Before H.S. Bhalla, J.

M/S DLF HOUSING AND CONSTRUCTION LTD. AND ANOTHER,—*Petitioner*

versus

STATE OF HARYANA AND OTHERS,—*Respondents*

C.W.P. NO. 13298 OF 2006

28th May, 2007

Constitution of India, 1950—Art. 226—Haryana Development and Regulation of Urban Areas Act, 1975—S. 24—Haryana Development and Regulation of Urban Area Rules, 1976—Rl. 13—Haryana Development and Regulation of Urban Areas (Amendment and Validation) Act, 2005—Company issued licence for setting up a commercial colony after change of land use—Renewal of licence from time to time on payment of renewal fee as prescribed in Schedule to Rl. 3 of 1976 Rules-Demand for enhanced/additional licence renewal fee-Challenge thereto-Notification dated 1st September, 2003 introduced rate of licence fee 'prescribed' in Schedule appended to 1976 Rules—Schedule not undergoing any change/amendment/modification—Whether Council of Ministers is vested with authority to alter licence fee prescribed by 1976 Rules—Held, no—No executive authority can over-ride rates of licence fee—"Prescribed" fee can only be altered by following procedure prescribed by S.24 of 1975 Act—S. 24 provides that all powers to frame rules vest with State Government—Rules proposed by State Government are required to be laid down before State Legislature which can effect modifications—Proposed rules approved or deemingly approved by State Legislature are enforceable only upon their publication and notification—Respondent can charge the licence fee 'prescribed' by the rules and the same could be modified only by amendment made in the rules by following two mandatory ingredients as envisaged u/s 24 of the 1975 Act—Since neither there had been any notification or previous publication in respect of the rates provided in the schedule appended to the validation clause nor these had been laid before the House, the action of the State Government in charging the said fee in past cannot be held to be validated—By virtue of amendment neither any notification subject to previous publication in respect thereof has ever been made nor they

have been laid before any House of State Legislature—Respondents failing to give any reason for drastic increase of licence fee—Petition partly allowed, validation clause struck down, memo requiring petitioners to deposit additional licence renewal fee set aside—However, amendment made by virtue of Amendment and Validation Act upheld.

Held, that the validation clause shows that the action of the Government in charging the rates mentioned in the Schedule appended to the validation clause are made valid as if the said rate are charged in accordance with the provisions of the 1976 Rules, which, in fact, is wrong. The perusal of the amendment itself shows that the mandatory ingredients in following the procedure to make/modify the rules wherein the fee is 'prescribed' are still to be complied with. Since neither there had been any notification or previous publication in respect of the rates provided in the Schedule appended to the validation clause nor these had been laid before the House, the action of the State Government in charging the said fee in past cannot be held to be validated.

(Para 18)

Further held, that the State can revalidate actions found to be invalidated only if it removes the defects pointed out in that regard. The validation clause as sought to be incorporated in the Amendment and Validation Act cannot be allowed to sustain inasmuch as even by virtue of the amendment having been carried out, the two mandatory ingredients still exists and have been kept intact. Thus, the increase in the licence fee as depicted in the schedule appended to the validation clause does not have any force of law since neither any notification subject to previous publication in respect thereof has ever been made nor they have been laid before any House of State Legislature, which the State Government is mandatorily required to do by virtue of the new amendment.

(Para 19)

Further held, that it is evident from the Amendment and Validation Act that only Section 24(1) and (3) has been amended and not the Schedule to the 1976 Rules, which forms part of the 1976 Rules. In the Amendment and Validation Act, the only mention about the rules at which the licence fee is to be charged, has been made in the validation clause and the schedule forms part of the validation

clause. Amending a particular thing and validating a particular action, on the basis of the said amendment, are two different things. One can validate an action by making an amendment and removing the defect. However, if a particular thing has been held to be done in a particular manner and even by virtue of an amendment, the manner to do a particular thing has been kept intact, then there cannot be any validation of the actions carried out without having followed the procedure and manner in which they are required to do. The judicial review is one of the basic features of the Constitution and the validation clause has illegally sought to put an embargo on the right to seek judicial review of the actions of the respondents. Such a condition is not only arbitrary and against public policy but is also unconstitutional.

(Para 20)

Further held, that the respondents have failed to give any reason for the alleged increase in the fee from Rs. 50.00 lacs duly prescribed by the rules by virtue of the notification dated 1st September, 2003 in respect of commercial/office complex in residential sectors for 175 FAR to Rs. 2 crore purported to have been increased by virtue of the notification dated 13th September, 2005. The licence fee paid under the 1975 is only a fee and not a tax and cannot be equated and made the source of earning revenue for the State. In fact, the charging of such an exorbitant rate of licence fee is opposed to the object of the 1975 Act. The 1975 Act is not a fiscal law. Its object is only to ensure planned development and to avoid haphazard development in and around the towns in the State of Haryana. However, the respondent authorities at their whims and fancies and in utter disregard of the object of the 1975 Act and without any basis, had been increasing the licence fee and thereby had been misusing the power to convert it into a statute for earning income. The Legislature has provided separate fiscal statutes in that regard and the provisions of the 1975 Act cannot be used for the said purpose.

(Para 22)

A.K. Chopra, Senior Advocate, with Ashish Chopra, Advocate *for the petitioners.*

Hawa Singh Hooda, Advocate General assisted by Ajay Gulati, Assistant Advocate General, Haryana *for the respondents.*

JUDGEMENT

H.S. BHALLA, J.

(1) Invoking extra-ordinary writ jurisdiction under Article 226 of the Constitution of India, petitioners have knocked the door of this Court by filing the present writ petition for issuance of a writ in the nature of certioari quashing the memo/letter dated 20th May, 2005 (Annexure P-5) requiring them to deposit additional Licence renewal fee at the rate of 10% of Rs. 1 crore per gross acre in respect of commercial licence for land measuring 2.042 acres along with interest at the rete of 18% per annum from October15, 2004 till the date of payment over and above the renewal fee which the petitioners were liable to pay at the rate of 10% of the prescribed fee. The petitioners have further prayed for issuance of a writ for quashment of notification dated May 23, 2005 (Annexure P-9) as also the notification dated September 13, 2005 (Annexure P-9) being illegal and ultra vires the Constitution of India and the Haryana Development and Regulation of Urban Areas Act, 1975. The petitioners have further prayed for issuance of a writ in the nature of mandamus directing the respondents to grant the renewal of licence (s) to the petitioners by charging licence renewal fee at the rate prescribed at the time of submission of the applicatiion for grant of licence.

(2) The other facts required to be noticed for the disposal of the petition are that Petitioner No. 1 is a Public Limited Company, whereas petitioner No. 2 is a Private Limited Company. Both the petitioners are engaged in the business of planned urbanisation/colonisation by developing land into residential colonies etc. in association with M/s DLF Limited being the holding company. The said development is governed by the Haryana Development and Regulation of Urban Areas Act, 1975 (hereinafter referred to as "the Act") and the rules framed thereunder, i.e., Haryana Development and Regulation of Urban Areas Rules, 1976 and for this purpose, the petitioners submitted applications to the Director, Town and Country Planning, Haryana for the grant of licence under the 1975 Act for developing their land. The petitioner and associate companies were granted separate commercial licences. All the licenses were issued in the precribed form and covered an area of 2.42 acres for setting up a commercial colony at village Wazirabad, district Gurgaon. These

licences were being renewed from time to time as per the provisions of the 1975 Act and the 1976 Rules by moving appropriate applications along with licence renewal fee as 'prescribed' in the Schedule to the 1976 Rules. Since the said licences were to expire on 14th November, 2004, the petitioners applied for renewal of the said licences in form LC-VI and the same was duly received by respondent No. 3 on 7th October, 2004. Along with the said application, a consolidated demend draft No. 238467 dated October 6, 2004 for Rs. 10.21 lac as licence renewal fee was also given, but instead of granting renewal of the said licence to the petitioners, respondent No. 4 issued memo,—*vide* which the petitioners were required to pay licence renewal fee at the rate of Rs. 10% of Rs. 1.0 crore per acre, which came to Rs. 20.42 lac and as such, the petitioners were required to pay an additional Rs. 10.21 lac along with interest at the rate of 18% per annum from October 15, 2004 upto the date of payment on the said additional licnece renewal fee. In response thereto, petitioners wrote to respondent No. 4 stating that there is no justification for demanding the enhanced/ additional licence renewal fee at the rate of 10% of the alleged enhanced rate of Rs. 1.0 crore per gross acre. It was further stated in the reply that there is no notification with respect to the increase of the licence fee for commercial licence from Rs. 50 lac to Rs. 1.0 crore per acre and in absence of the same the petitioners could not be called upon to pay licence renewal fee at the alleged enhanced rate. However, with a view that the approval/sanction of building plans of the site submitted to the office of respondnet No. 4 were not held up, the petitioners made the payment of the additional licence fee of Rs. 10.21 lac along with interest of Rs. 1.17 lac totalling Rs. 11.38 Lac by way of a bank draft under protest and without prejudice to their rights and contentions. Since the action of the respondents was in contravention of the provisions of the 1975 Act and the 1976 Rules and also the judgment rendered by the Division Bench of this Court in Civil Writ Petition No. 15 of 2005 **Mahavir Singh** *Versus* **The State of Haryana and others,** the petitioners filed Civil Writ Petition No. 12165 of 2005 *inter alia* challenging the demand made,—*vide* Annexure P-5 as also the notification dated May 23, 2005 whereby the schedule of rates of licence fee given in schedule to Rule 3 of the 1976 Rules were allegedly amended. A draft gazette notification dated February 16, 2005 was issued by the Town and Country Planning Department, Haryana proposing to amend the schedule of rates of

licence fee given in the Schedule to Rule 3 of the 1976 Rules and inviting suggestions, if any, before the expiry of the period of 30 days from the date of issue of the above mentioned draft notification. The petitioners submitted objections to the abovesaid proposed amendment regarding incresae in the rates of licence fee through PHD Chambers of Commerce and Industry to respondent No. 2 Respondent No. 1 issued notification dated 23rd May, 2005 bringing in the amendment. The schedule was again substituted by a fresh schedule. The rates of licence fee for areas in Gurgaon, Faridabad and Panchkula were increased and another category of urban area, namely, Gurgaon-Mehrauli Schedule Road was introduced. It was stated that the amendment would come into force with effect from November 25, 2004. The petitioners even challenged the same being the only notification purported to have been issued exercising powers under section 24 after the notification dated September 1, 2003. This Court was pleased to issue notice of motion and a direction was passed that the application of the petitioner for renewal of licence be entertained as interim measure on payment of last paid renewal fee, without prejudice to the rights of the petitioners subject to further orders. Subsequently, written statement on behalf of the respondents was filed wherein the demand made,—*vide* Annexire P-5 had been sought to be justified by placing reliance *inter alia* on the Haryana Ordinance Act No. 4 of 2005; Haryana Development and Regulation of Urban Areas (Amendment and Validation) Ordinance 2005, which had been promulgated on July, 15, 2005 under clause 2 of Article 213 of the Constitiution of India and the same had been claimed to have been published in Haryana Government Gazette (Extra-Ordinary) on July 15, 2005. The respondents had further pleaded in the said written statement that subsequently notification dated September 13, 2005 had been issued and the licence fee was to be charged as per the said notification dated September 13, 2005. The petitioners then approached the Court by way of filing a Civil Writ Petition No. 247 of 2006, challenging the Ordinance as also the notification dated September 13, 2005. However, since the Ordinance was placed before the Legislative Assembly in the form of Haryana Development and Regulation of Urban Areas (Amendment and Validation) Bill, 2005 and the said bill had received the assent of the Governor of Haryana on January 12, 2006, which ultimately culminated into Haryana Development and Regulation of Urban Areas (Amendment and

Validatiion) Act, 2005, the petitioners withdrew the said writ petition with the liberty to challenge the Amending Act and to file the writ on the same cause of action. In view of this, petitioners had prayed for withdrawal of Civil Writ Petition No. 12165 of 2005 and sought permission to file a fresh petition on the same cause of action by making additional challenge to the Amending Act of 2005. The aforesaid liberty was granted and the interim order dated October 7, 2005 was ordered to be continued to operate in favour of the petitioners for a period of three weeks from that day. It is categorically pleaded that from scheme/provisions of the 1975 Act and the 1976 Rules, it is clear that while applying for the renewal of licence, the applicant-licensee has to pay licence renewal fee, as per rule 13, at the rate 10% of the fee prescribed under rule 3 for the issuance of the licence. It is further pointed out that the licence renewal fee prescibed in rule 13 of the 1975 Rules, which is 10% of the licence fee prescribed in rule 3 at the time of issance of licence or without prejudice, prescribed in the Scheduled appended to the 1976 Rules on the date of application for renewal, can only be claimed from the petitioners and any demand beyond that is arbitrary and *mala fide* and since action of the authorities in charging the licence fee other than what is prescribed under the rules was set aside by this Court in Mahavir Singh's case (*supra*), the authorities in order to frustrate the effect of the judgment rendered and to illegally validate their actions which otherwise were declared as invalid, has come out with the Amendment and Validation Act. Subsequent to the promulgation of the Ordinance, a draft notification dated July 26, 2005 was issued by the respondents. *Vide* the said draft notification, the Government has arbitrarly taken a decision to clasify the towns/urban areas into Hyper Potential Zone, High Potential Zone, Medium Potential Zone and Low Potential Zone and further enhanced the rates of licence fee exorbitantly without any reasonable nexus with the object sought to be achieved and further without any basis and rationale. The alleged increase made ,—*vide* abovesaid notification has neither any basis nor is there any rationale in a short span of two years as compared to the earlier notification dated September 1, 2003.

(3) On the other hand, the petition was contested by the respondents and through written statement filed by respondent Nos. 1 to 4, most of the assertions contained in the petition were denied.However, it was pointed out that during the period 2003 and

2004 frequent changes had taken place in the commercial licencing policy, i.e., increasing the permissible area for an independent commercial colony within a sector from 2% to 3.5%, de-restricting the Gurgaon-Mehrauli road to enable its development as a prime commercial street in the region and flexibility in the FAR giving an option of 150 and 175 requiring commensurate charges in the licnece fee structure of the commercial colonies. Accordingly, the fee was revised by the Government on 10th April, 2003, 22nd November, 2003 and 19th May, 2004 and 25th November, 2004. It is further pointed out that the colonizer had benefited from the charges in the policy parameters for grant of licence of commercial colonies; may be in the form of increase in the permissible area from 2% to 3.5% or de-restriction on Gurgaon-Mehrauli road and flexibility/increase in the FAR with option 150 and 175. The petitioner has also benefited from these charges in the policy parameters as they have availed the increased FAR (175) by paying the enhanced fee as per decision dated 29th August, 2002 and notified on 1st September, 2003 and also they have been granted a licence No. 173 of 2004 (adjoining to the licence under question making total area of the colony as 3,272 acres) again paying the revised licence fee as per decision dated 19th May, 2004 but published on 23rd May, 2005. These very notifications are now being challenged after enjoying the benefit. It has been further pleaded that the Government has been empowered under section 24 of the Act, 1975 to prejudice the licence fee. The policy to levy fee and charges by the Government is guided by factors encouraging the development in a particular sector of economy or a particular area that is why the fee structure is prescribed in a differential manner dividing the State in Hyper, High, Medium and Low Potential Zone. There is a policy to encourage investment in low potential zone by keeping the fee structure at the lowest possible rates, whereas in places like Gurgaon, Faridabed, Panchkula which are experiencing very high growth rate in the real estate development and consequently require investment into higher infrastructure the schedule for the licence fee is higher than the medium and low potential area.

(4) The petitioners were granted licence No. 135 to 144 of 1998 dated 15th November, 1998 for an area of 2.042 acres for setting up a commercial colony. The applicant did not complete the development work/construction of the colony within the valid period, i.e., upto 14th November, 2000; hence his licences are being renewed by the answering

respondent No. 4 on his request and on payment of the fee prescribed under rule 13. The prescribed licence fee for the commercial colonies was Rs. 25 lacs per gross acre and was revised to Rs. 50 lacs per gross acre for the colonizers opting for increased Floor Area Ratio (for short "FAR, i.e., 175 against the 150 earlier allowed. The schedule was notified,—*vide* notification dated 1st September, 2003 and this was effective from 29th August, 2002. The petitioners without raising any procedural issues requested for the increased FAR by paying the increased licence fee at the rate of Rs. 50 lacs per acre and accordingly the zoning plan regulating the development on the site was approved on 12th November, 2003. The colonizer has not come to this Court with clean hands as he has claimed that the licence fee paid by him is at the rate of Rs. 25 lacs per gross acre whereas actually the terms and conditions of licence were altered on 12th November, 2003 and he had paid the licence fee of Rs. 50 lacs per acre by getting incresed FAR. The licence renewal fee for the corresponding period was 10% of Rs. 50 lacs per acre and not Rs. 25 lacs per acre. Subsequently renewal of licences is subject to payment of the licence renewal fee as prescribed for the corresponding period. Repeated attempts by the petitioners through Civil Writ Petition No. 12165 of 2005 and the present writ petition shows the mischieves intent on part of the petitioners to cause loss to the public exchequer by not paying the licence renewal fee due to the answering respondent No. 4 despite the knowledge that the fee being demanded for renewal of licence is prescribed in the statute and by taking other preliminary objections raised in the written statement, it was finally prayed that the petition be dismissed.

(5) I have heard the learned counsel for the parties and with their assistance have gone through the record of the case meticulously.

(6) The entire controversy revolves around the rate at which licence fee is chargeable from an applicant like the petitioners who seeks change of user of his land under the provisions of the 1975 Act. According to the learned counsel for the petitioners, an application for licence under the 1975 Act is required to be preferred under section 3 of the said Act. Section 3 of the 1975 Act is being extracted hereunder for facility of reference:—

> "Section 3 Application for licence (1) Any owner desiring to convert his land into a colony shall unless exempted under section 9, make an application to the Director for the grant

of licence to develop a colony in the prescribed form and pay for it such fee and conversion charges as may be prescribed. The application shall be accompanied by an income tax clearance certificate :

Provided that if the conversion charges have already been paid under the provisions of the Punjab Scheduled Roads and Controlled Areas Restriction of Unregulated Development Act, 1963 (41 of 1963), no such charges shall be payable under this section.

(2) On receipt of the application under sub-section (1), the Director shall, among other things, enquire into the following matters, namely:—

(a) title to the land

(b) extent and situation of the land;

(c) capacity to develop a colony;

(d) the layout of a colony;

(e) plan regarding the development works to be executed in a colony; and

(f) conformity of the development schemes of the colony land to those of the neighbouring areas

(3) After the enquiry under sub-section (2), by an order in writing, shall (a) grant a licence in the prescribed form after the applicant has furnished to the Director a bank guarantee equal to twenty five per centum of the estimated cost of development works in case of area of land divided or proposed to be divided into plots or flats for residential, commercial or industrial purposes and a bank guarantee equal to thirty seven and a half per centum of the estimated cost of development works in case of cyber city or cyber park purpuses) as certified by the Director and has undertaken :—

(i) to enter into an agreement in the prescribed form for carrying out and completion of development works in accordance with the licence granted;

(ii) to pay proportionate development charges if the external development works as defined in clause (g) of Section 2 are to be carried out by the Government or any other local authority. The proportion in which and the time within which such payment is to be made, shall be determined by the Director;

(iii) the responsibility for the maintenance and upkeep of all roads, open spaces, public park and public health services for a period of five years from the date of issue of the completion certificate unless earlier relived of this responsibility and thereupon to transfer all such roads, open spaces, public parks and public health services free of cost to the Government or the local authority, as the case may be ;

(iv) to construct at his own cost, or get constructed by any other institution or individual at its cost, schools, hospitals, community centres and other community buildings on the lands set apart for this purpose, or to transfer to the Government at any time, if so desired by the Government, free of cost the land set apart for schools, hospitals, community centres and community buildings, in which case the Government shall be at liberty to transfer such land to any person or institutions, including a local authirity on such terms and conditions as it may deem fit;

(v) to permit the Director or any other officer authorised by him to inspect the execution of the layout and the developmemt works in the colony and to carry out all directions issued by him for ensuring due compliance of the execution of the layout and the development works in the colony and to carry out all directions issued by him for ensuring due compliance of the execution of the layout and development works in accordance with the licence granted :

Provided that the Director, having regard to the amenities which exist or are proposed to be provided in the

locality, is of the opinion that it is not necessary or possible to provide one or more such amenities, may exempt the licences from providing such amenities either wholly or in part;

(b) refuse to grant a licence by means of speaking order, after affording the applicant an opportunity of being heard.

(4) The licence so granted shall be valid for a period of two years and will be renewable from time to time for a period of one year, on payment of prescribed fee :

Provided that in the licenced colony permitted as a special project by the Government, the licence shall be valid for a maximum period of five years and shall be renewable for a period as decided by the Government;

(5) A separate licence shall be required for each colony."

(6) Learned counsel for the petitioners has vehemently argued that an owner who desires to convert his land into commercial colony, like the petitioners, can only be required to pay such licence fee as is "prescribed". In order to substantiate his plea that the "prescribed" licence fee for grant of licence can be none other than the licence fee "prescribed" by the rules framed under section 24 of 1975 Act, learned counsel for the petitioners invited my attention to Section 2(n) of the 1975 Act. Section 2(n) of the 1975 Act is being extracted herein :—

"2 (n) 'prescribed' means prescribed by rules made under the Act."

(7) It is submitted that the State Government in exercise of powers vested in it under Section 24 of the 1975 Act, issued the Haryana Development and Regulation of Urban Area Rules, 1976 (hereinafter referred to as "the 1976 Rules"), wherein Rule 3 deals with applications for grant of licence under Section 3 of the 1975 Act. Rule 3 of the 1976 Rules is being extracted herein :—

3. Application for licence (Section 3 and 24)

(1) Any owner of land desirous of setting up a colony shall make an application in writing to the Director in from LC-1 and shall furnish therewith:—

(a) a demand draft for licence fee at the rates (given in Schedule to these rules) for the plotted colony, group housing colony and commercial/office complex in residential sectors and for industrial colony;

(b) income tax clearance certificate;

(c) particulars of experience as colonizer showing number and details of colonies already established or being established;

(d) particulars about financial position (so as to determine the capacity to develop the colony for which he is applying; and

(e) the following plans and documents in triplicate :—

(i) copy or copies of all title deeds and other documents showing the interest of the applicant in the land under the colony, along with a list of such deeds and documents;

(ii) a copy of Shajra Plan showing the location of the colony along with the names of the revenue estate, khasra number and area of each filed;

(iii) a guide map on a scale of not less than 10 centimetre to 1 Kilometer showing the location of the colony in relation to surrounding geographical features to enable the identification of the land.

(iv) a survey plan of the land under the proposed colony on a scale of 1 centimetre to 10 metres showing the spot levels at a distance of 30 metres and where necessary, contour plans. The survey will also show the boundaries, and dimensions of the said land the location of streets, buildings, and premises within a distance of at least 30 metres of the said land and existing

means of access to it from existing roads.

(v) layout plan of the colony on a scale of 1 centimetre to 10 metres showing the existing and proposed means of access to the colony the width of streets, size and types of plots, sites reserved for open spaces, community buildings and schcols with area under each and proposed building lines on the front and sides of plots;

(vi) an explanatory note explaining the salient features of the colony, in particular the source of wholesome water supply arrangement and site for disposal and treatment of storm and sullage water;

(vii) plans showing the cross-sections of the proposed roads indicating in particular the width of the proposed carriage was cycle tracts and footpaths, green verges, position of electric plots and of any other works connected with such roads;

(viii) plans as required sub-clause (vii) indicating, in addition the position of sewers, storm water channels, water supply and any other public health services;

(ix) detailed specifications and design of road works shown under sub-clause (viii) and estimated cost thereof;

(x) detailed specifications and design of sewerage, storm water and water supply schemes with estimated cost of each;

(xi) detailed specification and designs for disposal and treatment of storm and sullage water and estimated costs of works;

(xii) detailed specification and designs for electric supply including street lighting.

(2) The triplicate plans mentioned in clause (e) of sub-rule (1) shall be clear and legible azo prints with one set mounted on cloth.

(3) If the application wants to be exempted from providing any one or more of the amenities in a colony, he shall furnish detailed explanatory note in triplicate along with application if necessary, indicating the reasons as to why the said amenity or amenities need not or cannot be provided.

(8) A perusal of Rule 3(1)(a) of the 1976 Rules, according to the learned counsel for the petitioners, spells out that licence fee chargeable under section 3 of the 1975 Act, is the fee expressed in the Schedule appending to the 1976 Rules. He referred the Schedule appended to the 1976 Rules and then pointed out that the rates of licence fee depicted therein, for conversion of land into commercial/ office complexes constitutes the licence fee "prescribed" for the town of Gurgaon, which is Rs. 50 lacs per acre (for 175 floor area ratio), and Rs. 25 lacs per acre (for 100 and 150 floor area ratio). It is also pointed out that at present the rate of licence fee "prescribed" in the Schedule appended to the 1976 Rules was introduced through a notification published in the Haryana Government Gazette (Extra Ordinary) on 1st September, 2003. He has also pointed out Schedule appended to the 1976 Rules, has not undergone any change/ amendment/modification after the aforesaid notification dated 1st September, 2003. Based on a cumulative reading of Sections 3 and 2(n) of the 1975 Act and Rules 3 read with the Schedule appended to the 1976 Rules, it is asserted that the licence fee chargeable for conversion of the land owned by the petitioners to commercial purposes, must essentially be the fee "prescribed" by the Rules framed under the 1975 Act, namely the fee indicated in the Schedule appended to the 1976 Rules. In order to lend support to his contention, learned counsel for the petitioners submitted that the rules framed pursuance to the exercise of power vested by a legislative authority, assume the force of the legislating authority itself. For the instant proposition, learned counsel for the petitioners has placed reliance, firstly, on the decision redered by the Supreme Court in **State of Tamil Nadu** *Versus* **M/s Hind Stone etc (1)** wherein the Apex Court observed as under :—

"A statutory rule, while ever subordinate to the parent statue, is otherwise, to be treated a part of the statute and as

(1) AIR 1981 S.C. 711

effective. "Rules made under the Statute must be treated for all purposes of construction or obligation exactly as if they were in the Act and are to be the same effect as if contained in the Act and are to be judicially noticed for all purposes of construction or obligation" **(State of U.P. V. Babu Ram Upadhya** (1961) 2 SCR 679 at P. 702; AIR 1961 SC 751); (See also Maxwell; Interpretation of statures, 11th Edn. Pp 49-50f). So, statutory rules made pursuant to the power entrusted by Parliament are law made by Parliament within the meaning of Article 302 of the Constitution. To hold otherwise could be to ignore the complex demands made upon modern legislation which necessitate the plenary legislating body to dischage its legislative function by laying down broad guide-lines and standards, to lead an guide as it were, leaving it to the subordinate legislating body to fill up the details by making necessary rules and to amend the rules from time to time to meet unforeseen and unpredictable situation, all within the frame work of the power entrusted to it by the plenary legislating body."

(9) Reliance has also been placed for substantiating the aforesaid plea on the judgment rendered by the Supreme Court in **National Insurance Limited** *Versus* **Swaran Singh and others (2)** wherein the Supreme Court observed as under:—

"It is now a well settled principle of law that rules validly framed become part of the statute. Such rules are, therefore, required to be read as a part of the main enactment. It is also a well-settled principle of law that for the interpretation of statute an attempt must be made to give effect to all provisions under the rules. No provision should be considered as surplusage."

(10) Based on the judgments referred to above, it is submitted by the learned counsel for the petitioners that the State Government having rules in exercise of the powers conferred on it under by Section 24 of the 1975 Act, and having "prescribed" through the said rules, licence fee chargeable for grant of licences under the 1975 Act, the same could not be deviated from. In other words, according to learned counsel, it was imperative for the respondents to claim licence fee

(2) (2004) 3 S.C.C. 297

only the rates depicted in the Schedule appended to the 1976 Rules. To my mind, proposition put forward by the learned counsel for the petitioners is liable to be accepted because I find that an application for grant of licence under the 1975 Act is to be made in terms of the provisions of Section 3 of the said Act, Section 3 of the 1975 Act expressly envisages the requirements of paying licence fee as may be "prescribed" used in the 1975 Act, would mean prescribed by Rules framed under the 1975 Act. The only rules framed under Section 24 of the 1975 Act undisputedly are the 1976 Rules, wherein Rule 3 leaves no manner of doubt that licence fee chargeable for grant of licences under Section 3 of the 1975 Act, is to be at the rates expressed in the Schedule appended to the 1976 Rules. Schedule further spells out that for obtaining a licence so as to convert the use of land into a commercial/office complex at Gurgaon, the Schedule appended to the 1976 Rules (amended as on 1st September, 2003), prescribes a sum of Rs. 50 lacs per acre for 175 floor area ratio, and Rs. 25 lacs per acre for 100 and 150 floor ratio. The aforesaid rates of licence fee depicted in the Schedule, in my view, has the force of law in view of the law laid down by the Supreme Court in State of Tamil Nadu's case (supra) and National Insurance Company Limited case (supra). Licence fee to be charged from the petitioners in furtherance of the application preferred by them under Section 3 of the 1975 Act, therefore, in my view cannot be at variance with the rates of licence "prescribed" in the Schedule appended to the 1976 Rules. No authority vested with the Council of Ministers to alter licence fee prescribed in the Schedule 1976 Rules and as such, the decisions of the Council of Ministers referred to by the learned counsel for the respondents do not have the force of law.

(11) Faced with this situation, the learned counsel for the respondents has vehemently argued that initially licence fee for charge of use of land into commercial colonies/office complexes was fixed at Rs. 25 lacs per acre by a decision of Council of Ministers. The Council of Ministers reviewed the issue of change of use of land into commercial colonies/office complexes on 11th November, 1999. At this juncture, the Council of Ministers removed the embargo of allowing only two commercial licences in a sector because the permissible sector area available for commercial licensing was not being fully utilized. Again in the meeting of the Council of Ministers held on 29th August, 2000, a decision was taken to increase the permissible floor area ratio for

commercial colonies from 150 to 175. At this juncture, it was also decided to increase the licence fee from Rs. 25 lacs to Rs. 50 lacs per acre, but keeping in view the increasing demands for setting up commercial colonies, the Council of Ministers in their meeting held on 10th April, 2003 took a decision to increase the permissible limit for commercial licensing from 2% to 3% of the sector area and accordingly, it also decided to increase the licence fee from Rs. 50 lacs to Rs. 75 lacs per acre. In the process of implementation of the commercial licencing policy, it was realised that the sector area abutting the Gurgaon Mehrauli Road at Gurgaon had become highly potential for the development of commercial colonies/office complexes. Keeping in view this locataion specific potential, the Council of Ministers in its meeting held on 22nd November, 2003 decided that the stretch abutting the Gurgaon Mehrauli Road which passed through Sectors 24, 25, 25-A, 26 and 28 be derestricted from the proportionate area limit for purposes of commercial licensing and the licence fee chargeable for erection of commercial colonies/office complexes along with Gurgaon Mehrauli Road be increased to Rs. 1.5 crores per acre. Consequently, the Council of Ministers in meeting held on 19th May, 2004 enhanced licence fee for commercial colonies/office complexes uniformly to Rs. 1.5 Crores per acre on the Gurgaon Mehrauli Road to Rs. 1 crore per acre on other roads.

(12) At this stage, it is required to be examined whether the decision of the Council of Ministers in fixing the rates of licence fee can over ride the licence fee "prescribed" by the 1976 Rules framed under Section 24 of the 1975 Act ? The answer to the instant query has already been rendered by me while dealing with the submissions of the learned counsel for the petitioners in the negative. It has been concluded that the rates of licence fee depicted in the schedule appended to the 1976 Rules have the force and authority of law and no executive authority can over-ride the same, irrespective of its stature or authority. The licence fee "prescribed" in the Schedule appended to the 1976 Rules (by following the prescribed procedure), can only be claimed from applicants like the petitioners. In sum and substance, therefore, to amend/modify/revise the licence fee "prescribed" in the Schedule appended to the 1976 Rules, it would be imperative to follow the procedure prescribed by Section 24 of the 1975 Act, and unless the said procedure is followed, the "prescribed" fee cannot be altered, not even by the Council of Ministers. The power and the procedure to

make rules under the 1975 Act has been delineated in Section 24. Section 24 of the 1975 Act is being extracted herein :—

"Power to make rules (1) The Government may, by notification, subject to the condition of previous publication, make rules for carrying out the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely :—

(a) fee, form and manner of making an application for obtaining licence under sub-section (1) of Section 3

(b) form of licence agreement under sub-section (3) of Section 3 ;

(c) fee for grant of renewal of licence under sub-section (4) of Section 3 ;

(d) form of registers to be maintained under Section 4 ;

(e) form of accounts to be maintained under sub-section (2) of Section 5 ;

(f) manner of getting the accounts audited under sub-section (2) of Section 6 ;

(g) manner in which preference is to be given to the plot-holders under sub-section (3) of Section 8 ;

(h) form and manner of making application under sub-section (2) of Section 9 ;

(i) any other matter in connection with preparation submission and approval of plans.

(3) All Rules made under this Act shall be laid, as soon as may be after they are so made, before the House of the State Legislature while it is in session for a period of not less than fourteen days, which may be comprised in one session or two successive sessions, and if, before the expiry of the session in which they are so laid or the session immediately following, the House of the State Legislature makes any modification, in any of such rules of resolves that any such

> rule should not be made such rules shall thereafter have effect only in such modified form or be of no effect as the may be, so however, that any such modification or annulment shall be without prejudice to the validity of anything previously done thereunder."

(13) Section 24 of the 1975 Act, clearly spells out that all powers to frame rules vest with the State Government. The rules proposed by the State Government are required to be laid down before the State Legislature (i.e. the Haryana Legislative Assembly), while it is in session, for a period of not less than fourteen days (under section 24(3) of the 1975 Act). This according to me is a mandatory ingredient of the procedure, in the process of framing rules under the 1975 Act. The Haryana Legislative Assembly can effect modifications in the proposed rules, placed before it by the State Government (under section 24(3) of the 1975 Act). The State Legislature may, resolve during the aforesaid consideration that the proposed rule placed before the State Legislature are, however, not modified the same will be deemed to be rules approved by the State Legislature (under Section 24(3) of the 1975 Act). And if the same are modified, the modified rules will be deemed to be the rules approved by the State Legislature (under Section 24(3) of the 1975 Act). The proposed rules approved (or deemingly approved) by the State Legislature, are enforceable, only upon their publication and notification (under Section 24(1) of the 1975 Act). This, according to me, is another mandatory ingredient of the procedure, in the process of framing rules under the 1975 Act. Even if it is assumed, for the sake of arguments, that the decisions of the Council of ministers in revising the licence fee constitute the proposed rules of the State Government, the same are not enforceable till the procedure envisages under Section 24 of the 1975 Act is followed. The same are required to be placed before the State Legislature till the State Legislature approves (or deemingly approves) the proposed rules, and further till the approved rules are published and notified. It is not disputed that the proposals of the Council of Minister, have admittedly not been placed before the State Legislature (in terms of the requirement of Section 24(3) of the 1975 Act). It is, therefore, apparent that the State Legislature has till date not considered, whether the proposals are at the hands of the Council of Minister deserve to be approved as they are, of need to be modified before they are accepted, or deserve to be outrightly rejected (in terms of the requirement

of Section 24(3) of the 1975 Act). In view of the above, the occasion for publication and notification of the said proposals (in terms of the requirement of Section 24(1) of the 1975 Act) does not arise at all in the instant case. It is, therefore, apparent that the series of decisions of the Council of Ministers, referred to by the learned counsel for the respondents cannot be accepted to have assumed the status of rules framed under the 1975 Act.

(14) Now reverting back to the facts of the case in hand, it is the case of the petitioners that since the respondents sought to charge the petitioners the renewal licence fee at the rate of 10 percent of the alleged licence fee other than and more than what was 'prescribed' in contravention of the 1975 Act, the 1976 Rules and also in contravention of the law quoted above, the petitioners had approached this Court impugning the said action by filing Civil Writ Petition No. 12165 of 2005. However, during the pendency of the lis, the authorities came up with the amendment and validation Act. The petitioners have inter alia challenged in the present petition the action of the respondents in validating their illegal and arbitrary actions, which actions have been otherwise held to be illegal by this Court in another judgment without removing the illegality. It is settled law that the State can validate the actions found to be invalidated provided it removes the defects pointed out in that regard. The learned Advocate General representing the State of Haryana has submitted that the licence fee paid at the time of grant of licence is applicable till the validity of the licence and the renewal of licence requires payment of licence renewal fee, as prescribed under rule 13. It has been submitted that the rate of licence fee applicable with effect from 10th April, 2003, 22nd November, 2003 and 19th May, 2004 have been made part of the validation clause in the form of Schedule and no amendment as such in any of the provisions of the 1975 Act was required on account of validation of licence fee Schedule and, as such, the Validation Act, 2005 has been made in accordance with the power available to the State Legislature under the Constitution of India. It has further been contended that this Court deliberating in a similar matter in Civil Writ Petition No. 5036 of 1997 **M/s Trishul Industries** *versus* **State of Haryana and another, (3)** relating to levy of conversion charges under the Punjab Scheduled Roads and Controlled Areas Restriction

(3) 2006 (4) R.C.R. (Civil) 367

of Unregulated Development Act, 1963 did not find the criteria adopted by the government as irrational or arbitrary. Further, it has been submitted by the State Counsel that by virtue of the Amendment and Validation Act, the State Legislature has amended the Schedule itself which is part of the Amendment and Validation Act and thus it cannot be called for in question and the petitioners have not raised any challenge in respect thereof.

(15) To my mind, from perusal of the various provisions of the 1975 Act, it is evident that the defect pointed out by this Court was that only the licence fee 'prescribed' by the rules could be charged and the same could be modified only by amendment made in the rules by following two mandatory ingredients as envisaged under section 24 of the 1975 Act, i.e. by notification and previous publication and by laying the same before the House of the State Legislature. The respondent-State in its anxiety to modify the effect of the judgment of this Court has come up with Amendment and Validation Act so as to validate its illegal acts. However, even by virtue of the amendment, the ingredients which are mandatory have not been done away with. The amendment carried in sub-sections (1) and (3) in Section 24 by virtue of the Amendment and Validation Act reads as under :—

"Section 24(1) The Government may, by notification in the Official Gazette, subject to the condition of previous publication, make rules for carrying out the purposes of this Act may give them prospective and retrospective effect."

(3) Every rule made under this Act shall be laid, as soon may be, after it is made before the House of the State legislature, while it is in session."

(16) The comparison before unamended sub-section (1) would show that only the words "and may give them prospective and retrospective effect" have been added and sub-section (3), the following portion after the words "Session" has been deleted from the unamended sub-section (3) :—

"for a period of not less than fourteen days, which may be comprised in one session or two successive sessions, and if, before the expiry of the session in which they are so laid

> or the session immediately following, the House of the State Legislature makes any modification in any of such rules or resolves that any such rule should not be made, such rules shall thereafter have effect only in such modified form or be of no effect as the case may be, so however, that any such modifications or annulment shall be without prejudice to the validity of anything previously done thereunder."

(17) The perusal of the above would show that the mandatory ingredients which are required to be followed for amending the rules have still been kept intact even by virtue of the amendment. There has to be notification and previous publication and they have to be laid before the house of the State Legislature. In the instant case, there has been neither any notification subject to previous publication in respect of the rates mentioned in the Schedule appended to the Validation clause in the Amendment and Validation Act nor have these been laid before the House of Legislature. Thus, the respondents cannot validate their past actions basing on the said Schedule, which is part of the validation clause and not the amendment.

(18) However, the validation clause shows that the action of the Government in charging the rates mentioned in the Schedule appended to the validation clause are made valid as if the said rates are charged in accordance with the provisions of the 1976 Rules, which, in fact, is wrong. The perusal of the amendment itself shows that the mandatory ingredients in following the procedure to make/ modify the rules wherein the fee is 'prescribed', are still to be complied with. Since neither there had been any notification or previous publication in respect of the rates provided in the Schedule appended to the validation clause nor these had been laid before the House, the action of the State Government in charging the said fee in past cannot be held to be validated. It is a settled law that the State can validate actions found to be invalid only if it removes the defects pointed out in that regard. This reasoning of mine is also supported by the law laid down in the following authorities :—

(a) **Ahmedabad Municipality** *versus* **The New Shrock Spg. And Wvg. Co. (4).**

(4) AIR 1970 S.C. 1292 (Paras 6 & 7)

(b) **State of Tamil Nadu *versus* M Rayappa (5).**

(c) **Janapada Sabha *versus* The Central Provinces Syndicate (6).**

(d) **Bhubaneshwar Singh *versus* Union of India (7).**

(e) **Indian Aluminium Company *versus* State of Kerala (8).**

(19) In the light of the law settled by the Apex Court that the State can revalidate actions found to be invalidated only if it removes the defects pointed out in that regard. The validation clause as sought to be incorporated in the Amendment and Validation Act, in the instant case, cannot be allowed to sustain inasmuch as even by virtue of the amendment having been carried out, the two mandatory ingredients, as discussed above, still exists and have been kept intact. Thus, the increase in the licence fee as depicted in the schedule appended to the validation clause does not have any force of law since neither any notification subject to previous publication in respect thereof has ever been made nor they have been laid before any House of State Legilature, which the State Government is mandatorily required to do by virtue of the new amendment. Even the perusal of the judgment passed by this Court, the stand of the respondents had been that the increase in the licence fee has been taken in various meetings on 10th April, 2003, 22nd May, 2003, 19th May, 2004 and 25th November, 2004 which has been struck down by the Division Bench of this Court in view of the ratio laid down in that case. The respondent-State has again averred that the licence fee was revised by the Government on 10th April, 2003, 22nd May, 2003, 19th May, 2004 and 25th November, 2004 and has tried to give effect to those meetings by virtue of the validating clause. The same is not permissible in light of the discussions made in the foregoing paras.

(20) The submission of the learned State Counsel that by virtue of the Amendment and Validation Act, the State Legislature has amended the Schedule itself which is part of the Amendment and Validation Act and thus cannot be called in for question, is legally and factually incorrect. It is evident from the Amendment and Validation Act that only Section 24(1) and (3) has been amended and not the

(5) AIR 1971 S.C. 231 (Paras 4 & 5)
(6) AIR 1971 S.C. 57 (Paras 4 & 5)
(7) (1994) 6 S.C.C. 77 (Paras 11, 12 & 14)
(8) (1996) 7 S.C.C. 637 (Para 56)

Schedule to the 1976 Rules, which forms part of the 1976 Rules. In the Amendment and Validation Act, the only mention about the rules at which the licence fee is to be charged, has been made in the validation clause and the schedule forms part of the validation clause. Amending a particular thing and validating a particular action, on the basis of the said amendment, are two different things. One can validate an action by making an amendment and removing the defect. However, if a particular thing has been held to be done in a particular manner and even by virtue of an amendment, the manner to do a particular thing has been kept intact, then there cannot be any validation of the actions carried out without having followed the procedure and manner in which they are required to do. The judicial review is one of the basic features of the Constitution and the validation clause has illegally sought to put an embargo on the right to seek judicial review of the actions of the respondents. Such a condition is not only arbitrary and against pubic policy but is also unconstitutional.

(21) Even the judgment cited by the respondents in the case of M/s Trishul Industries (*supra*) does not come to their rescue. Rather to the contrary, it supports the contention of the petitioners inasmuch as it was the submission of the learned State Counsel in the said judgment as noted down in para 11 that the Division Bench of this Court was dealing with the situation, which is distinguishable from the case in M/s Trishul Industries.

(22) Further, the petitioners, without prejudice to their submissions as aforesaid, have rightly submitted that the licence fee is to be charged on 'quid-pro-quo', basis. This submission of the petitioners also carries weight. Licence fee is a regulatory fee and there has to be reasonable co-relation between the levy of licencee and the purpose for which the provisions of the 1975 Act and the 1976 Rules have been enacted and in fact is to be supported by consideration of service rendered in return and thus there has to be an element of 'quid pro quo' between the person who pays the fee and the public authority which imposes it. In the instant case, the respondents have failed to give any reason for the alleged increase in the fee from Rs. 50,00 lacs duly prescribed by the rules by virtue of the notification dated 1st September, 2003 in respect of commercial/office complex in residential sectors for 175 FAR to Rs. 2 crore purported to have been increased by virtue of the notification dated 13th September, 2005. The licence fee paid under the 1975 Act is only a fee and not a tax and cannot be equated and made the source of earning revenue for the State. In

fact, the charging of such an exorbitant rate of licence fee is opposed to the object of the 1975 Act. The 1975 Act is not a fiscal law. Its object is only to ensure planned development and to avoid haphazard development in and around the towns in the State of Haryana. However, the respondent authorities at their whims and fancies and in utter disregard of the object of the 1975 Act and without any basis, had been increasing the licence fee and thereby had been misusing the power to convert it into a statute for earning income. The Legislature has provided separate fiscal statutes in that regard and the provisions of the 1975 Act cannot be used for the said purpose. This reasoning of mine is supported by the authorities cited in **Government of Andhra Pradesh** *versus* **Hindustan Machine Tools Limited (9),** and **A.P. Paper Mills Limited** *versus* **State of Andhra Pradesh and another (10).**

(23) The arbitrariness and high handedness on the part of the respondents to increase the fee without any basis is writ large in the schedule annexed to the Amendment and Validation Act dated 15th July, 2005,—*vide* which the fee for the areas falling in Gurgaon, Faridabad and Panchkula for 175 FAR is fixed at Rs. one crore and for Gurgaon Mehrauli schedule road, for 175 FAR, it is fixed at Rs. 1.5 crore is made effective with effect from 19th May, 2004, whereas,—*vide* the draft notification dated 26th July, 2005 and the impugned notification dated 13th September, 2005 (Annexure P-14), the fee rate has been increased to Rs. 4 crore on Gurgaon-Mehrauli road for 175 FAR and on any other road, for 175 FAR to Rs. 2.5 crores. The respondents have nowhere explained the drastic increase of the licence fee sought to be charged.

(24) In view of the discussions made above, writ petition is partly allowed. The validation clause is struck down and the memo dated 20th May, 2005 (Annexure P-5) is set aside. However, the amendment made by virtue of the Amendment and Validation Act is kept intact. It is also made clear that in case the petitioners fulfil the eligibility criteria, the respondents shall issue licences to them in accordance with law.

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(9) AIR 1975 S.C. 2037 (Paras 19, 20, 21 & 22)
(10) (2000) 8 S.C.C. 167 (Paras 32 & 33)