

HIGH COURT OF MADHYA PRADESH: JABALPUR

Writ Petition No.7707/2012 (PIL)

**Petitioners: Gangaram Loniya Chohan
and others**

Versus

**Respondents: State of Madhya Pradesh
and others**

Writ Petition No.19318/2012

Petitioner : Gram Panchayat Padua

Versus

**Respondents: State of Madhya Pradesh
and others**

Writ Petition No.14839/2013

Petitioner : Gram Panchayat Padua

Versus

**Respondents: State of Madhya Pradesh
and others**

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Coram:

**Hon'ble Shri Justice A. M. Khanwilkar, Chief Justice
Hon'ble Shri Justice Sanjay Yadav**

Whether approved for reporting : Yes

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Shri Manas Verma, learned counsel for the petitioner in
W.P.No.7707/2012.

Shri P.K.Kaurav, learned Additional Advocate General with Shri Amit Seth, learned Govt. Advocate for the respondents No.1 to 3/State in W.P.No.7707/2012

Shri Himanshu Mishra, learned counsel for the respondent No.4 in W.P. No.7707/2012.

Shri Anil Khare, learned Senior counsel with Shri H.S.Chhabra, learned counsel for the respondent No.7.

Shri Kunal Thakre, learned counsel for the petitioner in W.P.Nos.19318/2012 and 14839/2013.

Shri Himanshu Mishra, learned counsel for the respondent No.5 in W.P. No.19318/2012.

Shri P.K.Kaurav, learned Additional Advocate General with Shri Amit Seth, learned Govt. Advocate for the respondents/State.

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Reserved On : 29.10.2015

Date of Decision : 17.11.2015

J U D G M E N T

{17.11.2015}

Per: A.M. Khanwilkar, Chief Justice:

This common judgment will dispose of all the three writ petitions as overlapping issues have been raised in these matters.

2. Writ Petition No.7707/2012 is filed on 15.5.2012, as public interest litigation praying for the following reliefs :-

- “(i) to direct the respondents to produce the entire record relating to impugned exchange of land for kind perusal of Hon’ble Court.
- (ii) to issue a writ in the nature of certiorari for quashing impugned orders in Annexure P.1 (dated 1.1.2011) and P.2 (dated 5.1.2011)
- (iii) to issue a writ in the nature of mandamus directing respondents to forth with restore the use of land in question as Grass Land (Gouthan) in the revenue records.
- (iv) Any other writ/direction or order which this Hon’ble Court may deem just and proper under the facts and circumstances of the case may also be granted.
- (v) Costs of the petition may kindly be allowed.”

3. The reliefs claimed in Writ Petition No.19318/2012 filed on 8.11.2012 by the Gram Panchayat Padua, read thus:-

- “(i) This Hon’ble Court may kindly be pleased to issue appropriate writ to set aside the impugned order dated 04.09.2012 (Annexure P/14).
- (ii) This Hon’ble Court may kindly be pleased to issue appropriate writ to set aside the impugned order dated 05.01.2011 (Annexure P/1).
- (iii) This Hon’ble Court may kindly be pleased to issue appropriate writ to set aside the impugned order dated 14.06.2011 (Annexure P/2).
- (iv) This Hon’ble Court may further kindly be pleased to issue appropriate writ commanding the

Respondent to remove the structure already erected by them on the land in question and return the land back as *Nistar Bhumi*.

- (v) This Hon'ble Court may further kindly be pleased to direct the land 3.18 Hect. (7.87 acres) already taken back from the Respondent No.5 to be used as *Nistar Bhumi*.
- (vi) Any other relief/order/direction as deem fit and proper in the present facts and circumstances of case may be issued.
- (vii) Cost of the petition may also be granted.
- (viii) This Hon'ble Court may kindly be pleased to issue a Writ of Certiorari and quash the circular dated 04.12.2009 bearing No.F.4-1/2003/Seven/2A (Annexure P/15).
- (ix) This Hon'ble Court may kindly be pleased to issue a Writ of Certiorari and quash the obtained in principal sanction dated 16.06.2010 bearing No.F-20 /05 /2010 /B / Eleven (Annexure P/16).
- (x) This Hon'ble Court may kindly be pleased to direct the Respondents to demolish the construction raised by the Respondent No.5 on the land in question.”

4. The reliefs claimed in Writ Petition No.14839/2013 filed on 22.8.2013, by the same petitioner (Gram Panchayat, Padua) read thus :-

- “(i) This Hon'ble Court may kindly be pleased to issue appropriate Writ and to set aside the draft Nistar Patrak and further to direct the Respondents to prepare fresh Draft Nistar Patrak after following statutory provisions.

5

- (ii) This Hon'ble Court may kindly be pleased to issue appropriate writ commanding the respondents not to shift the land reserved for *Imarati lakdi athwa indhan hetu surakshit* to grassland.
- (iii) This Hon'ble Court may kindly be pleased to issue appropriate writ commanding the respondents not to include lands already being used for various other purposes, as grassland.
- (iv) This Hon'ble Court may kindly be pleased to issue appropriate writ commanding the respondents to make necessary changes in the draft Nistar Patrak as per the objections submitted by the Petitioner Gram Panchayat and other Villagers and thereafter finalise the Nistar Patrak.
- (v) Any other relief/order/direction as deem fit and proper in the present facts and circumstances of case may be issued.
- (vi) Cost of the petition may also be granted.”

5. Briefly stated, the private respondent (M/s Sukh Sagar Food Private Limited – respondent No.5 in Writ Petition No.19318/2012 and respondent No.4 in Writ Petition No.7707/2012) made application to the Collector, Katni under Section 234(2)(3) read with RBC Part IV Chapter 3-20 of the M.P. Land Revenue Code, 1957 for exchange of land. That application was rejected by the Collector on 05.04.2010. Later on, the District Trade and Industries Department, Katni (respondent No.6 in Writ Petition No.7707/2012 and

6

respondent No.4 in Writ Petition No.19318/2012) made application to Naib Tehsildar, Katni for allotment of land admeasuring 4.74 Hectare (Khasra No.2017 Rakba 1.90 Hectare; Khasra No.2018 Rakba 1.03 Hectare, Khasra No.2020 Rakba 0.93 Hectare; Khasra No.2021 Rakba 0.88 Hectare) in village Padua - which was recorded as “*Ghas Mad*”, for setting up of industries. That application dated 27.08.2010 was processed by the Naib Tehsildar and report was submitted to the Collector, Katni. In the meantime, the Padua Grampanchayat convened a Gram Sabha meeting on 4.10.2010 and articulated objections, which in turn were submitted to the Collector. The Sub Divisional Officer, Katni took note of those objections and submitted the same with his opinion to the Collector on 19.10.2010. The Collector vide letter dated 29.11.2010 raised eight points. Pursuant to the said communication, spot inspections were conducted and on the basis of which recommendation was sent by the Sub Divisional Officer on 27.12.2010. The Nazul Officer vide

communication dated 01.01.2011 recommended for setting apart the land for the stated purpose.

6. On the basis of the reports and recommendations received by the Collector, Katni, an order was passed on 05.01.2011, purportedly in exercise of powers under Section 237(2) read with Revenue Book Circular Part IV No.1, Condition No.26, allotting the land to District Trade and Industries Centre, Katni. The District Trade and Industries Centre, Katni in turn allotted 10.92 Acres land to the private respondent M/s Sukh Sagar Food Private Limited on 14.06.2011. Notably, in the meeting of District Trade and Industry Centre held on 9.7.2012, it has been noticed that M/s Sukh Sagar Food Private Limited was entitled only for 1.24 Hectare of land. Hence, it was decided to take back 3.18 Hectare (7.87 Acres) of land from the said Company.

7. The Gram Panchayat Padua within whose jurisdiction the land was situated had objected to the diversion of purpose and allotment of land by the Collector to the District Trade and Industries Department, Katni. Notwithstanding the

8

objection taken by the Gram Panchayat Padua the land was allotted to the District and Trade Industries Department, Katni who in turn gave portion of the land to M/s Sukh Sagar Food Private Limited. According to the Gram Panchayat Padua as well as the petitioners in Writ Petition No.7707/2012 (PIL), the user of the land could not have been altered for purpose other than the specified user in terms of Section 237 of the Code. Section 237 of the Code, as it stood on the date when the Collector passed the order on 5.1.2011, to divert the purpose and allot the subject land to District and Trade Industries Department Katni, read thus:-

“237. Collector to set apart land for exercise of Nistar rights.- (1) Subject to the rules made under this Code, the Collector may set apart unoccupied land for the following purposes, namely, -

- (a) for timber or fuel reserve;
 - (b) for pasture, grass bir or fodder reserve;
 - (c) for burial ground and cremation ground;
 - (d) for gaathan;
 - (e) for encamping ground;
 - (f) for threshing floor;
 - (g) for bazar;
 - (h) for skinning ground;
 - (i) for manure pits;
 - (j) for public purposes such as schools, play grounds, parks road, lanes, drains and the like;
- and

9

- (k) for any other purposes which may be prescribed for the exercise of right of Nistar.

(2) Lands set apart specially for any purpose mentioned in sub-section (1), shall not otherwise be diverted without the sanction of the Collector.

(3) Subject to the rules made under this Code, the Collector may divert such unoccupied land, which is set apart for the purposes mentioned in clause (b) of sub-section (1) subject to secure minimum five percent of the agriculture land of that village for the said purposes into abadi or for agricultural purposes.”

(emphasis supplied)

8. Relying on this provision, it has been asserted by the petitioners that the subject land - which was earmarked for pasture, grass bir or fodder reserve, even though unoccupied could be converted to the extent permissible only and for the use of *Abadi* or for agricultural purposes and for no other purpose. As a result, the diversion and consequential allotment of land by the Collector was in the teeth of the statutory mandate and thus non-est in law, being *void-ab-initio*. On this premise, the petitioners have prayed for setting aside the order passed by the Collector for diverting the purpose and allotting the subject land for setting up of industries; and for consequential relief to restore *status quo ante* as on the date of the impugned order, *qua* the said land.

9. The respondents including the State Authorities, on the other hand, have relied on the decision of the Supreme Court in the case of **State of Madhya Pradesh and others Vs. Nilendra Pratap Singh**¹ to contend that the allotment has been made by the Collector while ensuring that the unoccupied land which was earmarked for pasture, grass bir or fodder reserve is not reduced below 2% of the agricultural land in village Padua. Further, it was permissible to convert the user of the land in public interest for construction of roads, State Highways, National Highways, canals, tanks, hospitals, schools, colleges, Goshalas and *Abadi* and any other public utility projects, as may be determined by the State Government. The land having been allotted to District Trade and Industries Department for setting up of Industries was in compliance with that requirement. The respondents additionally relied on the same provision namely - Section 237 of the Code which was substituted by M.P. Act of 42 of

¹ (2009) 17 SCC 780

11

2011 w.e.f. 30.12.2011. Sub-section 3 as substituted by M.P.

Act of 42 of 2011 reads thus:-

“Sub-sec. (3) as applicable in M.P. only

[(3) Subject to the rules made under this Code, the Collector after securing the land mentioned in clause (b) of sub-section (1) to minimum two percent of the total agriculture land of that village, may divert such unoccupied land as mentioned in sub-section (1) into abadi or for construction of roads, state highways, national highways, canals, tanks, hospitals schools, colleges, Goshalas and any other public utility projects as may be determined by the State Government:

Provided that the land set apart for the purposes mentioned in sub-section (1) shall not be diverted and allotted to any person for agriculture purpose.]”

(emphasis supplied)

10. The respondents, therefore, submitted that no illegality has been committed by the Collector in allotting the land to District Trade and Industries Department, Katni for setting up of industries, being in conformity with the abovesaid provisions.

11. In the writ petitions besides challenging the order of the Collector being without jurisdiction and nullity, it has been further contended that the Authorities committed manifest error in issuing draft Nistar Patrak and in computing the total

12

unoccupied land set apart for pasture, grass bir or fodder reserve out of the total agricultural land of village Padua. However, it may not be necessary for us to elaborate on other contentions, if the argument of the petitioners that the land in question could not be allotted by the Collector for the purpose other than specified in Section 237 of the Code is accepted.

12. Having considered the rival submissions and after going through the record, it is indisputable that the Collector passed order under Section 237(2) of the Code on 05.01.2011, allowing diversion for setting up of industries and allotted the subject land to District Trade and Industries Department, Katni. On the date of passing of the said order, the provision as it stood, however, permitted diversion of such land upto permissible limits for *Abadi* and for agricultural purposes only. Indisputably, the subject land has been shown as land for pasture, grass bir or fodder reserve in the relevant records. The same was covered by the purpose described under Section 237(1)(b) of the Code. For

13

conversion of such land special provision in the shape of sub-section (3) was enacted by the Legislature. Originally, the provision mandated setting apart minimum 2% of the agricultural land of the concerned village for said purpose, even if the Collector wanted to divert the surplus land falling in that category. The 2% stipulation was enhanced by way of amendment in 2000 by Act No.23 of 2000. That position continued till the further amendment by Act No.42 of 2011 was introduced, which came into force with effect from 30.12.2011 – restoring the permissible limit to 2% of the agriculture land of that village. At the relevant time, however, stipulation was to secure minimum 5% of the agriculture land of that village for the purpose referred to in clause (b) of sub-section (1) of Section 237 of the Code. The surplus land could be diverted for the purpose of *Abadi* or agriculture and none else. In contradistinction to the special provision with reference to the land earmarked for pasture, grass bir or fodder reserve, the land earmarked for other purposes referred to in clause (a), (c) to (k) of sub-section(1)

14

of Section 237, there was no such restriction and the Collector was invested with the authority to sanction diversion of those purposes to other purposes. This being the scheme of the enactment, the provision concerning the land earmarked for pasture, grass bir or fodder reserve must be treated as mandatory and inviolable. The Rules framed in exercise of powers under section 237 of the code dealing with preparation of Nistar Patrak and in particular regarding diversion of unoccupied land reinforce the view that the stipulation regarding diversion of land specified in clause (b) is a special provision and has been made mandatory. The Rules regarding diversion of unoccupied land came into force with the issuance of notification dated 8.3.1999 and amended by notification dated 15.5.2001; and notification dated 15.5.2001 and notification dated 8.11.2002. The said Rule read thus :

“DIVERSION RULES OF UNOCCUPIED LAND”

(Under Section 237)

[Notfn. No.F.2-28-VII-Sec.-6-97, dt.8-3-1999, published in M.P.Raj-patra Part4(C), dt.19-3-1999, p. No.72 as amended by Notfn. dated 15-5-2001 and Notfn. dated 8.11.2002]

Diversion rules of unoccupied land which is set apart for the purposes mentioned in clause (b) of sub-section (1) of Section 237 of the Madhya Pradesh Land Revenue Code, 1959 into Abadi or for agricultural purposes.

Rules 1 & 2 applicable in Chhattisgarh only (Omitted in M.P. by Notification dated 8.11.2002).

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3. After ensuring, that the two per cent, area of total agricultural land of village is secured for the purpose mentioned in clause (b) of sub-section (1) of Section 237, the Collector may divert such land into abadi or for agricultural purposes or into both.

Provided that, in passing the diversion order, the Collector shall keep it in mind that such diversion shall be for fulfillment of abadi purposes of such village at first.

4. The Collector shall declare secured area for Government buildings from diverted land as much as reasonable and necessary in view of future

2. Prior to deletion the provision read thus:-

1. Any Gram Panchayat may submit an application to the Collector, alongwith a copy of resolution duly passed by the Gram Sabha to this effect for diverting of unoccupied land into abadi or for agricultural purposes which is set apart for the purposes mentioned in clause (b) of sub-section (1) of Section 237 of the said code.

2. After receiving the Application under rule 1, the Collector shall examine whether, after the diversion of questioned land, rest area of land mentioned in clause (b) of sub-section (1) of Section 237 shall be more than five per cent, area of total agricultural land of village or not.

16

development and such secured plot for Government building shall be kept in custody of the Gram Panchayat for its maintenance.

5. After securing the plots for Government buildings under rule 4 from the diverted land for abadi purposes, the rest diverted land for abadi and agricultural purposes shall be disposed of according to rules, regulations/instructions for the time being in force.”

(emphasis supplied)

Notably, the Rules framed for diversion of land continue to permit diversion only for *Abadi* and for agricultural purposes or into both. These Rules have not been amended to allow diversion for other additional purposes specified in the substituted Section 237 (3) of the Code. In that sense, no Rules have been framed till date (atleast brought to our notice), permitting diversion for industries. Strikingly, sub-section (3) opens with the expression “subject to the Rules made under this Code.” Therefore, in absence of Rules for diversion of the land used for purposes mentioned in Clause (b) of sub-section (1) of Section 237 of the Code, it was not permissible to divert the user of such land to any other purpose than Abadi or agricultural or into both,

muchless industrial purpose. Nevertheless, the diversion of the subject land was allowed notwithstanding the objection by the petitioner - Gram Panchayat, Padua that too for industrial purposes. As a result, the said diversion and allotment of subject land and in particular, the order passed by the Collector in that behalf will have to be treated as *non-est* and nullity in law.

13. The respondents, however, heavily relied on the decision of the Supreme Court in the case of **State of M.P. and others vs. Nilendra Pratap Singh** (supra). After going through the said reported decision, it is seen that the appeals filed by the State Government were disposed of on the basis of the statement made by the State Government on affidavit. None of the respondents in the appeals had appeared to contest the said statement of the State Government. The order passed by the Supreme Court in its entirety reads, thus:-

“1. Delink and list separately.

Rest of appeals.

2. These appeals are by the State of Madhya Pradesh. The appellant State had allotted charnoi land to

landless persons belonging to the Scheduled Castes and Scheduled Tribes. According to the appellant, this was done as part of the implementation of the mandate contained under Article 46 of the Constitution of India. Various persons belonging to non-SCs/STs filed writ petitions before the High Court of Madhya Pradesh alleging that the allotment of land exclusively to SCs/STs was not proper and similar extent of land should be allotted to such persons.

3. The High Court, by the impugned judgment, has held that the classification made by the State was not proper and others were also entitled to get allotment of land and ultimately, the High Court has directed that the State shall endeavour to arrange land allotment equivalising land allotted to the SCs/STs and the unoccupied land shall thus be allotted to such persons.

4. Though notice was served on the respondents, nobody has appeared when the case was called out.

5. The appellant State has filed an affidavit on 29-1-2007 to the effect that the charnoi land is not going to be distributed to the landless persons under the Circular issued by the Revenue Department of the State Government earlier. On 13-10-2008 the State Government has filed another affidavit, Para 4 of which is quoted below:

“4. That the State Government has received several proposals wherein difficulties have been expressed and requests have been made for allotment of nistar land including charnoi for using the same for public utility purposes like construction of roads, State highways, national highways, canals, tanks, hospitals, schools, colleges, goshalas and abadi etc. Several villages are included in urban areas governed by the M.P.Municipalities Act and the M.P.Municipal Corporation Act. Land recorded as nistar including charnoi land in such villages is not being used as nistar and that such land is also required for various public utility projects in public interest and often no other appropriate government land is available for such projects. Realising these difficulties, the State Government has reconsidered

19

the matter and the following decisions have been taken:

(i) Total land reserved for charnoi will not be reduced below 2% in any village;

(ii) Land reserved for charnoi shall not be diverted and allotted to anyone for agriculture purpose;

(iii) The charnoi land in excess of prescribed 2% and also land recorded under any other head of nistar patrak may be allotted in public interest for construction of roads, State Highways, national highways, canals, tanks, hospitals, schools, colleges, goshalas and abadi and any other public utility projects as may be determined by the State Government.”

6. In the said affidavit it was stated that the charnoi land will not be reduced below 2% in any village and such land in excess of 2% and also the land recorded under any other head of nistar patrak may be allotted for public interest for construction of roads, State highways, national highways, canals, tanks, hospitals, schools, colleges, goshalas and abadi and any other public utility projects as may be determined by the State Government. Learned counsel appearing for the State Government has submitted that in view of this change, the State would not be in a position to comply with the direction of the High Court.

7. In view of this undertaking/statement and fresh policy decision of the Government, the direction of the High Court about land allotment is modified and the appeals are disposed of accordingly. No costs.”

(emphasis supplied)

14. The question is: whether this decision can be considered as a binding precedent. No doubt, the State Government is bound by the statement made before the

Supreme Court as recorded in the said order. However, in the first place, the Supreme Court was not concerned with the issue under consideration in the present case. In the case before the Supreme Court, the issue was regarding reduction of Charnoi land from 5% to 2%; and about the validity of the circular dated 2.3.2002 whereunder 100% reservation was made in favour of Schedule Castes and Scheduled Tribes.

15. In the present case, the question is: whether diversion under section 237 of the code of the land covered by clause (b) of sub-section (1) of Section 237 for industrial purposes, was permissible on 5.1.2011? Keeping in mind the statutory provisions as in vogue at the relevant time, the Collector was invested with the limited authority to divert such land only for *Abadi* or agricultural purposes and no other purpose.

16. Notably, the State Government had submitted before the Supreme Court that in view of the changed policy, it was not in a position to comply with the direction given by the High Court – to arrange equivalent land for the persons other

than Scheduled Castes Scheduled Tribes. It is on that basis the appeal was disposed of without considering the justness of fresh policy decision of the Government. In other words, the Supreme Court merely modified the direction given by the High Court to allot equivalent land to persons other than Scheduled Castes Schedule Tribes. Further, the Supreme Court was neither informed about the provisions, which were in force, when the said order was passed by the Supreme Court on 5.2.2009 referred to above; and which are applicable to the case on hand. Nor the Supreme Court was called upon to examine the question whether the statement made by the State Government was in consonance with the said provisions. Understood thus, the decision of the Supreme Court will be of no avail. It is a different matter that subsequently the State Legislature amended Section 237(3) of the Code, which mirrors the policy of the State Government, as was pointed out to the Supreme Court. That amendment came into force with effect from 30.12.2011 before which date, however, the impugned order of allotment

was passed by the Collector. Thus, the amended provision Section 237(3) will be of no avail to the respondents to justify the order of the Collector, which inherently lacks jurisdiction to allow diversion of land in question for purposes other than *Abadi* or for agricultural use. Significantly, there is no corresponding amendment in the Diversion Rules in force permitting diversion for industrial purpose or for that matter public utility projects. A priori, reliance placed on the decision of the Supreme Court in the case of **Fida Hussain and ors. vs. Moradabad Development Authority and another**³ and **Sahu Madho Das and others vs. Mukund Ram and anr.**⁴, on the question of ratio decidendi and binding precedent will be of no avail. For, the decision of the Supreme Court in the case of **State of M.P. and ors. vs. Nilendra Pratap Singh (supra)** is on the facts of that case and has no application to the question involved in the present petitions.

³ (2011) 12 SCC 615

⁴ AIR 1955 SC 481

17. Reverting to the substituted provision [Section 237 (3)], which has come into force with effect from 30.12.2011, the diversion permitted is for *Abadi* or for construction of roads, State High-ways, national highways, canals, tanks, hospitals, schools, colleges, goshalas and any other public utility projects as may be determined by the State Government. The amended provision does away with diversion of such land for agricultural purposes as such, as was permitted earlier. The proviso to amended sub-section (3), on the other hand, mandates that the land so diverted shall not be given to any person for agricultural purposes. The question is: whether setting up of industry is one of the permitted purpose in terms of the substituted provision? In the first place, the Rules for diversion of the purpose of land used for activity referred to in Clause (b) of sub-section (1) of Section 237 of the Code, permit diversion for *Abadi* or agricultural purposes or into both and no other purpose. Further, the only expression that may be of some help to the respondents occurring in amended provision is “any other public utility projects as

may be determined by the State Government.” The question whether the diversion of land for allotment to District Trade and Industries Department, Katni would qualify this description would depend on the nature of activity of the said Department. The said Department is one of the arm of the State. It does not engage in any business of public utility projects. At best, it promotes and regulates industrial activity in the State.

18. The expression “public utility projects” has not been defined in the Code. The meaning of expression “public utility” as given in Black’s Law Dictionary, Ninth Edition reads thus :

“**public utility.** See UTILITY.

Utility.(14c)**1.** The quality of serving some function that benefits society; meritoriousness. **2.Patents.** Capacity to perform a function or attain a result for which the patent applicant or holder claims protection as intellectual property. In patent law, utility is one of the three basic requirements of patentability, the others being nonobviousness and novelty. In the calculation of damages for patent infringement, utility is the benefit or

advantage of the patented product or process over the products or processes, if any, that previously had been used to produce similar results.[Cases: Patents 47.]

“[T]he utility requirement does not mandate that the invention be superior to existing product’s and processes in order to qualify for a patent. The utility standard reflects the judgment that society is better served by access to a library of issued patents describing as many inventions as possible, even if many of them do not achieve better results than public domain technology. This liberal view of utility allows subsequent inventors access to a greater variety of previous technologies, some of which may yet be judged the superior solution when employed within a different context.”
Roger E.Schechter & John R. Thomas,
Intellectual Property 15.1,at316 (2003).

3.A business enterprise that performs an essential public service and that is subject to governmental regulation.

Public utility.(1895) 1. A company that provides necessary services to the public, such as telephone lines and service, electricity, and water. Most utilities operate as monopolies but are subject to governmental regulation. [Cases : Public Utilities 101.] 2. A person, corporation, or other association that carries on an enterprise for the accommodation of the public, the members of which are entitled as a matter of right to use the enterprises’s facilities.”

(emphasis supplied)

19. The question whether the diversion of the subject land would qualify the specified activities as mentioned in sub-section (3) of Section 237 of the Code, should receive attention of the Collector in the first place, who has been invested with the authority to divert the land covered under sub-clause (b) of sub-section (1) of Section 237 of the code. Obviously, the Collector has not dealt with all the relevant matters while passing the impugned order dated 5.1.2011. Further, even if diverting the subject land for being allotted to the District Trade and Industries Department, Katni may be permissible, two other questions must also receive attention of the Collector, namely, whether the allotment can be unconditional or on condition to use the diverted land for the specified purposes only by itself (by DTID, Katni) or to allow it to be used by its lessee/Agent for such purpose. Secondly, whether the extent of diverted land does or does not reduce and affect the permissible limit of two percent of the total agriculture land of that village.

20. It is significant to take note of the provision inserted by the same amendment Act 42 of 2011 in section 237 of the Code. Sub-section (4) has been inserted by the said Amendment, which reads thus :

“(4)” When it becomes indispensable to divert the land set apart for the purposes mentioned in sub-section (1) for such development and infrastructural projects which are owned or approved by the State Government but not covered under sub-section (3), the Collector, after satisfying himself on alternatives available and also on obtaining land of equivalent area for fulfilling the same Nistar rights from the concerned project, may divert the land for such purposes by passing a reasoned order to this effect.

Sub-section (4) expressly deals with all other unoccupied land referred to in Section 237 (1), except covered by clause(b) thereof. In that, sub-section (3) of the Code deals specifically with the land covered by clause (b) of sub-section (1). Sub-section (4) is, therefore, a general provision dealing with other situations, excluding the situation covered by sub-section (3). Thus understood, the responsibility of the

Collector is much higher when he is called upon to deal with the proposal to divert the user of the land covered by clause (b) of sub-section(1), for purposes specified in sub-section (3) read with Rule 3 of the Diversion Rules of unoccupied land – be it unamended provision or amended provision.

21. Reverting to the substituted provision, the nearest category specified for diverting the user of the land would be any other public utility projects. Prefix to expression “Public Utility Projects”, is “any other” - which expression, therefore, must be read *ejusdem generis* alongwith the other preceding specified users. However, even if the District Trade and Industries Department, Katni would fulfil that criteria, the question is whether the allotment of land by the said Authority to any other person on lease or otherwise, would fulfill the said requirement, is also of utmost relevance. Whether Respondent No.5 would fulfill that criteria of public utility projects is a matter again worthy of consideration. In other words, by executive fiat the Authorities cannot be permitted to do something which the law does not permit

them to do so. In our considered opinion, therefore, the entire matter deserves reconsideration by the Collector in the first place and who in turn must record tangible reasons for accepting the proposal for diversion of the said land.

22. The respondents would next contend that the policy was formulated by the State Government prior to filing of the affidavit before the Supreme Court. However, it is cardinal that the policy of the State Government cannot be contrary to the mandate of statutory provisions in vogue. If such policy was framed when the law mandated the user of land earmarked for pasture, grass bir or fodder reserve only for Abadi or for agricultural purposes, the policy providing for any other user would be *ultra vires* the statutory provision. Hence, neither the said policy nor the Supreme Court decision can be of any avail to justify the order passed by the Collector dated 5.1.2011.

23. Counsel for the State was at pains to point out that sub-section (3) as introduced by amending Act 42 of 2011, which has come into force with effect from 30.12.2011, is to

substitute the existing provision. The Legislature intended to substitute the provision as was in force prior to 30.12.2011. To buttress this argument, reliance has been placed on the recent Full Bench decision of our High Court in the case of **M/s Technofab Engineering Limited vs. Bharat Heavy Electricals Limited and others** in F.A.No.514/2012 decided on 15.9.2015. The Full Bench after adverting to the Supreme Court decisions expounded that the substitution of provision results in repeal and replacement by the new provision. This argument is founded on the statement of objects and reason for the Amendment Act and in particular the opening note against section 34 of the Amendment Act which mentions that for sub-section (3), the following sub-section shall be “substituted”. The note against amendment of sub-section (4) of section 237 is in contradistinction thereto. It provides that the “following sub-section shall be inserted”. Even if we may take note of this position, the question remains as to whether it is possible to take the view that the diversion of the subject land for allotting the same to the District Trade and Industries

Department, Katni would qualify the excepted category specified in the amended sub-section (3) read with Rule 3 of the said Rules, muchless to encompass the description of any other public utility projects as may be determined by the State Government. That is a question which must be examined by the Collector in the wake of objection taken by the petitioner(s) and other interested persons.

24. Respondents No.5 heavily relied on the decision of the Supreme Court in case of **M.P. Housing Board vs. Shiv Shankar Mandil & Ors.**⁵, to contend that since the allotment of portion of land has been made in favour of the said respondents by the District Trade & Industries Department, Katni, it is not open to unsettle that position. The decision pressed into service, however, is on the facts of that case. In para 12 of the decision, it has been found as of fact, that barring one revenue entry, the State Government has not produced any evidence either before the High Court or even before the Supreme Court to suggest that the piece of

⁵ AIR 2009 SC 863

land in question was set apart for pasture or for fodder reserve. On this finding, the special provisions of clause (b) of sub-section (1) and in turn sub-section (3) of Section 237 were not attracted in that case. The dictum of the Supreme Court that there is no bar in diverting the unoccupied land must be understood in that context - which is permissible in terms of sub-section (2) of Section 237 with reference to land covered by clauses (a) and (c) to (k) of sub-section (1) of Section 237 of the Code. This decision, therefore, will be of no avail to the respondents.

25. We may now advert to the objections raised by respondent No.5 - M/s Sukhsagar Food Private Limited regarding maintainability of these petitions. It was argued that the petitions under consideration suffer from the vice of res judicata and concealment of earlier Court's order. Further, alternative statutory remedy is provided under the Code which ought to have been resorted to by the petitioners. Thirdly, the factual matrix involved in the petitions would give rise to disputed questions of facts and ought not to be

33

decided in writ jurisdiction. Fourthly, the objections suffer from laches; and having been filed after the allotment of land to Respondent No.5, the Court should be loath to entertain the challenge. Lastly, the petitioners have no locus to question the validity of allotment in favour of Respondent No.5. In the context of objection regarding *res judicata*, reference was made to filing of writ petition No.10831/2012. According to the respondents, the relief claimed in that petition was similar. The petitioners, on the other hand, rightly contend that they have disclosed the factum of filing of the said writ petition in the opening paragraph of the present writ petitions. Further, the reliefs claimed in the said writ petition were different. On perusal of the said writ petition, we find force in the plea taken by the petitioners that the purpose of filing of writ petition No.10831/2012 was limited to calling upon the State Authorities to follow proper procedure for preparation of Nistar Patrak. The reliefs claimed in the present petition are in relation to the order passed by the Collector to divert the user of the subject land

and the follow up action taken on the basis of the said order. The cause of action for filing of present petition is, therefore, ascribable to the order passed by the Collector dated 05.01.2011. Considering the fact that the petitioners have not only disclosed about filing of earlier writ petition but also the order passed on that petition, we do not find any merits in the objection about the maintainability of these petitions on that count. Even the argument of the respondents that the petitioners have alternative remedy does not commend to us. The issue raised in the present writ petitions is not only about unjust order passed by the Collector but more about the lack of authority to pass such order at the relevant time. In that, the provisions in vogue permitted diversion of land covered by Clause (b) of sub-section (1) of Section 237 of the Code only for Abadi or agriculture purpose and no other purpose. It was thus open to the petitioners to approach this Court for the reliefs as claimed. As regards objection regarding disputed questions of facts, we may immediately observe that we have not examined any contention which may require

35

examination of correctness of those facts. Instead, we have left all other issues relevant for deciding the objections of the petitioners open to be decided by the Appropriate Authority. Hence, even this objection will not take the matter any further for the respondents. As regards the objection regarding locus of the petitioners, we find no merits even in this objection. Inasmuch as, two writ petitions have been filed by the Gram Panchayat Padua, who has been resisting diversion of the subject land for purpose other than prescribed by law. The petitioners are not only interested persons, but, also aggrieved by the order passed by the Collector and, therefore, competent to maintain these petitions. Moreover, Public Interest Litigation has been filed to unravel the illegality in diversion and allotment of the land to private person. Even for that reason, the objection regarding locus standi of the petitioners or that the petitions have been filed with *malafide* purpose, need not detain us from answering the main controversy. Accordingly, the

36

objections regarding maintainability of the writ petitions deserve to be rejected.

26. A priori, the question whether the subject land could be allotted for other purpose, now specified by the substituted provision [Section 237 (3)] – including for public utility projects and whether setting up of industries can be said to be one such permissible user as per the said provision, are left open to be considered by the Collector while dealing with the proposals afresh. Those matters must be considered as per the statutory provisions in force. If such proposal is initiated within one month from today, the same may be considered afresh by the concerned Authorities expeditiously and not later than three months from the date of presentation of the proposals after following due process and giving opportunity to all concerned. If the said proposal is accepted, it would be a different matter. However, in the event of rejection of the said proposal for whatever reason, the State Authorities must move into action forthwith thereafter for restoration of *status quo ante* (as pasture, grass bir or fodder reserve) and make

corresponding entry in the concerned revenue records qua the subject land situated at village Padua.

27. Needless to mention that for the view taken by us it is unnecessary to examine other questions which may be germane for considering whether the diversion allowed by the Collector in the fact situation of the present case is in excess of the stipulation of not more than 2% of the agricultural land of that village. Those questions also may have to be considered by the Appropriate Authority on its own merits. That question can be answered only after the objections regarding the entries in the draft Nistar Patrak are finalized in accordance with law. It was stated that the revenue appeals have been filed in relation to the draft Nistar Patrak. Those appeals will have to be decided expeditiously to obviate any further legal complications. The Collector may ensure that the said matters are redressed in accordance with law after giving due opportunity to all concerned.

28. We are inclined to mould the reliefs in the fact situation of the present case as the Authorities mistakenly proceeded

on the assumption that it was open to them to allot the subject land for setting up of industry in the light of the decision of the Supreme Court referred to above.

29. Accordingly, we set aside the impugned order dated 5.1.2011 passed by the Collector allotting the subject land to the District Trade and Industries Department, Katni as well as order dated 14.6.2011 regarding allotment of land by the District Trade and Industries Department, Katni to the private respondent - M/s Sukh Sagar Food Private Limited or any other allotment made thereafter to any person from the subject land. Further, if the fresh proposal to be submitted by the aspirants for allotment of land is finally rejected by the State Authorities, the State Authorities would be obliged to restore the *status quo ante* as on 5.1.2011, *qua* the subject land including by removing all the structures that have been constructed thereon. We further declare that the circular issued under the signature of the Principal Secretary, Revenue Department, Government of Madhya Pradesh dated 4.12.2009 is also quashed and set aside, as it is not consistent

39

with the statutory provision in force. The amendment to Section 237 came into force with effect from 30.12.2011. The circular, in any case, could have no binding effect or could be acted upon by the State Authorities contrary to the statutory mandate as applicable at the relevant time. Any action founded on the said circular must be considered as *non-est, having been taken* without authority of law.

30. The petitions are **disposed of** on the above terms with no order as to costs.

31. Although we have disposed of these petitions, the matters may be notified under caption “**Direction**” in the **last week of April, 2016** for reporting compliance.

(A.M. Khanwilkar)
Chief Justice

(Sanjay Yadav)
Judge