therefore the area is no longer water sheet. Even though the land was reclaimed, the area was not statutorily reassigned under any use in the structure plan till date. Since the area is reclaimed, it is no longer under 'water sheet' category. The area has to be zoned afresh in any one of the remaining two categories viz. Agriculture use and developed land. This can be done only through a variation of the structure plan under section 13 of the Town Planning Act 1108 ME (IV of 1108) and section 15 of Madras Town Planning Act 1920. The whole process, includes statutory time period for publishing draft variation plan and review of objections and suggestions of general public.

7) The proposed project is a large scale investment which will attract further investments in the region, thereby benefiting the State at large, and it is anticipated as one of the landmarks WPC.26435/13 & 31081/13 project of Kochi. Moreover, the applicant has obtained major clearances from the respective departments. Therefore, Government are pleased to accord Special permission to the Lulu Convention & Exhibition Centre Pvt Ltd for the above mentioned construction in the land having an extent of 10.59 hectare in survey no.31/3, 31/20 of Mulavukad Village in Mulavukad Panchayat of Ernakulam District relaxing zoning provisions of the Structure Plan for Central City, Kochi and other town planning schemes subject to the condition that the construction should satisfy the conditions stipulated in prevailing building rules and all other statutory provisions.

8) Further necessary action in the matter will be taken by the Secretary Mulavukad Grama Panchayath.

(By Order of the governor) James Varghese Principal Secretary to Government

42. According to the petitioners, as held by a Division Bench of this Court in Sayeesh Kumar v. State of Kerala [2005(4) KLT 1027], the Government have no power to grant relaxation from the provisions of the Town Planning Scheme, viz., the structure plan for Central City, Cochin. They also referred us to Ext.P13 Government Order which was issued referring WPC.26435/13 & 31081/13 to Sayeesh Kumar (supra) and cancelling the Government Orders granting relaxation from the Town Planning Schemes. It was also stated that Ext.P14 building permit was issued based on the directions contained in Ext.P12 and that the same, having been issued without any application of mind and on the dictates of the Government, is vitiated. In this context, reference was also made to the judgment of the Apex Court in Joint Action Committee of Air Line Pilots' Association of India v. Director General of Civil Aviation [(2011) 5 SCC 435], where, in paragraphs 26 to 28, it was held thus:

"26. The contention was raised before the High Court that the Circular dated 29-5-2008 has been issued by the authority having no competence, thus cannot be enforced. It is a settled legal proposition that the authority which has been conferred with the competence under the statute alone can pass the order. No other person, even a superior authority, can interfere with the functioning of the statutory authority. In a democratic set-up like ours, persons occupying key positions are not

supposed to mortgage their discretion, volition and decision-making authority and be prepared to give way to carry out commands having no WPC.26435/13 & 31081/13 sanctity in law. Thus, if any decision is taken by a statutory authority at the behest or on suggestion of a person who has no statutory role to play, the same would be patently illegal. (Vide *Purtabpore Co. Ltd. v. Cane Commr. of Bihar* [(1969) 1 SCC 308], *Chandrika Jha v. State of Bihar* [(1984) 2 SCC 41] *Tarlochan Dev Sharma v. State of Punjab* [(2001) 6 SCC 260] and *Manohar Lal v. Ugrasen* [(2010) 11 SCC 557]).

27. Similar view has been reiterated by this Court in *Commr. of Police v. Gordhandas Bhanji*, [AIR 1952) SC 16] *Bahadursinh Lakhubhai Gohil v. Jagdishbhai M. Kamalia* [(2004) 2 SCC 65] and *Pancham Chand v. State of H.P.* [(2008) 7 SCC 117] observing that an authority vested with the power to act under the statute alone should exercise its discretion following the procedure prescribed therein and interference on the part of any authority upon whom the statute does not confer any jurisdiction, is wholly unwarranted in law. It violates the constitutional scheme.

28. In view of the above, the legal position emerges that the authority who has been vested with the power to exercise its discretion alone can pass the order. Even a senior official cannot provide for any guideline or direction to the authority under the statute to act in a particular manner."

WPC.26435/13 & 31081/13

43. However, this contention was resisted on behalf of the State as well as the 10th respondent by referring us to the provisions of the Town Planning Scheme itself. According to them, there is no illegality whatsoever in the issuance of Ext.P12. A reading of Ext.P12 itself shows that as per the structure plan for Central City Cochin, the area in question, which was reclaimed by the Port Trust way back in 2005, was classified as water sheet. It is also stated in Ext.P12 that as a result of the reclamation of the land, though it has ceased to be water sheet, modification has not so far been effected to the structure plan in terms of section 13 of the Town Planning Act and that therefore, the structure plan remained unamended. The contention raised by the petitioners is that as per the structure plan, so long as the area in question is a water sheet, the project in question is an impermissible one and that in the absence of any power to the Government to grant relaxation, Ext.P12 could not have been validly issued.

WPC.26435/13 & 31081/13

44. We have considered this submission. By notification dated 20.3.1991, the Government have sanctioned the structure plan (General Town Planning Scheme) for Central City of Cochin under section 12(2) of the Town Planning Act, 1108 ME. This was subsequently varied by notification dated 13.4.1999. The Scheme was again varied by notification dated 31.5.2007. As per clause 4.1 providing for the nature of regulations for the purpose of the Town Planning Scheme, a general land utilization pattern consisting of water sheet, agricultural use and developed land with specified uses have been prescribed for the Central City area. Clause 4.2 deals with pattern of land utilization and it also

provides that three major categories of uses prescribed in land utilization pattern are as given in table No.4.1, viz., (i) water sheet (ii) agricultural use and (iii) developed land. Table 4.2 provides the prescribed uses in different categories of land. In so far as this case is concerned, it is only relevant to state that after the tables, clause 4.13 providing for Other Special Provisions have been incorporated. This clause starts with the provision providing that WPC.26435/13 & 31081/13 the above regulations specified under clauses 4.2 (except water sheet) to 4.8 shall be applicable with the modifications prescribed thereunder. Clause 4.13

(ix), being relevant, reads thus:

"(ix) Large Scale development proposals in an area not less than 2 Ha, exceeding an investment of Rs.50 crores, which provide direct employment (after commissioning of the project) to the tune of not less than 500 may be permitted in Agricultural and Developed land use zones, subject to the recommendation of a committee to be constituted by the Government for this purpose, under the chairmanship of the Secretary, Local Self Government Department, consisting of the Chief Town Planner of Kerala State Town and Country Planning Department, Secretary GCDA, Senior Town Planner, District office of the Kerala State Town and Country Planning Department, Ernakulam and the Secretary of the local body concerned, and satisfying the following conditions:

The developer shall produce project cum feasibility report and Environmental Impact Assessment Report, if required, of the project to the convener of the committee, 15 days in advance of the committee meeting.

The developer shall produce before the committee all required clearances from the State and Central Govt. agencies concerned.

WPC.26435/13 & 31081/13 Adequate provision shall be made for supporting infrastructure such as water supply, sewerage, solid waste management etc. Separate sewage treatment plant and solid waste management measures shall be provided and maintained by the developer at his cost.

Adequate MoU between the developer and the secretary of the local body concerned shall be undertaken to bring this into effect.

Maximum F.A.R. Shall be 2 and minimum access width shall be 12m.

The project shall be completed within a period of 3 years if not specified otherwise.

The Senior Town Planner, Ernakulam District shall be the convener of the committee."

45. Before us, Government did not dispute that before its reclamation, the area in question was a part of the back waters and that the said part of the back waters formed part of the water sheet as per the Town Planning Scheme. However, in truth and reality, with its reclamation in 2005, at least

that part of the area which is reclaimed has ceased to be a water sheet. Though, following the reclamation, the Town Planning Scheme has not been modified in terms of section 13 of the Town Planning Act and as a result, the area still continues in the scheme as water WPC.26435/13 & 31081/13 sheet, in truth and reality, it is not a water sheet. It cannot also be disputed that if the scheme is modified as per section 13 of the Town Planning Act, the area should fall within either of the remaining two categories of uses prescribed in the land utilization pattern as per table 4.1 of the scheme, viz., agricultural use or developed land. The project in question is in an area of more than 10 hectares. The investment is in excess of Rs.50 crores and the direct employment projected is not less than 500. The project has also been recommended by a committee consisting of the officers mentioned in clause 4.13

(ix). In other words, the project satisfies all the conditions specified in clause (ix) (supra).

46.This means that irrespective of whether the land falls in agricultural use or developed land, a project of the nature specified in clause 4.13 (ix) is permissible in both categories. This therefore shows that at best, in this case, the Government can only be accused of a technical lapse or defect in permitting the project without awaiting for modification of the scheme, taking into account the WPC.26435/13 & 31081/13 reclamation of the land in 2005. In view of the fact that even if the scheme is modified, the uses prescribed in respect of the land can only be agricultural use and developed land and that clause 4.13(ix) permits implementation of the project in question in both the categories of lands, we feel that the fact that the Government has permitted the project without awaiting for a formal modification of the Town Planning Scheme need not be and should not be a good ground for invalidating the permission granted. While saying so, we are not unmindful of the fact that in Ext.P12, it has been stated that a relaxation has been granted from the provisions of the Town Planning Act. It is also true that as held by this Court in Sayeesh Kumar (supra) and as is evident from Ext.P13 Government Order, the Government have no power to grant relaxation from the Town Planning Scheme. However, despite what is stated in Ext.P12, in effect, since the order in question cannot be construed as one relaxing the Town Planning Scheme, we are not inclined to find fault with Ext.P12 as sought for in the writ petitions. Therefore, this contention raised by the learned WPC.26435/13 & 31081/13 counsel for the petitioners does not persuade us to interfere with Ext.P12.

47.Having rejected the challenge against Ext.P12, we do not see any reason to interfere with Ext.P14 building permit, particularly in the absence of any case for the petitioners that in the grant of the building permit, any of the provisions of the Building Rules have been violated. Therefore, this contention also fails.

48.Yet another contention raised in the pleadings in W.P(C).26435/13 is with respect to Ext.P3 therein, which is the proceedings of the State Environment Impact Assessment Authority, Kerala. Based on the recommendations of the State Level Expert Assessment Committee and the Kerala Coastal Zone Management Authority, by Ext.P3 order dated 23.8.2013, the State Environment Impact Assessment Authority Kerala (SEIAA) accorded necessary integrated CRZ cum environmental clearance for the construction of the Convention and Exhibition Centre by the 10th respondent in exercise of the powers vested in it WPC.26435/13 & 31081/13 under the provisions of

the Environment Impact Assessment (EIA) Notification, 2006 and its subsequent amendment, subject to the conditions specified therein. In sum and substance, the contention raised by the counsel for the petitioner was that if the 10th respondent had made true and correct declarations in the application submitted by it, the authority to consider the said application would have been the authority constituted by the Central Government under the EIA notification 2006 and therefore, Ext.P3 order passed by the SEIAA, Kerala is without jurisdiction.

49. In this context, reference was made to Exts.P21 and P22. According to the learned counsel, in Ext.P21, the application submitted for clearance under the EIA notification 2006, against the column 'Areas used by protected, important or sensitive species of flora or fauna for breeding, nesting, foraging, resting, over wintering, migration', the 10th respondent had stated that 'Mangalavanam Bird Sanctuary located about 60 m. (aerial distance) to the project site'. It is also pointed out that against the column 'Areas already WPC.26435/13 & 31081/13 subjected to pollution or environmental damage', the 10th respondent had declared that 'No critically polluted area located within 15 km. Radius'. Counsel also made reference to the concluding statement in Ext.P21 in the form of an undertaking furnished by the 10th respondent that the data and information given in the application and enclosures are true to the best of their knowledge and belief and that they were aware that in case any part of the data and information submitted is found to be false or misleading at any stage, the project will be rejected and clearance given, if any to the project, will be revoked at their risk and cost. Our attention was also drawn to the checklist of documents to be submitted along with the application for environmental clearance in which, in column 14, it was stated thus:

If General Conditions a) protected Areas notified under the N.A.

14 applicable: Wild Life (Protection) Act, 1972 Certificates from b) Critically Polluted areas as notified N.A. authorized departments by the Central Pollution Control Board if the project site is from time to time located in whole or in c) Notified Eco-sensitive areas N.A. part within 10 km from the boundary of: d) Inter-state boundaries and N.A.

international boundaries WPC.26435/13 & 31081/13

50. Learned counsel then referred us to Ext.P24, the notification issued by the Government of Kerala in exercise of its powers under section 18 of the Wild Life (Protection) Act, 1972, whereby, the Government of Kerala declared its intention to constitute the area specified therein viz., Mangalavanam Bird Sanctuary, as a sanctuary, for the purpose of protecting, propagating or developing wild life and its environment. Counsel also made reference to Ext.P25, a list of critically polluted industrial areas identified by the Central Pollution Control Board. In Ext.P25, among the critically polluted industrial areas, at Sl.No.24, 'Eloor-Edayar Industrial Belt and Ambala Mogal Industrial areas' are identified as critically polluted industrial areas. Referring to Google map showing the distance from Bolgatty to Eloor, it is averred in paragraph 27 of W.P(C).26435/13 that Eloor-Edayar industrial cluster is situated within 8 km from the project site and that the Ambala Mogal industrial cluster is situated within 10.5 kms from the project site. It is also alleged that the 10th respondent wrongly WPC.26435/13 & 31081/13 stated that there is no critically polluted area

within 15 kms radius of the project site in Ext.P21 application submitted by him. These allegations are contained in paragraphs 26 and 27 of W.P(C). 26435/13.

51. Based on the aforesaid averments, the contention raised by the counsel for the petitioners was that as per the General Conditions of the EIA notification, 2006, any project or activity specified in Category B will be treated as Category A if located in full or part within 10 kms from the boundary of protected areas, including under the Wild Life Protection Act, 1972, critically polluted areas notified by the Central Pollution Control Board from time to time, eco-sensitive areas, inter-state boundaries and inter national boundaries. It was also pointed out that as per clause 8(vi), it is made clear that deliberate concealment and/or submission of false or misleading information or data which is material to screening or scoping or appraisal or decision on the application shall make the application liable for rejection and cancellation of prior environmental clearance granted WPC.26435/13 & 31081/13 on that basis and that rejection of an application or cancellation of a prior environmental clearance already granted, on such ground, shall be decided by the regulatory authority, after giving a personal hearing to the applicant and following the principles of natural justice.

52. Thus, referring to Exts.P21 and P22 and the provisions of the EIA notification, the contention raised by the counsel for the petitioners was two fold. First was that though the project as offered by the 10th respondent falls under Category B, by virtue of its close proximity to the protected Bird Sanctuary and the critically polluted industrial areas, the project should fall within Category A and that in respect of category A projects, as per clause 2 of the EIA notification, the clearance required is that of the Central Government in the Ministry of Environment and Forests. Secondly, the contention raised is that the 10th respondent had made deliberate concealment or submission of false or misleading information or data, attracting clause 8(vi) of the EIA notification, requiring rejection of their WPC.26435/13 & 31081/13 application. In order to deal with this contention, a detailed reference to the EIA notification, 2006 as amended from time to time is required.

53. The notification providing for environmental impact assessment was issued by the Government of India on 14.9.2006 in exercise of its powers conferred under section 3(2) of the Environmental Protection Act, 1986 read with rule 5(3)(d) of the Environment Protection Rules, 1986. By that notification, the Central Government directed that on and from the date of its publication, the required construction of new projects or activities or the expansion or modernization of existing projects or activities listed in the Schedule to the notification entailing capacity addition with change in process and/or technology shall be undertaken in any part of India only after the prior environmental clearance from the Central Government or as the case may be, by the State Level Environment Impact Assessment Authority, duly constituted by the Central Government under section 3(3) of the Act, in accordance with the procedure specified in the notification. Clause 2 of WPC.26435/13 & 31081/13 the notification provide that the projects or activities enumerated therein shall require prior environmental clearance from the concerned regulatory authority which are referred to be as the Central Government in the Ministry of Environment and Forests for matters falling under Category A in the Schedule and at state level, the State Environment Impact Assessment Authority (SEIAA) in respect of matters falling under Category B to the schedule, before any construction work or preparation of land by the project management, except of securing the

land, is started on the project or activity.

54. The constitution of SEIAA and the members thereof are provided in Clause 3 of the notification. Clause 4 provides for category of projects and activities and it states that all projects and activities are broadly categorized in to Category A and Category B, based on the spatial extent of potential impacts and potential impacts on human health and natural and man made resources. Sub-clauses (ii) and (iii) details the projects in Category A and Category B and it WPC.26435/13 & 31081/13 being relevant, clause 4 of the notification is extracted below for reference:

"4. Categorization of projects and activities:-

(i) All projects and activities are broadly categorized in to two categories - Category A and Category B, based on the spatial extent of potential impacts and potential impacts on human health and natural and man made resources.

(ii) All projects or activities included as Category 'A' in the Schedule, including expansion and modernization of existing projects or activities and change in product mix, shall require prior environmental clearance from the Central Government in the Ministry of Environment and Forests (MoEF) on the recommendations of an Expert Appraisal Committee (EAC) to be constituted by the Central Government for the purposes of this notification;

(iii) All projects or activities included as Category 'B' in the Schedule, including expansion and modernization of existing projects or activities as specified in sub paragraph (ii) of paragraph 2, or change in product mix as specified in sub paragraph (iii) of paragraph 2, but excluding those which fulfill the General Conditions (GC) stipulated in the Schedule, will require prior environmental clearance from the State/Union WPC.26435/13 & 31081/13 territory Environment Impact Assessment Authority (SEIAA). The SEIAA shall base its decision on the recommendations of a State or Union territory level Expert Appraisal Committee (SEAC) as to be constituted for in this notification. In the absence of a duly constituted SEIAA or SEAC, a Category 'B' project shall be treated as a Category 'A' project;"

55. Reading of clause 4(iii) shows that all projects or activities included as Category B in the Schedule but excluding those which fulfill the General Conditions stipulated in the Schedule, will require prior environmental clearance from the State/Union territory Environment Impact Assessment Authority (SEIAA).

56. Clause 5 provides for screening, scoping and appraisal committees and as per this provision, the Expert Appraisal Committees (EACs) at the Central Government and Expert Appraisal Committees at the State level shall screen, scope and appraise projects or activities in Category A and Category B respectively. Clause 6 provides for application WPC.26435/13 & 31081/13 for prior environmental clearance and clause 7 of the notification provides for the stages in the prior environmental clearance process for new projects. Clause 8 deals with the grant or rejection of prior environmental clearances. The Schedule to the notification contains the list of projects or activities requiring prior

environmental clearance and at Sl.No.8 is Building/construction projects/area development projects and Townships. Clause 8(a) is Building and construction projects and the threshold limit prescribed is > 20000 sq. mtrs and <1,50,000 sq. mtrs of built up area. This provision is extracted for reference:

Building /Construction projects/ Area Development 8 projects and Township 8(a)
Building and 20000 sq. # (built up area for Construction mtrs and covered construction;

projects	<1,50,000 sq.mtrs. of built-up area#	in the case of facilities open to the sky, it will be the activity area
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57.It is also relevant to see the General Condition which reads thus:

WPC.26435/13 & 31081/13 General Condition (GC):

Any project or activity specified in Category 'B' will be treated as Category A, if located in whole or in part within 10 km from the boundary of: (i) Protected Areas notified under the Wild Life (Protection) Act, 1972, (ii) Critically Polluted areas as notified by the Central Pollution Control Board from time to time, (iii) Notified Eco- sensitive areas, (iv) inter-State boundaries and international boundaries.

58.From this General Condition, it is obvious that any project or activity specified in Category B will be treated as Category A if it is located in whole or in part within 10 kms from the boundary or protected areas notified under the Wild Life (Protection) Act, 1972 and the critically Polluted areas as notified by the Central Pollution Control Board from time to time. Provisions of clause 4(iii) makes it clear that all projects and activities included as Category B in the Schedule require prior environmental clearance from the SEIAA. A perusal of the Schedule to the notification shows that the threshold limit prescribed in respect of buildings and construction projects is the threshold WPC.26435/13 & 31081/13 limit for Category B projects. Ext.P3 in W.P(C). 26435/13, the integrated consent, shows that the total built up area of the project in question is 149820 m². This means that the project in question clearly falls within Category B. Such a project in Category B can fall in Category A if the General Conditions to the EIA notification are applicable to the project.

59.The question whether the General Conditions to the notification are applicable to the project in question or not has to be answered with reference to the provisions contained in the notification itself. A close perusal of the Schedule to the notification would give an answer to this question. The Schedule to this notification contains various projects and activities. For a better appreciation of this issue, the Schedule to the EIA notification, 2006 is extracted below:

WPC.26435/13 & 31081/13 SCHEDULE (See paragraph 2 and 7) LIST OF PROJECTS OR ACTIVITIES REQUIRING PRIOR ENVIRONMENTAL CLEARANCE Category with threshold limit Conditions if any Project or Activity A B 1 Mining, extraction of natural resources and power generation (for a specified production capacity)

(a) (1) (2) (3) (4) (5) Mining of 50 ha. of mining <50 ha General Condition shall 1(a) minerals lease area 5 ha .of apply mining lease Note Asbestos mining area. Mineral prospecting (not irrespective of involving drilling) are mining area exempted provided the concession areas have got previous clearance for physical survey 1(b) Offshore and All projects Note onshore oil and Exploration Surveys (not gas exploration, involving drilling) are development & exempted provided the production concession areas have got previous clearance for physical survey 1(c) River Valley (i) 50 MW (i) < 50 MW General Condition shall projects hydroelectric power 25 MW apply generation; hydroelectric

(ii) 10,000 ha. of power culturable generation;

command area (ii) < 10,000 ha. of culturable command area

WPC.26435/13 & 31081/13

1(d)	Thermal Plants	Power	500 MW < 500 MW General Condition shall	
			(coal/lignite/naphta & gas based);	(coal/lignite/ apply
			50 MW (Pet coke diesel and all other fuels)	naphta & gas based);
				<50 MW
				5MW (Pet coke ,diesel and all other fuels)
(1)	(2)	(3)	(4)	(5)
1(e)	Nuclear projects and processing of nuclear fuel	power All projects	-	

2

Primary Processing

2(a)	Coal washeries	1 million ton/annum throughput of coal	<1million ton/annum throughput of coal	General Condition sh apply (If located within mining
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2 (b)	Mineral beneficiation	0.1million < ton/annum mineral throughput	0.1million ton/annum mineral throughput	General Condition shall apply (Mining proposal with Mineral beneficiation shall be appraised together for grant of clearance)
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3	Materials Production			
(1)	(2)	(3)	(4)	(5)

WPC.26435/13 & 31081/13

3(a)	Metallurgical	a)Primary
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industries (ferrous metallurgical & non ferrous) industry All projects

b) Sponge iron manufacturing <200TPD iron manufacturing 200TPD Secondary

c)Secondary metallurgical processing industry i.)All toxic and heavy metal producing units <20,000 tonnes /annum ii.)All other non -toxic

- secondary metallurgical processing industries >5000 tonnes/annum 3(b) Cement plants 1.0 million <1.0 million General Condition shall apply production capacity. All Stand alone grinding units 4 Materials Processing (1) (2) (3) (4) (5) WPC.26435/13 & 31081/13 4(a) Petroleum All projects - -

refining industry 4(b) Coke oven plants 2,50,000 <2,50,000 & -

		tonnes/annum	25,000 tonnes/annum	
		-	-	
4(c)	Asbestos milling and asbestos based products	All projects	-	-
4(d)	Chlor-alkali industry	300 TPD production	<300 TPD production	Specific Condition shall apply

		capacity or a capacity unit located and located		No new Mercury Cell based plants will be permitted and existing units converting to membrane cell technology are exempted from this Notification
4(e)	Soda ash Industry	All projects	-	-
4(f)	Leather/skin/hide processing industry	New projects outside the industrial area or expansion within a notified area/ existing industrial units out side estate the industrial area	All new or expansion projects located	Specific condition shall of apply
5		Manufacturing/Fabrication		
5(a)	Chemical fertilizers	All projects	-	-
5(b)	Pesticides industry and producing pesticide specific intermediates (excluding formulations)	All units -	-	-
(1)	(2)	(3)	(4)	(5)

WPC.26435/13 & 31081/13

5(c)	Petro-chemical complexes (industries based on processing of petroleum fractions & natural gas and/or reforming to aromatics)	All projects	-	-
5(d)	Manmade fibres manufacturing	Rayon	Others	General Condition shall apply

- 5(e) Petrochemical Located out Located in a Specific Condition shall
based processing side the notified industrial apply
(processes other notified area/ estate
than cracking & industrial
reformation and area/ estate
not covered under -
the complexes)
- 5(f) Synthetic organic Located out Located in a Specific Condition shall
chemicals side the notified industrial apply
industry (dyes & notified area/ estate
dye intermediates; industrial
bulk drugs and area/ estate
intermediates
excluding drug
formulations;
synthetic rubbers;
basic organic
chemicals, other
synthetic organic
chemicals and
chemical
intermediates)

WPC.26435/13 & 31081/13

- 5(g) Distilleries (i) All All Cane General Condition shall
Molasses juice/non- apply
based molasses based
distilleries distilleries -
<30 KLD
(ii) All Cane
juice/ non-
molasses
based
distilleries
30 KLD
- 5(h) Integrated paint - All projects General Condition shall
industry apply
- (1) (2) (3) (4) (5)
- 5(i) Pulp & paper Pulp Paper General Condition shall
industry excluding manufacturing manufacturing apply
manufacturing of and industry without
paper from waste pulp

paper and Pulp & Paper manufacturing
 manufacture of manufacturing
 paper from ready industry
 pulp with out -
 bleaching

5(j)	Sugar Industry	-	5000 tcd cane General	Condition shall
		-	crushing capacity apply	
5(k)	Induction/arc	-	All projects	General Condition shall
	furnaces/cupola	-		apply
	furnaces 5TPH or more			

6 Service Sectors

WPC.26435/13 & 31081/13

6(a)	Oil & gas transportation	All projects	-	
	pipe line (crude and refinery/ petrochemical products), passing through national parks / sanctuaries/coral reefs /ecologically sensitive areas including LNG Terminal			
(1)	(2)	(3)	(4)	(5)
6(b)	Isolated storage & handling of hazardous chemicals (As per threshold planning quantity indicated in column 3 of schedule 2 & 3 of MSIHC Rules 1989 amended 2000)	-	All projects	General Condition shall apply

7	Physical Infrastructure including Environmental Services			
7(a)	Air ports	All projects	-	-
7(b)	All ship breaking yards including ship breaking units	All projects	-	-

WPC.26435/13 & 31081/13

7(c)	Industrial estates/ If at least one	Industrial estates	Special	condition sh
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parks/ complexes/ industry in the housing at least apply areas, export proposed one Category B processing Zones industrial industry and area Note: (EPZs), Special estate falls <500 ha. Industrial Estate of area Economic Zones under the below 500 ha. and not (SEZs), Biotech Category A, housing any industry of Parks, Leather entire category A or B does not Complexes. industrial area require clearance.

shall be
treated as
Category A,

irrespective of Industrial estates the area. of area > 500 ha.

			and not housing Industrial any industry estates with belonging to area greater Category A or B. than 500 ha. and housing at least one Category B industry.	
7(d)	Common hazardous waste treatment, storage and disposal facilities (TSDFs)	All integrated facilities having incineration & landfill or incineration alone	All facilities having land fill only	General Condition sh

(1)	(2)	(3)	(4)	(5)
7(e)	Ports, Harbours	5 million < 5 million	TPA General	Condition sh

TPA of cargo of cargo handling apply handling capacity and/or capacity ports/ harbours (excluding 10,000 TPA of fishing fish handling harbours) capacity WPC.26435/13 & 31081/13 7(f) Highways i) New i) New State General Condition shall National High High ways; and apply ways; and

ii) Expansion of

ii) Expansion National / State of National Highways greater High ways than 30 km greater than involving 30 KM, additional right involving of way greater additional than 20m right of way involving land greater than acquisition.

20m involving
land
acquisition
and passing
through more
than one
State.

7(g)	Aerial ropeways	All projects	General apply	Condition	shall
7(h)	Common Effluent Treatment Plants (CETPs)	All projects	General apply	Condition	shall
7(i)	Common Municipal Solid Waste Management Facility (CMSWMF)	All projects	General apply	Condition	shall
(1)	(2)	(3)	(4)	(5)	
8		Building /Construction projects/Area Development projects and Townships			
8(a)	Building and Construction projects	20000 and <1,50,000	sq.mtrs	#{built up area for covered construction; in the case of facilities oper	

sq.mtrs. of built- to the sky, it will be the up area# activity area) WPC.26435/13 & 31081/13 8(b) Townships and Covering an area ++ All projects under Item Area 50 ha and or 8(b) shall be appraised as Development built up area Category B1 projects. 1,50,000 sq .

mtrs ++

60. A close perusal of the Schedule to the notification shows that the activities or projects to which the General Conditions are applicable have been so indicated under Column No.5 with the heading 'Conditions if any'. For example, in respect of Item No.1(a) 'Mining of Minerals', in Column No.5, it is stated that 'General Condition shall apply'. Similarly, in respect of River Valley Projects, Thermal Power Plants, Coal washeries, Mineral beneficiation, Metallurgical Industries, Cement Plants etc., it is made clear that General conditions shall apply. However, in respect of some of the projects or activities, there is no such statement that the General Conditions shall apply. One of the projects or activities where the General Conditions are not made applicable is 'building and construction projects'. For some other projects and activities included in the Schedule also, for example, 'offshore and onshore oil and gas exploration, development & WPC.26435/13 & 31081/13 production', it is not stated that general conditions shall apply. This, therefore, means that when the EIA notification was issued with the General Conditions mentioned above, the Government of India also specified the projects or activities to which the General Conditions are to be made applicable and that building and construction projects, included at Sl.No.8(a) to the notification, the project or activity of the 10th respondent, is a project or activity to which the General Conditions are not made applicable by the Government of India.

61. This means that even if it is accepted that the project of the 10th respondent is located in whole or in part within 10 kms from the boundary of Mangalavanam, a Protected Area notified under section 18 of the Wild Life (Protection) Act and critically polluted industrial areas notified under the Central Pollution Control Board, in view of the above provisions of the EIA notification, the project of the 10th respondent cannot be treated as WPC.26435/13 & 31081/13 a category A project requiring clearance from the Central Government in the Ministry of Environment and Forest. Therefore, the clearance issued by the State Authority is not invalid for that reason and the argument that Ext.P3 in W.P(C).26435/13, the integrated consent issued by the SEIAA, is without jurisdiction cannot be accepted.

62. The further contention that in Column 14 of Ext.P22, the checklist of documents to be submitted along with the application for environmental clearance, against the column requiring to mention the protected areas notified under the Wild Life (Protection) Act, 1972 and critically polluted areas as notified by the Central pollution Control Board from time to time, the 10th respondent had stated "Not Applicable" and that it being a deliberate concealment of information requires rejection of their application, also cannot be accepted. First of all, in Ext.P21, the application for EIA clearance under the heading 'Environmental Sensitivity' in clause (III), the WPC.26435/13 & 31081/13 existence of Mangalavanam Bird Sanctuary located about 60 m. (areal distance) to the project site has been mentioned. Under Column 11, they have stated that there is no critically polluted area located within 15 kms radius. By producing Ext.P26 Google map, the contention raised is that Eloor- Edayar Industrial Centre is situated within 8 kms from the project site and Ambala Mogal Industrial Cluster is situated within 10.5 kms distance from the project site. Firstly, Ext.P26 cannot be taken as a conclusive proof of the areal or road distance between the two places. Secondly, in Ext.P21, all that has been stated is that there is no critically polluted area located within 15 kms radius. The petitioner does not have a case that if the distance is measured by road, the total distance to the

areas in question would be less than 15 kms. There is also no material before this Court to conclude that the statements made by the 10th respondent in Ext.P21 was a deliberate concealment or submission of false or misleading information, which alone would attract clause 8(vi) of the EIA WPC.26435/13 & 31081/13 notification. Further, there is also no material before us to hold that if the distance as claimed by the petitioner was mentioned in the application, that would have made any difference in the conclusion of SEIAA. Therefore, we are not in a position to accept the contention of the petitioner that the application of the 10th respondent should have been rejected in view of clause 8(vi) of the EIA notification.

63.It was also contended that the meetings of the Kerala Coastal Zone Management Authority (KCZMA), the minutes of which are Exts.P17 and P19 in W.P (C).26435/13, were held without the prescribed quorum and that therefore, the recommendation made by the said authority was illegal. Counsel for the petitioners referred us to Ext.P18 in W.P(C). 26435/13 which is the notification constituting the KCZMA. It was pointed out that the KCZMA consisted of a Chairman, Secretary and 9 members. According to the learned counsel, among the members of the KCZMA, those at Sl.Nos.2 to 8 in Ext.P18 WPC.26435/13 & 31081/13 notification were appointed in their official capacity and therefore, the meeting of the authority to be validly convened, should be attended by those persons themselves. Learned counsel pointed out that Ext.P17, the minutes of the 53rd meeting of the KCZMA shows that apart from the Chairman, Secretary and the Chairman of the Kerala State Pollution Control Board, the other participants of the meeting are not those who are mentioned in Ext.P18 notification. Reference was also made to Ext.P19, the minutes of the meeting of the KCZMA held on 15.4.2013, in which, Ext.P17, the minutes of the meeting held on 27.12.2012, was confirmed. This meeting also, according to the learned counsel, suffer from the very same defect. Learned counsel further referred to paragraph 8 of W.P(C).26435/13, where, it was averred that as per the notification dated 21.7.2008, quorum for the meeting of the authority has been prescribed as 2/3rd of the members. It was contended that if the ineligible participants were excluded from those who participated in the meetings which led to WPC.26435/13 & 31081/13 Exts.P17 and P19, the meetings did not have the prescribed quorum. He also stated that Ext.P16, the recommendation of the KCZMA enclosing Ext.P15 report to the State Environment Impact Assessment Authority, should not have been forwarded before Ext.P17 minutes of the meeting was confirmed on 15.4.2013 as per Ext.P19. Learned counsel for the petitioner referred us to the judgment of this Court in Mohan kumar v. University of Kerala [2007 (4) KLT 879], where, in paragraph 4, it has been held that where quorum has not been prescribed, law requires every member to be present for the meeting to be valid.

64.This argument of the learned counsel for the petitioners proceed on the assumption that in Ext.P18, the notification constituting the KCZMA, 6 members have been nominated in their official capacity and that a meeting of the authority to be valid, those 6 members having been so nominated should themselves be present. This needs reference to Ext.P18 notification, which reads thus:

WPC.26435/13 & 31081/13

MINISTRY OF ENVIRONMENT AND
FORESTS

ORDER

New Delhi, the 20th December, 2011

S.O.2843(E)- In exercise of the powers conferred by sub-sections (1) and (3) of Section 3 of the Environment (Protection) Act, 1986 (29 of 1986) hereinafter referred to as the said Act), the Central Government hereby constitutes an authority to be known as the Kerala Coastal

11. Sri.Baby John,
Malabar Coastal Institute for
Training Research and Action
(MCITRA), M.Kanaran Road,
Kozhikode, Kerala

12. Member Secretary,
Kerala State Council for
Science, Technology and
Environment, Kerala.
II. The Authority shall have the power to
implement and enforce the Coastal

Zone Management authority (hereinafter referred Zone Notification, 2011 for protecting and to as the Authority) consisting of the following improving the quality of the coastal environment persons, for a period of three years, with effect and preventing, abating and controlling from the date of publication of this order in the environmental pollution in areas of the State of Official Gazette, namely:- Kerala, namely:-

1. Principal Secretary, -Chairman Science and Technology Department, Government (i) The Coastal Zone Management authority shall of Kerala, Kerala. examine the project proposals in accordance with the approved Coastal Zone Management
2. Principal Secretary, -Member Plan and in compliance with Coastal Local Self Government, Regulation Zone notification and make Government of Kerala recommendations within a period of sixty days or his nominee. from date of receipt of complete application;
3. Secretary, -Member (a) to the Ministry of Environment and Environment Department, Forests or State Environmental Impact Government of Kerala Assessment Authority (hereinafter referred to or his nominee. as the SEIAA) as the case may be, for the
4. Principal Secretary, -Member project attracting Environmental Impact Industries Department, Assessment notification, 2006; Government of Kerala (b) to the Ministry of Environment and or his nominee. Forests for the projects not covered in the
5. Principal Secretary, -Member Environmental Impact Assessment Revenue Department, notification, 2006 but attracting the Government of Kerala provisions specified in sub-paras (ii) of para 4 or his nominee. of the Coastal Regulation Zone notification;
6. Secretary, -Member) to the concerned State Authority for the Fisheries Department, projects not covered under (a) and (b) above. Government of Kerala or his nominee.

(ii) The State Government, Union Territory

7. Chairman, -Member Administration, the local authority or the Kerala State Pollution Control concerned Coastal Zone Management Board, Government of Kerala. Authority within the framework of such

8. Director, -Member approved Coastal Zone Management Plans as Centre for Earth Science Studies, the case may be in accordance with provisions Thiruvananthapuram. of this notification shall regulate all developmental activities listed in this

9. Dr.K.Padmakumar, Professor, -Member notification. Aquatic Biology, University of Kerala, Thiruvananthapuram. (iii) The State Government or the Union Territory of Coastal Zone Management Authorities

10.Dr.A.Ramachandran, Professor -Member shall primarily be responsible for enforcing and Director Industrial Fisheries, and monitoring of this notification and to Cochin University of Science assist in this task, the State Government and And Technology, Kochi, Kerala. the Union WPC.26435/13 & 31081/13 Territory shall constitute District Level (vi) Filing complaints, under Section 19 of the said Committees under the Chairmanship of the Act in cases of non-compliance of the directions District Magistrate concerned containing at least issued by it under sub-paragraphs (i) and (ii) of three representatives of local traditional coastal paragraph II of this Order. communities including from fisher folk.

(vii) To take action under Section 10 of the said Act

(iv) Examination of proposals for changes or to verify the facts concerning the issues arising modifications in classification of Coastal from sub-paragraphs (i) and (ii) of paragraph II of Regulation Zone areas and in the Coastal Zone this Order. Management Plan (CZMP) received from the Kerala State Government and making specific III. The Authority shall deal with environmental recommendations to the National Coastal Zone issues relating to Coastal Regulation Zone which may Management Authority therefore. be referred to it by the State Government of Kerala, the National Coastal Zone Management Authority or

(v) (a) Inquiry into cases of alleged violation of the the Central Government. provisions of the said Act and the rules made thereunder or any other law which is relatable to IV. To maintain transparency in the working of the the objects of the said Act and, if found necessary Coastal Zone Management Authorities it shall be the in a specific case, issuing directions under Section responsibility of the Coastal Zone Management 5 of the said Act, in so far as such directions are Authority to create a dedicated website and post the not inconsistent with any direction issued in that agenda, minutes, decisions taken, clearance letters, specific case by the National Coastal Zone violations, action taken on the violations and court management Authority or by the Central matters including the Orders of the Hon'ble Court as Government; also the approved Coastal Zone Management Plans of the respective State Government or Union Territory.

(b) Review of cases involving violations of the provisions of the said Act and the rules made V.The Authority shall furnish report of its activities thereunder, or under any other law which is at least

once in six months to the National Coastal Authority relating to the objects of the said Act, and if Zone Management Authority found necessary, referring such cases, with VI. The foregoing powers and functions of the Authority, for review to the National Coastal Zone Authority shall be subject to the supervision and Management authority: control of the Central Government. Provided that the cases under sub-paragraphs (iv) VII. The Authority shall have its headquarters at

(a) and (ii) (b) of paragraph II may either be taken Thiruvananthapuram. up suo moto, or on the basis of complaint made by an individual, or an representative body, or an VII. Any matter specifically not falling within the organization. scope and jurisdiction of the Authority shall be dealt with by the statutory authorities concerned.

[F.No.J-17011/26/2007-IA-III(P1.)] Dr.NALINI BHAT, Scientist 'G'

65.A perusal of Ext.P18 itself would show that Sl.Nos.2 to 8 mentioned therein, though are nominated in their official capacity, are conceded freedom to depute their nominees to the meetings of the KCZMA. In other words, the members appointed to the KCZMA in their official capacity being very WPC.26435/13 & 31081/13 senior officers in the State Government and having several responsibilities, have been empowered to depute their nominees to attend the meetings of the KCZMA. Therefore, if the nominees of these officials participate in the meetings of the Authority, such meetings cannot be held to be invalid. The petitioners do not have a case that the participants in the meetings mentioned in Exts.P17 and P19 are not nominees of the officers who are members of the KCZMA. If that be so, the contention that the meeting has been attended by unauthorised persons and that for determining the quorum those participants should be excluded is only to be rejected and we do so.

66.In so far as the requirement of quorum that is canvassed by the learned counsel for the petitioners is concerned, neither in the Environmental Protection Act nor in the Rules thereunder or in Ext.P18 notification is there any prescription of quorum for the meeting of the KCZMA. The notification dated 21.7.2008, WPC.26435/13 & 31081/13 prescribing 2/3rd quorum mentioned in paragraph 8 of W.P(C).26435/13, is not incorporated in Ext.P18, the notification constituting the KCZMA and which superseded the earlier notification. Even otherwise, that does not mean that a meeting to be validly conducted, every member of the authority should be present. According to us, if the regulations which govern the KCZMA do not prescribe a quorum, the number of members who usually act in conducting the business of the KCZMA should be taken as constituting the quorum. This view that we have taken is found in *Re Tavistock Iron Works Co., Lyster's Case* [(1876) L.R. 4 Eq.233]. Referring to this judgment, in *Shackleton on the Law and Practice of Meetings*, 7th Edition, it has been stated thus:

"Where the articles of association of a company do not prescribe the number of directors required to constitute a quorum, the number who usually act in conducting the business of the company will constitute a quorum."

Therefore, we cannot accept this contention also. WPC.26435/13 & 31081/13

67. It is true that Ext.P17 minutes of the meeting held on 27.12.2012 was confirmed by the KCZMA only in its meeting held on 15.4.2013 as per Ext.P19. It is also true that the decision as reflected in Ext.P17 was forwarded to the State Environment Impact Assessment Authority on 29.1.2013 as per Ext.P16. It is on this basis that the counsel contended that the minutes should not have been forwarded before its confirmation. Though, going by the sequence of events, it is factually correct that the decision taken in the 53rd meeting of the KCZMA held on 27.12.2012 was forwarded to SEIAA much before its confirmation, learned counsel could not point out any legal infirmity in such a course of action adopted by the Authority. We also do not find any irregularity on the part of the KCZMA, particularly when the minutes of the 53rd meeting were confirmed by the Authority in its subsequent meeting held on 15.4.2013. However, we hasten to add that our conclusion could have been different, if the Authority had at least modified the minutes at the time when it was confirmed.

WPC.26435/13 & 31081/13

68. It was contended that the project of the 10th respondent is a prohibited activity in terms of the provisions contained in the Coastal Regulation Zone notification, 2011 issued by the Ministry of Environment and Forest in terms of the provisions contained in section 3 of the Environment (Protection) Act, 1986. In support of this contention, counsel placed reliance on the provisions of the notification, the judgment of this Court in *Ratheesh v. State of Kerala* [2013 (3) KLT 840] and the judgment of the Apex Court confirming the same in *Vaamika Island (Green Lagoon Resort) v. Union of India* [2013 (3) KLT 677 (SC)]. Learned counsel further referred to the judgment of the Apex Court in *Piedade Filomena Gonsalves v. State of Goa* [(2004) 3 SCC 445], where, in paragraph 6, it was held that illegality in construction cannot be condoned, the judgment in *Ansari Kannothe v. State of Kerala* [2011 (1) KHC 405 (DB)] where the requirement of scrupulously following the CRZ notification was highlighted by the court and also the judgment in *Union Territory WPC.26435/13 & 31081/13 of Lakshadweep v. Seashells Beach Resort* [(2012) 6 SCC 136], where it was held that the equitable considerations have no place in a matter involving environment.

69. The CRZ notification, 2011, as already stated, was issued by the Government of India for declaration of coastal stretches as Coastal Regulation Zone and imposing restrictions on industries, operations and processes in the CRZ. Clause 3 of the notification details the prohibited activities within CRZ and clause 4 provides for regulation of permissible activities in CRZ area. Clause 5 provides for the preparation of Coastal Zone Management Plans and clause 7 deals with classification of the CRZ into four different classes. In addition to the four different classes, separate classification has been made for areas requiring special consideration for the purpose of protecting the critical coastal environment and difficulties faced by local communities, in which, vide clause A(ii) CRZ areas WPC.26435/13 & 31081/13 of Kerala including the backwaters and backwater islands are included.

70. As we have already stated, clause 5 provides for preparation of Coastal Zone Management Plans. As per this provision, the Coastal Zone Management Plans may be prepared by the State Government by engaging reputed and experienced scientific institutions or agencies and in consultation with concerned stakeholders. The draft Plan shall be submitted by the State Government to the concerned Coastal Zone Management Authority for appraisal, including

appropriate consultations and recommendations in accordance with the procedures laid down in the Environment (Protection) Act, 1986. Further provisions are made for the State Government to submit the draft to the Ministry of Environment and Forest, which is to approve the Coastal Zone Management Plans and it is also provided that all developmental activities listed in the CRZ notification shall be regulated by the State Government within the framework of such WPC.26435/13 & 31081/13 approved Plans, as the case may be, in accordance with the provisions of the notification.

71. It is also relevant to note that in CRZ-III, area upto 200 mts from HTL on the landward side in case of seafront and 100 mts along tidal influenced water bodies or width of the creek whichever is less is to be earmarked as "No Development Zone (NDZ)". However, clause (i) provides that "the NDZ shall not be applicable in such area falling within any notified port limits". Clause V(2) provides CRZ for Kerala and this provision reads thus:

2. CRZ for Kerala- In view of the unique coastal systems of backwater and backwater islands along with space limitation present in the coastal stretches of the State of Kerala, the following activities in CRZ shall be regulated as follows, namely:-

(i) all the islands in the backwaters of Kerala shall be covered under the CRZ notification;

WPC.26435/13 & 31081/13

(ii) the islands within the backwaters shall have 50 mts width from the High Tide Line on the landward side as the CRZ area;

(iii) within 50 mts from the HTL of these backwater islands existing dwelling units of local communities may be repaired or reconstructed however no new construction shall be permitted;

(iv) beyond 50mts from the HTL on the landward side of backwater islands, dwelling units of local communities may be constructed with the prior permission of the Gram panchayat;

(v) foreshore facilities such as fishing jetty, fish drying yards, net mending yard, fishing processing by traditional methods, boat building yards, ice plant, boat repairs and the like, may be taken up within 50mts width from HTL of these backwater islands."

72. The authority to prepare the Coastal Management Zone Plans is the Kerala Coastal Zone Management Authority, the 6th respondent. In its counter affidavit dated 11.3.2014, the 6th respondent has specifically stated that the Bolgatty Island is in CRZ-III. In so far as the approval that was WPC.26435/13 & 31081/13 granted to the project of the 10th respondent is concerned, it is stated that the report submitted by the Committee constituted by the Authority was discussed by the Authority in its 53rd meeting and after detailed discussion, the proposal was recommended subject to the general conditions and also on condition that no untreated waste will be let into the water body and the same was forwarded to the State Environment Impact Assessment Authority. These

statements are contained in paragraph 14 of this affidavit, which reads thus:

"14. The committees report was discussed by KCZMA in its 53rd meeting. The KCZMA had detailed discussion and it was decided that the area being part of an island, the CRZ landward extends only upto 50m of High Tide Line (HTL) and the proposal is for construction of non-port related activity envisaged outside the 50m, therefore the proposal can be recommended to subject to the general conditions, and that no untreated waste will be let into the water body and to forward the same to State Environment Impact Assessment Authority (SEIAA). The KCZMA had taken this decision after detailed discussion on the implication of CRZ Notification WPC.26435/13 & 31081/13 and provisions thereon. Based on the decision the project was recommended to SEIAA for further necessary action as per the provisions of CRTZ notification 2011."

73.The Coastal Zone Management Plan which classifies Bolgatty Island into CRZ-III is not under challenge. Therefore, the question is whether the project of the 10th respondent is a permissible activity within the CRZ-III. As we have already seen, though a No Development Zone has been prescribed within CRZ-III, areas falling within any notified port limits stands excluded from the Non Development Zone. Admittedly, the area leased out to the 10th respondent is within the notified port limits. Therefore, subject to the clearances that are required to be obtained in terms of the CRZ notification, 2011 and from the other statutory authorities, a project involving construction activity, like the one proposed by the 10th respondent, is a permissible activity within the CRZ-III.

WPC.26435/13 & 31081/13

74.The judgment of this Court in Ratheesh v. State of Kerala [2013 (3) KLT 840] which was confirmed by the Apex Court in Vaamika Island (Green Lagoon Resort) v. Union of India [2013 (3) KLT 677 (SC)] was a case where construction activity was undertaken in Vettilla Thuruthu Island which was classified in the Coastal Zone Management Plan prepared by the Kerala Coastal Zone Management Authority as 'Filtration Pond' and consequently, under CRZ-I. It was seeking to challenge the classification of the property in the Coastal Zone Management Plan, the writ petition was filed. This court and the Apex Court upheld the classification made by the Kerala Coastal Zone Management Authority and on that basis, held the construction made illegal. It is true that in the judgment of the Apex Court, the importance of the Vembanadu lake has been taken note of and the need to preserve it for future generations has been highlighted. However, having regard to the factual difference between the case dealt with in the aforesaid judgments and the cases under WPC.26435/13 & 31081/13 consideration, where the land falls in CRZ-III, we are unable to place reliance on the reasoning contained in these judgments and find any illegality on the part of the authorities. For that reason itself, we do not think it necessary to deal with the other judgments referred to earlier in any greater detail.

75.One contention which was seriously urged by the counsel for the petitioners was that Ext.R10(a) tender was submitted by Sri.Yousuff Ali M.A. and that though this was the tender which was finally accepted by the Port Trust, the lease was granted to the 10th respondent, a company incorporated

under the Companies Act. It was also his contention that there is serious irregularity in the evaluation of the tender submitted and that neither the tenderer nor the 10th respondent satisfied the eligibility conditions specified in the tender notification.

76. Counsel made reference to Ext.R10(a) tender document and contended that as per clause 6, WPC.26435/13 & 31081/13 technical bids were to be opened on 27.7.2010 and as per clause 10, the tender documents are non-transferable and that the tenderers must obtain the Tender Documents in their own name and submit their tenders directly. Reference was also made to the minimum eligibility criteria prescribed in clause 4.0 of the Instructions to Tenderers, which reads thus:

"4.0 MINIMUM QUALIFYING CRITERIA 4.1 The bidders wishing to participate must fulfill the following requirements and bids of only those agencies that fulfill these requirements shall be considered for detailed evaluation:-

4.2 The bidder should be a Individual/ reputed Firms/ proven track record in planning, Developing, executing similar type of project.

4.3 The tenderer shall have an average financial turn over of Rs.16.50 crores for last 3 years ending 31-03-2010.

Documentary proof for the above, along with copies of audited balance sheet Loss or Profit statement etc. should be enclosed with their bid."

WPC.26435/13 & 31081/13

77. Learned counsel then referred us to clause 5.1 (C)(d)(vii), which states that the tenderer should not submit their offer with any conditions/counter conditions anywhere in the tender documents and that the conditional tenders, if any, shall be summarily rejected. Reference was then made to the General Conditions of Contract, in which, as per clause 1 (b), 'tenderer' has been defined as the person or persons, firm, corporation, consortium or company who submits the tender for the subject area. Clause 7 deals with award of lease which provides that lease will be awarded to the tenderer whose tender has been declared as highest upfront premium and accepted by the Port. In clause 10, it is also prescribed that the Port Trust will promptly notify the successful tenderer by facsimile, confirmed by registered letter that its tender has been accepted. In clause 12 which deals with execution of lease deed, it is also provided that successful tenderer shall execute lease deed agreement in the format at Annexure -I within 120 days from the date of taking over of the premises WPC.26435/13 & 31081/13 and that all the costs and expenses for executing of lease agreement shall be borne by the successful tenderer. In clause 5 of the Special Conditions to be satisfied by the Bidders, it is provided that the lessee shall obtain all statutory clearances as may be required as per law from the concerned department before execution/ commissioning of the project. Clause 7 therein provides that proper environmental/ Pollution control safe guards as per law must be incorporated in the design and implementation of the project.

78. All the aforesaid conditions of the tenders were pressed into service to impress upon us that the tender was submitted by Sri. Yusuff Ali M.A. and that even at the time when the tender was submitted or on the last date prescribed for opening of the tender on 27.7.2010, the 10th respondent company to which the lease was granted was not even in existence in as much as the same was incorporated only on 5.10.2010. This, according to the learned counsel, is a major irregularity which should WPC.26435/13 & 31081/13 invalidate the lease. Another contention urged in this context was that neither the tenderer nor the 10th respondent satisfied the eligibility criteria prescribed by the Port in the tender. We shall now examine the soundness of this contention.

79. It is apposite in this context to mention the limitations of an authority under Article 12 of the Constitution of India, which has been pithily put by the Apex Court in *New Horizons Limited v. Union of India* [(1995) 1 SCC 478] thus:

"17. At the outset, we may indicate that in the matter of entering into a contract, the State does not stand on the same footing as a private person who is free to enter into a contract with any person he likes. The State, in exercise of its various functions, is governed by the mandate of Article 14 of the Constitution which excludes arbitrariness in State action and requires the State to act fairly and reasonably. The action of the State in the matter of award of a contract has to satisfy this criterion.

Moreover a contract would either involve expenditure from the State exchequer or augmentation of public revenue and consequently WPC.26435/13 & 31081/13 the discretion in the matter of selection of the person for award of the contract has to be exercised keeping in view the public interest involved in such selection. The decisions of this Court, therefore, insist that while dealing with the public, whether by way of giving jobs or entering into contracts or issuing quotas or licences or granting other forms of largesse, the Government cannot act arbitrarily at its sweet will and like a private individual, deal with any person it pleases, but its action must be in conformity with the standards or norms which are not arbitrary, irrational or irrelevant. It is, however, recognised that certain measure of "free play in the joints" is necessary for an administrative body functioning in an administrative sphere. [See *Ramana Dayaram Shetty v. International Airport Authority of India* [(1979) 3 SCC 489]; *Kasturi Lal Lakshmi Reddy v. State of J & K* [(1980) 4 SCC 1]; *Fasih Chaudhary v. Director General, Doordarshan* [(1989) 1 SCC 89]; *Sterling Computers Ltd. v. M & N Publications Ltd*; *Union of India v. Hindustan Development Corporation* [(1993) 3 SCC 499]."

80. On facts, we find that in Ext.R10(a), the tender document, vide clause 4 of the 'Instructions to the tenderers', the Port has specified that the bidder WPC.26435/13 & 31081/13 should be an individual or reputed firm with proven track record in planning, developing and executing similar type of projects and that the tenderer shall have an average financial turn over of Rs.16.50 crores for the last three years ending 31.3.2010. In the notice inviting tenders, it was also specified that the bids should be submitted in accordance with the Instructions to the Tenderers, General Conditions of Contract etc. as enumerated in the tender document. It also states in clause 10 that tender documents are non-transferable and the tenderers must obtain the Tender Documents in their own name and submit their tenders directly.

81.The tender document was purchased by Sri.Yusuff Ali M.A. in his individual name. Annexure II to the tender document evidences this fact. In this document, name of the tenderer offering the bid has been shown as Yusuff Ali M.A. He has also added a note with a request "please see the note below", and the note reads as follows:

WPC.26435/13 & 31081/13 "Note: A new (P) Ltd company under the company's Act, 1956 will be incorporated for the purpose of implementation of the proposed project with Yusuff Ali M.A. as the Chief Promoter."

82.Reading of this document shows that tenderer is Sri.Yusuff Ali M.A. and that he has made it clear that a new private limited company under the Company's Act, 1956 will be incorporated for the purpose of implementation of the proposed project with he himself as the Chief Promoter. Section 6 (Schedule B) of the tender document contains the experience record submitted by Sri.Yusuff Ali M.A., which reads thus:

Sl. Name of firms Type of contract with year of Contract execution value No.

	LULU	CONVENTION CENTER	RS.30
1	INTERNATIONAL CONTENTION CENTER PVT. LTD.	STARTED OPERATION IN THE YEAR 2006	CRORES
2	LULU INTERNATIONAL SHOPPING MALL PVT. LTD.	SHOPPING MALL AND STAR HOTEL. THE WORK IS IN PROGRESS	RS.1250 CRORES
3	LULU FLIGHT KITCHEN PVT. LTD.	FLIGHT CATERING UNIT AND STAR HOTEL. THE WORK IS IN PROGRESS	RS.110 CRORES

WPC.26435/13 & 31081/13

83.A reading of this document shows that the

experience claimed by Sri.Yusuff Ali M.A. is not that of his own but is of certain companies, the names of which are mentioned in this document. No document whatsoever has been produced before this Court either by the 10th respondent or the Cochin Port Trust, indicating that the tenderer had furnished any document showing whether Sri.Yusuff Ali M.A. had any connection with the companies mentioned in the experience record or that these concerns were in any manner related to the tenderer. Therefore, this document did not in any manner prove that Sri.Yusuff Ali M.A., the tenderer, had proven track record in planning, developing or executing similar type

of work as specified in clause 4.2 of the Instructions to Tenderers.

84. The financial data submitted by the tenderer is contained in Schedule C of the tender document. Here the average financial turn over for the last three years ending 31.3.2009 is required to be WPC.26435/13 & 31081/13 furnished. The financial turn over furnished by the tenderer reads thus:

Sl. Financial Year Financial Turn Over (in Rs. IN LAKHS lakhs) No.

		(AED IN LAKHS)	
		EMKE GROUP UAE OPERATIONS	LULU INTERNATIONAL CONVENTION CENTER (P)
1	2007-08	29672	531.89
2	2008-09	45631	737.48
3	2009-2010	49144	1033.79

In the column requiring the declaration of

name/address of commercial bank providing credit line, what is stated is 'various banks in middle east'.

85. Here also, reading of this document would show that the financial turn over for the year 2007-08, 2008-09 and 2009-2010 furnished by the tenderer is that of 'EMKE Group UAE Operations' and 'Lulu International Convention Centre (P)'. Here also, as in the case of the experience record, the financial turn over furnished is not that of the tenderer Sri.Yusuff Ali M.A. but is of certain WPC.26435/13 & 31081/13 other entities and the connection between the tenderer and the entities mentioned in the financial data is unknown and is not disclosed either in Ext.R10(a) tender submitted or in any document produced by the 10th respondent or the Port Trust. This, therefore, shows that the Cochin Port Trust did not evaluate the tender received by it from Sri.Yusuff Ali M.A. applying the tender conditions set by itself and to a pointed question put to the counsel for the Cochin Port Trust, the disappointing answer was that having regard to the fact that the bid received was the sole tender and having regard to the offer received, the Port accepted the tender. In our view, the Port Trust appear to have compromised its tender conditions in its anxiety to accept the tender submitted by Sri.Yusuff Ali M.A. and this amounts to changing the rules of the game after the game has begun, which is impermissible in a tender process. In this context, it is relevant to refer to the judgment of the Apex Court in M/s. Monarch Infrastructure (P) Ltd. v. Commissioner, WPC.26435/13 & 31081/13 Ulhasnagar Municipal Corporation [AIR 2000 SC 2272]:

"12. The High Court had taken the view that if a term of the tender having been deleted after the players entered into the arena it is like changing the rules of

the game after it had began and, therefore, if the Government or the Municipal Corporation was free to alter the conditions fresh process of tender was the only alternative permissible. Therefore, we find that the course adopted by the High Court in the circumstances is justified because by reason of deletion of a particular condition the wider net will be permissible and a larger participation or more attractive bids could be offered."

86.However, the lease that was granted by the Port Trust has already been upheld by this court in Ext.R10(b) judgment in W.P.(C)36882/10. That judgment has attained finality. Therefore, in the light of the principles contained in Section 11 of the CPC and the principles laid down by the Apex Court, the issues raised by the petitioners questioning the grant of lease, cannot be reopened in these proceedings.

WPC.26435/13 & 31081/13

87.Yet another argument raised by the counsel for the petitioners was that though the tender in question was submitted by Sri.Yusuff Ali M.A., lease was granted to the 10th respondent, a company incorporated under the Company's Act long after the submission and even the opening of the tender. As we have already mentioned, the last date for submission of the tender was 27.7.2010 and the 10th respondent company was incorporated only on 5.10.2010. According to the learned counsel, if the tender was submitted by a particular individual or an entity, even if the tender is accepted, award of the tender could have been only to the tenderer and nobody else. Therefore, according to him, award of tender to the 10th respondent cannot be sustained. In this context, reference was made not only to the tender document but also to Ext.P7, the resolution of the board of trustees resolving to approve the proposal to accept offer of Sri.Yusuff Ali M.A. and this resolution reads thus:

WPC.26435/13 & 31081/13 "81. The Board, after detailed deliberations and considering the wide publicity given to the tendering process, resolved to approve the proposal for accepting the single offer of Shri Yusuff Ali M.A. for leasing the 10 Hectares of land at Bolghatty Island for a period of 30 years with an option for renewal for a further period of 30 years, as authorized by the Ministry of Shipping, Govt, of India, vide their letter No.PO.28015/19/2008-DRG dated 4th June, 2010, on the following conditions:

1. The upfront premium for the first 30 years would be Rs.6,74,00,000/- per hectare ie,Rs.67,40,00,000/- for 10 hectares.
2. The annual nominal lease rental would be payable at Re.1/- per metre square for the first 30 year period.
3. At the end of the first 30 year lease period, the lessee would have an option for renewal of the Lease for a further period of 30 years. In the event of the lease being extended for a further period of 30 years, the annual lease rental would be payable at the then prevailing lease rentals fixed by the Competent Authority, as per the then existing land policy guidelines of Government of India.

WPC.26435/13 & 31081/13

4. The authorized purposes for which the land could be used are: setting up of hotels, resorts, convention centres, shopping malls, commercial/ office complexes and allied facilities, as provided in the tender conditions and detailed in the Board Note.

Considering the circumstances and Port's financial commitments, the Board also authorized the Chairman to take necessary action in the matter without waiting for confirmation of the minutes."

88. Counsel thereafter referred us to Ext.P18 letter dated 7.10.2010, whereby Sri.Yusuff Ali M.A. Informed the Port Trust that as mentioned by him in his tender offer, a new private limited company under the name 'Lulu Convention and Exhibition Centre Private Limited' has been incorporated on 5.10.2010 and that this company promoted by him will be implementing the project. He has also furnished the address of the registered office of the new company. In this letter, he has requested the Cochin Port Trust to award the tender in the address of the new company to enable him to remit WPC.26435/13 & 31081/13 the amounts and to move forward. Subsequently, Sri.Yusuff Ali M.A. again wrote to the Port Trust by his letter dated 25.10.2010, requesting the Port Trust to send the documents relating to the award of contract and all other communications pertaining thereto in the address furnished therein which reads thus:

"I would request you to send the documents relating to the award for contract and all other communications pertaining thereto on the below mentioned address:

Shri.Yusuff Ali M.A.

Managing Director, Lulu Convention and Exhibition Center Pvt. Ltd 50/2392,
N.H.17, Edappally, Kochi-682024, Kerala."

89. It is on this basis that the Cochin Port Trust issued Ext.P19 dated 26.11.2010 to Sri.Yusuff Ali M.A. in the address furnished by him in his communication dated 25.10.2010. allotting the land on lease to Sri.Yusuff Ali M.A. In clause 8 of this WPC.26435/13 & 31081/13 communication, the Port Trust has also specified as follows:

"The Cochin Port Trust must be consulted whenever Mr.Yusuff Ali M.A., Mansion-1, Nattika P.O., Thrissur -680 566 proposes to construct structures/facilities from time to time in the area allotted and plans of the proposed construction should be sent to the Port's Chief Engineer in quadruplicate for prior scrutiny and approval".

90. In clause 11, the Port Trust has further specified that the leased property shall not be transferred by the lessee to any third party either by way of sub-lease or any other means without the prior approval of the lessor. It appears that subsequently, when draft lease deed was submitted to it, the Port found that the name of the lessee has been changed as M/s.Lulu Convention and Exhibition Centre (P) Ltd, the 10th respondent. Thereupon, the Port issued Ext.P20 stating that as the tender was submitted by Sri.Yusuff Ali M.A. and the lease was awarded to him, registration of the

WPC.26435/13 & 31081/13 lease deed in the name of the 10th respondent will be a transfer of lease and therefore attracts transfer fee in accordance with the Land Policy Guidelines of the Government of India. Accordingly, the Port Trust informed Sri.Yusuff Ali M.A. that the transfer fee applicable in this case is `3,34,36,093/- and requested him to remit that amount so as to regularise the transfer and proceed with the execution of the lease deed in the name of the 10th respondent. This letter reads thus:

"On scrutiny of the draft lease deed submitted it has been observed that the name of the Lessee has been changed as M/s.Lulu Convention and Exhibition Centre (P) Ltd. As the Tender was submitted by Shri.Yusuff Ali M.A. and the lease was awarded to him, registration of the lease deed in the name of M/s.Lulu Convention Centre (P) Ltd, will be a transfer of lease and therefore attracts transfer fee in accordance with the Land Policy Guidelines of the Government of India.

You are requested to furnish a letter from the new Company to the effect that the assets and liabilities in respect of the leased property WPC.26435/13 & 31081/13 will be taken over by M/s.Lulu Convention and Exhibition Centre (P) Ltd. during the period of lease.

As per the Government of India Land Policy Guidelines, the transfer fee applicable in this case is Rs.3,34,36,093/- (one year's lease rent as per the SOR). You are requested to remit the transfer fee in the office of the FA & CAO so as to regularize the transfer and proceed with the execution of the lease deed in the Company's name."

91.It appears that challenging Ext.P20 letter of the Cochin Port Trust, Sri.Yusuff Ali M.A. and the 10th respondent filed W.P(c).9346/11. That writ petition was disposed of by Ext.R10(c) judgment dated 12.7.2011. In this judgment, this Court held that there is no transfer of lease attracting levy of transfer fee and that the respondents are estopped from adopting a stand that there occurred a transfer of the lease which was created in favour of the second petitioner, Sri.Yusuff Ali M.A., in his personal capacity to the 1st petitioner, the 10th respondent company. On that basis, Ext.P20, WPC.26435/13 & 31081/13 which was produced in that case as Ext.P9, was quashed. The reasoning of this Court contained in paragraphs 3 to 6 of the judgment reads thus:

"3. Based on the above factual aspects, question arises as to whether the demand of transfer fee is justifiable. It is true that the 2nd petitioner had participated in the tender in his personal capacity. But in the proforma submitted along with the tender he had specifically noted that implementation of the proposed project will be by a Company which will be incorporated with the 2nd petitioner as its Chief Promoter. All subsequent communications reveal that, even before awarding the tender the 2nd petitioner had informed the 1st respondent that such a Company was already incorporated and Company is going to implement the project. At no point of time the 1st respondent had rejected or refused any of those communications nor they have denied acceptance of the 1st petitioner Company for implementation of the project. Ext.P4 is a crucial document which indicate the allotment of lease on the basis of the tender. It is mentioned therein that the lease is allotted to the 2nd petitioner in his

capacity as Managing Director of the 1st petitioner Company.

Thereafter the advice bill was issued in the name of the 1st petitioner Company. Receipt for WPC.26435/13 & 31081/13 acceptance of money was also issued in the name of the 1st petitioner Company. The 1st respondent had communicated with other authorities about awarding of the lease in favour of the 1st petitioner Company. Under the above mentioned circumstances prima facie, the 1st respondent is estopped from taking any stand that the tender was awarded only in favour of the 2nd petitioner in his personal capacity or that the payment of upfront premium was accepted from the 2nd petitioner in his personal capacity.

4. But, contention has been raised on behalf of the 1st respondent to the effect that if there is a transfer of the lessee at any point of time after acceptance of the tender, the same will amount to a transfer of lease as contemplated under the Land Policy Guidelines for major Ports formulated by the Government of India. A copy of the said Policy is produced as Ext.P12. Among various guidelines it is prescribed therein that, in case of lease granted on up front basis transfer can be allowed subject to the transferee agreeing to pay revised lease rent as prevalent at the time of transfer, subject to revision from time to time in the light of the provisions contained in the original lease agreement. It provides that fee equal to 50% of the difference between the current up front premium and the original premium calculated for the balance lease period is to be collected as WPC.26435/13 & 31081/13 transfer fee. Learned Senior counsel appearing for the respondents contended that when the tender submitted by the 2nd petitioner was accepted a lease has been created or rather, a lease has come into existence. Therefore if the lease deed has to be executed in favour of the 1st petitioner Company, it has to be treated as a transfer. With respect to various communications received from the 2nd petitioner, it is contended that no estoppel can be attributed against the respondents on the basis of such letters, because law insist for collection of such transfer fee. Of course, it is to be accepted that there cannot be any estoppel against Statute. But it is pertinent to note that the 1st respondent had repeatedly indicated in various documents that the lease is created in favour of the 1st petitioner Company. Learned Senior counsel contended that the communications issued by the 2nd petitioner, prior to acceptance of the tender, will only indicate that he was making requests to issue all communications in the address as Managing Director of the 1st petitioner Company. But as already observed, Ext.P4 letter of allotment, Ext.P5 advice bill, Ext.P13 receipt acknowledging payment and Ext.P16 letter etc. will clearly indicate that the 1st respondent had on unequivocal terms mentioned that the lease is made in favour of the 1st petitioner. WPC.26435/13 & 31081/13

5. Even assuming that there was no acceptance of the 1st petitioner Company as Lessee from the side of the 2nd respondent and that there cannot be any estoppel against law, it is to be examined whether there is any transfer coming within the policy guidelines formulated by the Government of India. Ext.P12 indicate collection of transfer fee only with respect to transfer of lessee after creation of the lease. Crucial question is as to when the lease is coming into existence. Learned senior counsel on behalf of the respondents contended that the lease can be construed as created at the time when the tender was accepted. But Sri.Suresh Kumar, learned Senior counsel appearing on behalf of the petitioners pointed out that a lease can be created only by virtue of a registered instrument as provided under Section 107 of the Transfer of Properties Act, 1882. Per contra, learned Senior counsel for respondents contended that the parties will be at liberty to enter upon a lease and to

ratify the action by execution of a registered instrument. But as observed above, even if a view is adopted to the effect that the lease had come into existence even prior to execution and registration of the lease deed, there are clear admissions through various documents from the side of the 1st respondent that the lease is created in favour of the 1st petitioner.

WPC.26435/13 & 31081/13

6. Conclusion of the discussion is that, there is no transfer of lease occurred which will attract collection of transfer fee and that the respondents are estopped from adopting a stand that there occurred a transfer of the lease which was created in favour of the 2nd petitioner in his personal capacity to the 1st petitioner (sic) (1st respondent) Company. Therefore the demand for transfer fee under Et.P9 notice cannot be sustained as legal."

It was accordingly that Ext.P8 lease deed was executed between the Port Trust and the 10th respondent on 26.7.2011.

92. Although it is true that in view of Ext.R10(c) judgment of this Court in W.P(C).9346/11, the Port Trust was bound to proceed to execute the lease deed in favour of the 10th respondent on the basis that there was no transfer of lease attracting the levy of transfer fee as provided in the Land Policy Guidelines of the Government of India, still we find it extremely strange that the Port Trust which had a stake of Rs.3,34,36,093/- in the matter left the judgment unchallenged and allowed it to become WPC.26435/13 & 31081/13 final. This is all the more so in view of the fact that the judgment shows that the Port Trust did not bring to the notice of this Court several important factual and legal aspects such as Ext.R10(b) Division Bench judgment of this Court in W.P(C). 36882/10, where, the award of lease to Sri.Yusuff Ali M.A. was challenged by a public interest litigant, in which, after hearing the Port Trust, this Court specifically found in paragraph 3 of the judgment that respondent No.5 (Yusuff Ali M.A.) is the lessee chosen by the Port Trust by a process of inviting tenders from interested parties. It was also found in paragraph 5 that the highest offer made was by Sri.Yusuff Ali M.A. and that the petitioner therein was not in a position to identify any person who was willing to offer an amount higher than what was offered by him. In paragraph 6, it was also stated that the challenge in that writ petition was only to the choice of the 5th respondent, Sri.Yusuff Ali M.A. Finally, this Court declined jurisdiction by holding that by interfering with the decision of the Port, in the WPC.26435/13 & 31081/13 absence of any other prospective bidder who is willing to offer an amount higher than what was offered by Sri.Yusuff Ali M.A., this Court would only be scuttling the decision of the Port without any benefit either to the Port or to the Public in general. In other words, the fact that the lessee chosen by the Port Trust was Sri.Yusuff Ali M.A. has been found by a Division Bench of this Court in a judgment rendered after hearing the Port Trust.

93. We also find that the communications referred to in Ext.R10(c) judgment that were issued by the Port Trust to the 10th respondent were all issued at the request of Sri.Yusuff Ali M.A. and that even in Ext.P19 allotting the land, the Port Trust has not recognised anybody other than Sri.Yusuff Ali M.A. as the lessee. Similarly, the fact that somebody else has made payment of the amounts due from Sri.Yusuff Ali M.A. does not recognise the payee as the lessee, was also not highlighted by the Port Trust. Despite all these and the substantial financial stake it had in the matter, the Port

WPC.26435/13 & 31081/13 Trust, which is reported to be in loss of crores of rupees annually, chose not to pursue the matter further. This, to our mind, is a serious lapse and misfeasance on the part of the Port Trust and is a matter which requires to be examined by the authorities concerned.

94. In this connection, learned senior counsel for the 10th respondent sought to support the contention of the Port Trust contending that the 10th respondent is a company incorporated with Sri.Yusuff Ali M.A. as the Chief Promoter and that therefore, there is no transfer of lease as contended by the counsel for the petitioners. This contention was sought to be substantiated by relying on the principles laid down Apex Court judgment in *New Horizons Limited v. Union of India* [(1995) 1 SCC 478]. That was a case where awarding tender to NHL was impugned on the basis that it did not satisfy the experience criteria. However, it was found that NHL was a joint venture company of certain other companies and that those joint WPC.26435/13 & 31081/13 venture partners had the prescribed experience. Taking into account that fact, the Apex Court held that while assessing the experience of NHL, the experience gained by the joint venture partners also can be reckoned. This principle has been laid down by the Apex Court in paragraphs 23 to 26 thus:

"23. Even if it be assumed that the requirement regarding experience as set out in the advertisement dated 22-4-1993 inviting tenders is a condition about eligibility for consideration of the tender, though we find no basis for the same, the said requirement regarding experience cannot be construed to mean that the said experience should be of the tenderer in his name only. It is possible to visualise a situation where a person having past experience has entered into a partnership and the tender has been submitted in the name of the partnership firm which may not have any past experience in its own name. That does not mean that the earlier experience of one of the partners of the firm cannot be taken into consideration. Similarly, a company incorporated under the Companies Act having past experience may undergo reorganisation as a result of merger or amalgamation with another company which may have no such past experience and the tender is submitted in the name of the reorganised company.

It could not be the purport of the requirement WPC.26435/13 & 31081/13 about experience that the experience of the company which has merged into the reorganised company cannot be taken into consideration because the tender has not been submitted in its name and has been submitted in the name of the reorganised company which does not have experience in its name. Conversely there may be a split in a company and persons looking after a particular field of the business of the company form a new company after leaving it. The new company, though having persons with experience in the field, has no experience in its name while the original company having experience in its name lacks persons with experience. The requirement regarding experience does not mean that the offer of the original company must be considered because it has experience in its name though it does not have experienced persons with it and ignore the offer of the new company because it does not have experience in its name though it has persons having experience in the field. While considering the requirement regarding experience it has to be borne in mind that the said requirement is contained in a document inviting offers for a commercial transaction. The terms and conditions of such a document have to be construed from the standpoint of a prudent businessman.

When a businessman enters into a contract whereunder some work is to be performed he seeks to assure himself about the credentials of the person who is to be entrusted with the performance of the work. Such WPC.26435/13 & 31081/13 credentials are to be examined from a commercial point of view which means that if the contract is to be entered with a company he will look into the background of the company and the persons who are in control of the same and their capacity to execute the work. He would go not by the name of the company but by the persons behind the company. While keeping in view the past experience he would also take note of the present state of affairs and the equipment and resources at the disposal of the company. The same has to be the approach of the authorities while considering a tender received in response to the advertisement issued on 22-4-1993. This would require that first the terms of the offer must be examined and if they are found satisfactory the next step would be to consider the credentials of the tenderer and his ability to perform the work to be entrusted. For judging the credentials past experience will have to be considered along with the present state of equipment and resources available with the tenderer. Past experience may not be of much help if the machinery and equipment is outdated. Conversely lack of experience may be made good by improved technology and better equipment. The advertisement dated 22-4-1993 when read with the notice for inviting tenders dated 26-4-1993 does not preclude adoption of this course of action. If the Tender Evaluation Committee had adopted this approach and had examined the tender of NHL in this perspective it would have found that NHL, being a joint venture, has access WPC.26435/13 & 31081/13 to the benefit of the resources and strength of its parent/owning companies as well as to the experience in database management, sales and publishing of its parent group companies because after reorganisation of the Company in 1992 60% of the share capital of NHL is owned by Indian group of companies namely, TPI, LMI, WML, etc. and Mr Aroon Purie and 40% of the share capital is owned by IIPL a wholly-owned subsidiary of Singapore Telecom which was established in 1967 and is having long experience in publishing the Singapore telephone directory with yellow pages and other directories. Moreover in the tender it was specifically stated that IIPL will be providing its unique integrated directory management system along with the expertise of its managers and that the managers will be actively involved in the project both out of Singapore and resident in India.

24. The expression "joint venture" is more frequently used in the United States. It connotes a legal entity in the nature of a partnership engaged in the joint undertaking of a particular transaction for mutual profit or an association of persons or companies jointly undertaking some commercial enterprise wherein all contribute assets and share risks. It requires a community of interest in the performance of the subject-matter, a right to direct and govern the policy in connection therewith, and duty, which may be altered by agreement, to share both in profit and WPC.26435/13 & 31081/13 losses. (Black's Law Dictionary, 6th Edn., p. 839) According to Words and Phrases, Permanent Edn., a joint venture is an association of two or more persons to carry out a single business enterprise for profit (p. 117, Vol. 23). A joint venture can take the form of a corporation wherein two or more persons or companies may join together. A joint venture corporation has been defined as a corporation which has joined with other individuals or corporations within the corporate framework in some specific undertaking commonly found in oil, chemicals, electronic, atomic fields. (Black's Law Dictionary, 6th Edn., p. 342) Joint venture companies are now being increasingly formed in relation to projects requiring inflow of foreign capital or technical expertise in the fast developing countries in East Asia, viz., Japan, South Korea, Taiwan, China, etc. [See

Jacques Buhart : Joint Ventures in East Asia -- Legal Issues (1991).] There has been similar growth of joint ventures in our country wherein foreign companies join with Indian counterparts and contribute towards capital and technical know-how for the success of the venture. The High Court has taken note of this connotation of the expression "joint venture". But the High Court has held that NHL is not a joint venture and that there is only a certain amount of equity participation by a foreign company in it. We are unable to agree with the said view of the High Court.

WPC.26435/13 & 31081/13

25. As noticed earlier, in its tender NHL had stated that it is a joint venture company established by TPI, LMI and WML and IIPL wherein TPI, LMI and WML and other companies in the same group as well as Mr Aroon Purie own 60% shares and IIPL owns 40% shares. It was also stated that the joint venture has received approval of the Government of India and is currently in operation and that the promoter will increase their capital/contribution to commensurate with the project need and that the company has been established as an information and database management company with expertise in database processing, publishing, sales/marketing and the dissemination of related information. In the tender it is also stated that as a joint venture in the true sense of the phrase, the company will have access to expertise in database management, sales and publishing of its parent group companies. It would thus appear that the Indian group of companies (TPI, LMI and WML) and the Singapore- based company (IIPL) have pooled together their resources in the sense that TPI, LMI and WML have made available their equipment and organisation at various places in the country while IIPL has made available its wide experience in the field as well as the expertise of its managerial staff. All the constituents of NHL have thus contributed to the resources of the Company (NHL). This shows that NHL is an association of companies jointly undertaking a commercial enterprise wherein they will all contribute assets WPC.26435/13 & 31081/13 and will share risks and have a community of interest. We are, therefore, of the view that NHL has been constituted as a joint venture by the group of Indian companies and IIPL, the Singapore-based company and it would not be correct to say that IIPL which has a substantial stake in the success of the venture, having 40% of shareholding, is a mere shareholder in NHL.

26. Once it is held that NHL is a joint venture, as claimed by it in the tender, the experience of its various constituents namely, TPI, LMI and WML as well as IIPL had to be taken into consideration if the Tender Evaluation Committee had adopted the approach of a prudent businessman."

95. However, according to us, these principles cannot be applied to the facts of this case for more reasons than one. As stated by us, the sum and substance of the principles laid down in New Horizons Limited (supra) is that for the purpose of considering whether NHL had the experience prescribed in the notice inviting tenders, the experience of the constituents of NHL could be taken into consideration. In other words, this judgment only laid down the principle that while WPC.26435/13 & 31081/13 reckoning the experience of a joint venture undertaking, the experience of its joint venture partners could also be taken into account. We have already seen that the tender in these cases was submitted by Sri.Yusuff Ali M.A. in his individual capacity. The conditions of the tender, the details of which have already been referred to in the earlier part of this judgment, would show that the tenderer was required to satisfy the eligibility criteria consisting of both experience

and financial turn over. Though the tenderer was Sri.Yusuff Ali M.A., the experience record contained in Schedule B of Ext.R10(a) shows the names of three companies, viz., Lulu International Convention Centre Private Ltd., Lulu International Shopping Mall Private Ltd., and Lulu Flight Kitchen Private Ltd. There is nothing on record to indicate that these concerns mentioned in the experience record submitted by the tenderer are in any way connected to the tenderer Sri.Yusuff Ali M.A. or the 10th respondent herein.

WPC.26435/13 & 31081/13

96. Similar is the case with financial data submitted along with Ext.R10(a) vide Schedule C thereof. The financial data shown is that of EMKE Group UAE Operations and Lulu Convention Centre Private Ltd. As in the case of experience record, here also, there is nothing connecting the concerns mentioned in the financial data with either the tenderer or the 10th respondent. In other words, unlike in the case of New Horizons Limited (supra), along with the tender document, the tenderer had not submitted any document connecting him or the 10th respondent with the firms mentioned in the experience record and financial data. If that be so, the principle laid down by the Apex Court in New Horizons Limited (supra) that while reckoning the experience of a joint venture undertaking, the experience of its constituents could also be taken into account cannot have any application. For that reason, we are unable to apply the principles laid down by the Apex Court in New Horizons Limited (supra) nor the Andhra Pradesh High Court judgment in [131 Company Case 135] relied on by the learned senior counsel WPC.26435/13 & 31081/13 for the petitioner. Despite all this, this Court has to respect the conclusions in Ext.R10(c) judgment in W.P(C).9346/11 and therefore, we leave the matter at that.

97. In spite of all these, since this Court has pronounced a judgment concluding that there occurred no transfer of lease from Sri.Yusuff Ali M.A. to the 10th respondent, which has attained finality, for reasons of propriety, we are bound to respect that conclusion. Consequently, we decline to accept the case of the petitioners that the tenderer was Sri.Yusuff Ali M.A. and therefore, the lease could not have been granted to the 10th respondent.

The upshot of the above discussion is that the writ petitions are only to be dismissed and we do so.

Sd/-

ANTONY DOMINIC, Judge.

Sd/-

P.V.ASHA, Judge.

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