



**THE GAUHATI HIGH COURT**  
(THE HIGH COURT OF ASSAM, NAGALAND, MIZORAM & ARUNACHAL PRADESH)

**WRIT PETITION (C) No. 6103/2012**

M/s. M.K. Dhiroomal Associates JV, a Joint Venture of M/s M.K. Engineering and M/s Shiroomal and Sons Pvt. Ltd., having its registered office at West Guwahati, Maligaon, Guwahati - 11.

.....Petitioner

**-Versus-**

- 1) Union of India, represented by the Secretary, Ministry of Railways, Railway Board, Railway Bhawan, New Delhi.
- 2) Northeast Frontier Railways, represented by the General Manager, Northeast Frontier Railways, Guwahati -12.
- 3) The Chief Engineer, Constructions, the North East Frontier Railways, Maligaon, Guwahati - 12.
- 4) The Chief Engineer, Constructions – 3, the North East Frontier Railways, Guwahati- 12.

- 5) The Deputy Chief Engineer, Constructions  
– 2, the North East Frontier Railways,  
Guwahati - 12.
- 6) The Assistant Engineer, Constructions - 4,  
Bogibeel, North East Frontier Railways,  
Silapathar.
- 7) The Executive Director, Civil Engineer G,  
Railway Board, North East Frontier  
Railways, Guwahati - 12.

.....Respondents

**WRIT PETITION (C) No. 266/2012**

Smti. Purnima Das, W/o Late J.C. Das R/o  
Sibbari Road, Tarapur P.S. Silchar, District -  
Cachar, Assam.

.....Petitioner

**-Versus-**

- 1) Union of India, represented by the  
Secretary, Ministry of Railways, Railway  
Board, Railway Bhawan, New Delhi.
- 2) General Manager, Office of the General  
Manager, Northeast Frontier Railway,  
Maligaon, Guwahati -11.
- 3) The Chief Engineer, Constructions, the  
North East Frontier Railways, Maligaon,  
Guwahati - 11.

4) The Public Information Officer,  
Northeast Frontier Railway, Maligaon,  
Guwahati - 11.

.....Respondents

**Advocates :**

Petitioners : Mr. M. Biswas, Advocate

Respondents [W.P.(C) no. 6013/2012] : Dr. B.N. Gogoi, SC, N.F. Railway

Respondents [W.P.(C) no. 266/2012] : Mr. B.K. Das, Addl. SC, N.F. Railway

Date of Hearing, Judgment & Order : 21.09.2023

**BEFORE**  
**HON'BLE MR. JUSTICE MANISH CHOUDHURY**  
**JUDGMENT & ORDER [ORAL]**

As both the writ petitions instituted under Article 226 of the Constitution of India involve similar nature of challenge, the same are taken up together at the request of the learned counsel for the parties, as they have stated that exchange of pleadings in both the writ petitions is complete.

2. The petitioners in both the writ petitions are represented by Mr. M. Biswas, learned counsel; the respondents in the writ petition, W.P.[C] no. 266/2012 are represented by Dr. B.N. Gogoi, learned Standing Counsel, N.F. Railway; and the respondents in the writ petition, W.P.[C] no. 6103/2012 are represented by Mr. B.K. Das, learned Additional Standing Counsel, N.F. Railway.
3. As the nature of challenge in both the writ petitions are similar, the facts, pleadings and issues involved in the writ petition, W.P.[C] no. 6103/2012 are taken up for discussion, at first.

Writ Petition, W.P.[C] no. 6103/2012 :-

4. The writ petition, W.P.[C] no. 6103/2012 has been preferred to assail a Final Variation Statement issued vide Letter no. W/60/CON/BB/NB-

Dyke/DBRT/2006/22/120 dated 08.12.2010 in relation to a contract agreement, that is, Contract Agreement no. CON/Bogibeel/120 dated 27.02.2007. In addition, the petitioner has also sought setting aside and quashing of a Letter no. W/60/CON/NB/Dyke/120/02 dated 03.01.2011; and another Letter no. W/60/CON/Bogibeel/NB-Dyke/SPTR/120 dated 05.01.2011 issued by the respondent N.F. Railway authorities. Assailment is also made to Clause 6.0 contained in the Contract Agreement, executed between the petitioner and the respondent N.F. Railway authorities on 27.02.2007, with regard to its inapplicability.

5. In order to understand and appreciate the challenge made, it is necessary to narrate the background events, which have led to the issuance of the Final Variation Statement and the impugned Letters, in brief, at the inception.
  - 5.1. In the year 2006, the respondent N.F. Railway authorities vide Tender no. CE/CON/Bogibeel/NB Dyke/2006/22 invited bids from intending eligible bidders for execution of a contract-work viz. "Raising, widening, strengthening of North bank dyke by earthwork in filling to form embankment & formation with mechanical compaction and other ancillary works in between Chainage 0.5 km upstream of Bridge Centre Line perpendicular to Bogibeel Bridge centre line [Service road] to Ch. 7.0 Km downstream of Bridge centre line along with perpendicular to Bogibeel Bridge centre line at North bank of River Brahmaputra in connection with Bogibeel Bridge Project [Gr.2]" ['the Contract-Work', for short]. Responding to the Tender no. CE/CON/Bogibeel/NB Dyke/2006/22, the petitioner which is a joint venture concern of two entities, submitted its Offer on 14.08.2006. The Offer of the petitioner was accepted by the Competent Authority in the respondent N.F. Railway for and on behalf of the President of India at a total cost of Rs. 18,74,69,000/-, as quoted by the petitioner, and an Acceptance Letter bearing no. W/362/CON/BBI/NB-Dyke/DBRT/2006/22 dated 12.12.2006 stood issued under the hand of the Chief Engineer/Construction-3/N.F. Railway, Maligaon O/o the General Manager [Construction], Maligaon, Guwahati.
  - 5.2. With the issuance of the Acceptance Letter dated 12.12.2006, the petitioner was authorized to commence the Contract-Work and to ensure completion of the Contract-Work within the stipulated period of time, mentioned therein. By the

Acceptance Letter dated 12.12.2006, the petitioner was informed that Earnest Money Deposit to the extent of Rs. 34,09,540/-, deposited by it, would be retained as a part of the Security Deposit and rest of the amount towards the Security Deposit would be deducted from CC bills as per conditions of the Contract Agreement. The petitioner was asked to execute a formal Contract Agreement for the Contract-Work and to deposit a Performance Guarantee in the form of an irrevocable Bank Guarantee amounting to 5% of the Contract Value, prior to signing of the Contract Agreement within a period of 15 [fifteen] days therefrom. A Schedule of Items of Work and approximate Quantities was made as part of the Acceptance Letter dated 12.12.2006. It was mentioned that the Acceptance Letter shall be legal and enforceable contract between the petitioner and the respondent N.F. Railway authorities.

5.3. Subsequent to deposit of the Performance Guarantee and compliance of other requisite formalities, a contract agreement being Contract Agreement no. CON/Bogibeel/120 dated 27.02.2007 came to be executed between the petitioner on one hand and the Chief Engineer/Construction-3/N.F. Railway for the Railway Administration on behalf of the President of India on the other hand. As per the Contract Agreement dated 27.02.2007, the petitioner as the Contractor had agreed with the N.F. Railway authorities for performance of the Contract-Work set forth in a Schedule thereto, that is, [i] the General Conditions of Contract; [ii] the Specifications of the Northeast Frontier Railway 1998 Edition, corrected up-to-date; and [iii] the Special Conditions and Special Specifications, if any, as part of the Contract Agreement. As per the Contract Agreement, the total approximate Contract Value of the Contract-Work was Rs. 18,74,69,000/-. One set of Additional Special Conditions of Contract was also made part of the Contract Agreement no. CON/Bogibeel/120 dated 27.02.2007. Clause 6.0 in respect of which the petitioner has mounted a challenge, is part of the said Additional Special Conditions of Contract.

5.4. On being awarded the Contract-Work, the petitioner proceeded to execute the Contract-Work. In course of time, the petitioner had completed the Contract-Work and it was inspected by the concerned authorities in the respondent N.F. Railway. A Completion Certificate bearing no. W/60/CON/Bogibeel/NB/North Dyke/120 dated 29.07.2009 stood issued under the hand of the Deputy Chief Engineer/Construction 2/N.F. Railway certifying that the petitioner had

successfully completed the Contract-Work awarded vide the Contract Agreement no. CON/Bogibeel/120 dated 27.02.2007. The Completion Certificate also contained the detail expenditure of the works wherein it was mentioned that the Date of Commencement of the Contract-Work was 26.12.2006 and the Actual Date of Completion was 31.01.2009. The Certificate also mentioned the original Contract Agreement value was Rs. 18,74,69,000/- and the up-to-date value of bill was Rs. 11,29,08,422/-. Mention was also made in the said Certificate to the effect that the Final Variation Statement of the Contract Agreement was under process for finalization whereas the overall progress of work achieved was 100%.

- 5.5. It was on 08.12.2010, the respondent N.F. Railway authorities vide Letter bearing no. W/60/CON/BB/NB-Dyke/DBRT/2006/22/120 issued a Final Variation Statement in relation to the Contract Agreement no. CON/Bogibeel/120 dated 27.02.2007. As per the Final Variation Statement, which was shown to have been approved by the Competent Authority in the respondent N.F. Railway, there was negotiation with the Contractor i.e. the petitioner towards Final Variation Statement against the Contract Agreement dated 27.02.2007 and it was agreed that the revised Contract Value in respect of the Contract-Work would be Rs. 12,86,54,574.39.
- 5.6. The Final Variation Statement dated 08.12.2010 was followed by a Letter bearing no. W/60/CON/NB/Dyke/120/02 dated 03.01.2011 addressed to the petitioner. By the Letter dated 03.01.2011, it was informed to the petitioner that the Competent Authority had approved the Final Variation Statement against the Contract Agreement no. CON/Bogibeel/120 dated 27.02.2007. The petitioner was, thereby, requested to deposit a sum of Rs. 25,21,881.27 as 'vitiating amount' or to submit a no claim certificate for deduction of the said sum from the final bill amount of the petitioner which would result in finalization of the Contract Agreement from the end of the respondent N.F. Railway. The Letter no. W/60/CON/Bogibeel/NB-Dyke/SPTR/120 dated 05.01.2011 of the Deputy Chief Engineer/Construction-2/SPTR to Chief Engineer/Construction-3/MLG, N.F. Railway contained a proposal to consider the Contract Agreement for single tender on a number of grounds.

6. Mr. Biswas, learned counsel for the petitioner has submitted that it is not in dispute that the petitioner had executed the Contract-Work to the extent of 100%, as certified by the N.F. Railway authorities themselves in the Certificate dated 29.07.2009. He has drawn attention to Clause no. 2.8 of the Additional Special Conditions of Contract [Additional SCC] to submit that the parties to the Contract Agreement had agreed that the quantities specified in the Schedule of Works were approximate and meant to give the tenderers an idea of quantum of works involved. Right stood reserved to the respondent N.F. Railway authorities to increase or decrease the quantities against various items and add/or delete from the items up to 50% of the quantities or even more, as per the actual requirements at site. Thus, there was provision to reduce payment after measurements of the completed work with the issuance of a Final Variation Statement. The petitioner is not aggrieved to that part of the Final Variation Statement issued on 08.12.2010 whereby the value of the Contract-Work had been revised to Rs. 12,86,54,574.39. The petitioner is aggrieved by that part of the Final Variation Statement dated 08.12.2010 whereby a sum of Rs. 25,21,881.27 has been sought to be recovered from the petitioner on the premise that the Contract Agreement stood 'vitiating' to that extent.
- 6.1. Contending that such kind of recovery on the ground of vitiating was not contemplated in the Contract Agreement, he has strenuously contended that though in Clause 6.0 of the Additional Special Conditions of Contract, a mention was made about 'Vitiating of Contract', the concept of 'Vitiating' was neither explained in the Contract Agreement nor the same was brought to the notice of the petitioner for any kind of consent from his side, by any mode whatsoever. In such view of the matter, it is absolutely arbitrary on the part of the respondent N.F. authorities to ask for a no claim certificate from the petitioner vide Letter no. W/60/CON/NB/Dyke/120/02 dated 03.01.2011 for the purpose of deducting the sum of Rs. 25,21,881.27 as vitiating amount, from the final bill amount of the petitioner submitted for the Contract-Work.
- 6.2. Mr. Biswas has further submitted that though the Letter dated 05.01.2011 was an inter-departmental communication between the authorities in the N.F. Railway, but a perusal of the same would go to show that a decision had already been taken by the respondent N.F. Railway authorities, as revealed from the Letter no. W/60/CON/NB/Dyke/120/02 dated 03.01.2011, to the effect that

recovery of a sum of Rs. 25,21,881.27 would be made either from the final bill amount of the petitioner or on the basis of a no claim certificate. It is his further contention that the respondent N.F. Railway authorities by making mention about a Circular Letter no. XXIII no. 64/CE-I/CT/37 dated 05.05.1995 and other letters of the Railway Board, Ministry of Railway, Government of India, in their Affidavit-in-Opposition, have sought to bring the aspect of 'vitiation' for the purpose of consideration in contracts entered into by the N.F. Railway authorities on one side unilaterally. But, the said Circular Letter was never made a part of the Contract Agreement dated 27.02.2007 by even making a mention of it therein. It is his contention that to bind a contractor like the petitioner in the manner contemplated in the Circular Letter dated 05.05.1995 of the Railway Board, it was incumbent on the part of the respondent N.F. Railway authorities to specifically include the same in the Contract Agreement, at least by mentioning it. In the absence of any explanation provided in the Contract Agreement about 'vitiation' and since the Circular Letter dated 05.05.1995 or any other Circular/Letter/Notification, etc. was not part of the Contract Agreement, it is not open for the respondent N.F. Railway authorities to resort to a method which was neither mentioned in the Contract Agreement nor envisaged by it, even by implication. Mr. Biswas has submitted that the main reason to challenge the Letter dated 05.01.2011 is that the respondent N.F. Railway authorities had brought in the figures of another contractor [L-1], to make a comparison of the rates in respect of 5 [five] nos. of items offered by the petitioner in his Bid to arrive at the alleged 'vitiated' amount of Rs. 25,21,881.27. He has contended that since the parties neither at the time of execution of the Contract Agreement nor at a later point of time by any kind of supplementary agreement had agreed for any method of calculation for any vitiated amount, the petitioner as the Contractor, cannot be asked to agree to such method.

7. In response, Mr. Das, learned Additional Standing Counsel, N.F. Railway has, at first, placed reliance on Clause 6.0 :- 'Vitiation of Contract', appearing in the Additional Special Conditions of Contract, to contend that if during the execution of the Contract-Work, variation of quantities against items of work became inevitable and such variation caused 'vitiation' of the Contract, it is permissible on the part of the N.F. Railway authorities as the Tendering Authority/Employer, to deduct the amount of 'vitiation' from the Contractor's bill. While admitting

that the concept of 'vitiation' has not been defined in the Contract Agreement or any other documents which were made part of the Contract Agreement in any specific manner, he has referred to the Circular Letter dated 05.05.1995 of the Railway Board, Ministry of Railways, Government of India. He has contended that the concept of 'vitiation' has been explained in the said Circular Letter dated 05.05.1995. It was made clear therein that that the concept of 'vitiation' gets operational in the event there is increase or decrease of quantities substantially, that is, more than 25% of the overall accepted tender cost.

- 7.1. It is the contention of Mr. Das that the petitioner as the Contractor/tenderer had full knowledge about the implication of Clause 6.0 of the Additional Special Conditions of Contract and the obligation arising out of it. He has adverted to the contentions made in paragraph 18 of the Affidavit-in-Opposition filed by the respondent N.F. Railway authorities wherein it has been sought to canvass that the respondent N.F. Railway authorities while accepting an Offer, considers the overall bid value of the bidders and not the rates of individual items. It is contended that ordinarily, the lowest eligible and technically suitable tenderer [L-1] is awarded the contract-work for which tender process is undertaken. The respondent N.F. Railway has envisaged a situation that it is quite possible that for some of the rates quoted by the L-1 bidder, L-1 bidder might be higher though overall he is L-1 and so, it is also quite possible for some items in which L-1 is not a lowest, there is positive variation in quantities and for other items in which L-1 is lowest, there is a negative variation in quantities. In such situation, 'vitiation' can set in and then, L-1 may not remain L-1. It is for the purpose of ensuring that L-1 remains L-1 at all times, the 'vitiation' amount has to be deducted from the bidder who is awarded the contract-work, as per Clause 6.0 of the Additional Special Conditions of Contract. It is further contended that due to the nature of contract entered into by the parties, it is not open for a contractor like the petitioner to raise such contentions in a writ petition under Article 226 of the Constitution of India whereas such disputes are arbitrable.
8. I have given due consideration to the rival submissions advanced by the learned counsel for the parties and have also perused the materials on record brought by the parties through their pleadings.

9. In view of the above rival contentions, it is necessary to find out about the nature of the contract, that is, Contract Agreement no. CON/Bogibeel/120 dated 27.02.2007, entered into between the parties herein. In the Acceptance Letter bearing no. W/362/CON/BBI/NB-Dyke/DBRT/2006/22 dated 12.12.2006, it was *inter alia* mentioned that the Offer of the petitioner for the Contract-Work was accepted by the Competent Authority for and on behalf of the President of India at a total cost of Rs. 18,74,69,000.00. The Contract Agreement no. CON/Bogibeel/120 had been executed on 27.02.2007 between the President of India acting through the Railway Administration, thereafter called the 'Railway' on one part and the petitioner [JV], thereafter called the 'Contractor' of the other part.
- 9.1. As per Clause [1] of Article 299 of the Constitution of India, all contracts made in exercise of the executive power of the Union or of a State shall be expressed to be made by the President, or by the Governor of the State, as the case may be, and all such contracts and all assurances of property made in the exercise of that power shall be executed on behalf of the President or the Governor by such persons and in such manner as he may direct or authorise. The provisions of Article 299 of the Constitution of India require that a contract made in the exercise of the executive power of the Union or of a State must satisfy three conditions viz. [i] it must be expressed to be made by the President or by the Governor of the State, as the case may be; [ii] it must be executed on behalf of the President or the Governor, as the case may be; and [iii] its execution must be by such person and in such manner as the President or the Governor may direct or authorise. It is settled that failure to comply with these conditions nullifies the contract and renders it void and unenforceable. It has been interpreted in a recent three-Judges Bench decision of the Hon'ble Supreme Court of India in **Arbitration Petition no. 51 of 2022 [M/s Glock Asia-Pacific Ltd. vs. Union of India]**, decided on 19.05.2023, that Article 299 of the Constitution only lays down the formality that is necessary to bind the Government with contractual liability and Article 299 does not lay down the substantial law relating to the contractual liability of the Government. In the case in hand, no question has been raised as regards non-compliance of any of such mandatory formalities, set forth in Article 299[1].

- 9.2. In *State of Haryana and others vs. Lal Chand and others*, reported in [1984] 3 SCC 634, it has been held that Article 299[1] applies to a contract made in exercise of the executive power of the Union or the State, but not to a contract made in exercise of statutory power. Article 299[1] has no application to a case where a particular statutory authority as distinguished from the Union or the States enters into a contract which is statutory in nature. Such a contract, even though it is for securing the interest of the Union or the States, is not a contract which has been entered into by or on behalf of the Union or the State in exercise of its executive power. It has been held to be settled that contracts made in exercise of statutory powers are not covered by Article 299[1].
- 9.3. There are two categories of contracts – statutory contract and non-statutory contract. It is settled that even if a contract is entered into in exercise of an enabling power conferred by a statute then also the contract does not become a statutory contract. If a contract incorporates certain terms and conditions in it which are statutory then such a contract to that extent can be termed as statutory. A contract may contain certain other terms and conditions which are not of statutory character and which have been incorporated as a result of mutual agreement then such terms and conditions in the contract are to be treated of non-statutory character. The Contract Agreement herein admittedly falls in the category of non-statutory contract.
- 9.4. After surveying a number of precedents, the Hon'ble Supreme Court of India in *Joshi Technologies International Inc. vs. Union of India and others*, reported in [2015] 7 SCC 728, has observed that contracts governed by the provisions of Article 299 of the Constitution of India are formal contracts made in exercise of the executive power of the Union or of a State, as the case may be, and are made on behalf of the President or the Governor, as the case may be. These contracts are to be made by such persons and in such a manner as the President or the Governor may direct or authorize. Therefore, there is no doubt to the position that the Contract Agreement no. CON/Bogibeel/120 dated 27.02.2007 is not a statutory contract and is a non-statutory contract.
10. The present writ petition was filed on 03.12.2012 and was first moved on 17.12.2012. The Affidavit-in-Opposition on behalf of the respondent N.F. Railway authorities was filed on 27.11.2013. It was not alluded in the Affidavit-

in-Opposition that the alleged dispute was referable to arbitration as per any arbitration clause contained in the Contract Agreement. It is only at the time of final hearing of the writ petition, a plea has been advanced that the dispute could be referred to arbitration. One has to bear in mind that the Contract Agreement no. CON/Bogibeel/120 was executed between the parties on 27.02.2007. It is true that where the contract itself provides an effective alternative remedy by way of reference to arbitration, it is ordinarily a good ground for declining to exercise the extra-ordinary and discretionary jurisdiction under Article 226 of the Constitution of India. It has been held in **Ram Barai Singh and Company vs. State of Bihar and others**, reported in [2015] 13 SCC 592, that a constitutional remedy by way of writ petition is always available to an aggrieved party and an arbitration clause in an agreement between the parties cannot *ipso facto* render a writ petition not maintainable. It has been observed to the effect that availability of alternative remedy is definitely a permissible ground for refusal by a writ court to exercise its jurisdiction in appropriate cases. But once the respondent had not objected to entertainment of the writ petition on the ground of availability of alternative remedy, the final judgment rendered on merits is not to be faulted with. It is for the writ court to consider whether in an appropriate case, the writ petitioner should be relegated to avail alternative remedy or not. But once the writ petition is heard at length and decided against one or the other party on merits, such a decision/order cannot be held to be bad in law only on the ground that the writ petition was not maintainable due to availability of alternative remedy. In **Maharashtra Chess Association vs. Union of India and others**, reported in [2020] 13 SCC 285, it has been observed that mere existence of alternate forums where the aggrieved party may secure relief does not create a legal bar on a High Court to exercise its writ jurisdiction. In **Ram Barai Singh [Supra]**, it was found that the agreement itself had worked out long back and on that ground, the plea as regards availability of remedy of arbitration was negated. In the case in hand, after the Contract Agreement was executed on 27.02.2007, the Contract-Work was completed as far back as on 31.01.2009. It was on and from 08.10.2010 when the Final Variation Statement was issued by the respondent N.F. Railway authorities, the dispute regarding 'vitiation' arose between the parties.

11. The alleged dispute involved herein is the alleged decision to recover a sum of Rs. 25,21,881.27 by the respondent N.F. Railway authorities on the ground that

the Contract Agreement between them stood vitiated to the extent of Rs. 25,21,881.27. As to the maintainability of a writ petition, the Hon'ble Supreme Court of India in **ABL International Ltd. and another vs. Export Credit Guarantee Corporation of India Ltd. and others**, reported in [2004] 3 SCC 553, after discussing a number of previous preiudacates/authorities, has laid down the legal principles as follows :- [a] in an appropriate case, a writ petition as against a State or an instrumentality of a State arising out of a contractual obligation is maintainable; [b] merely because some disputed questions of fact arise for consideration, same cannot be a ground to refuse to entertain a writ petition in all cases as a matter of rule; and [c] a writ petition involving a consequential relief of monetary claim is also maintainable. The aforesaid principles have been followed in subsequent three-Judge Bench decision in **State of Uttar Pradesh vs. Sudhir Kumar**, reported in 2020 SCC OnLine SC 847 and **Popatrao Vynkatrao Patil vs. State of Maharashtra**, reported in [2020] 19 SCC 241. It is, however, to be kept in mind that the plenary power under Article 226 is to be exercised with circumspection when other remedies have been provided by the contract. But as a statement of principle, the jurisdiction under Article 226 is not excluded in contractual matters. Reiterating the said principles, it has been observed in **Unitech Limited and others vs. Telangana State Industrial Infrastructure Corporation [TSIIC] and others**, reported in [2021] 2 SCALE 653, that while exercising its jurisdiction under Article 226, the Court is entitled to enquire into whether the action of the State or its instrumentalities is arbitrary or unfair and in consequence, in violation of Article 14. The jurisdiction under Article 226 is a valuable constitutional safeguard against an arbitrary exercise of State power or a misuse of authority. In determining as to whether the jurisdiction should be exercised in a contractual dispute, the Court must, undoubtedly eschew, disputed questions of fact which would depend upon an evidentiary determination requiring a trial. But, it is equally well-settled that the jurisdiction under Article 226 cannot be ousted only on the basis that the dispute pertains to the contractual arena. This is for the simple reason that the State and its instrumentalities are not exempt from the duty to act fairly merely because in their business dealings they have entered into the realm of contract. Similarly, the presence of an arbitration clause does not oust the jurisdiction under Article 226 in all cases though, it still needs to be decided from case to case as to whether recourse to a public law remedy can justifiably be invoked.

12. Reverting back to the facts of the case in hand, it is noticed that the respondent Railway authorities had first raised the issue of 'vitiating' in the Final Variation Statement prepared against the Contract Agreement no. CON/Bogibeel/120 dated 27.02.2007 on 08.12.2010. For ready reference, the contents of the said Final Variation Statement are extracted hereunder :-

**“NORTH EAST FRONTIER RAILWAY**

[Construction Organisation]

General Manager/  
Construction N.F. Railway,  
Maligaon-11

No.W/60/CON/BB/NB-Dyke/DBRT/2006/22/120

dated 08.12.2010

Dy.CE/Con-2/Bogibeel,  
N.F. Railway, Silapathar

Sub :- Final Variation Statement against CA No.CON/Bogibeel/120 dated 27.02.2007.

CAO/Con. N.F. Railway, Maligaon with the vetting of Associate Finance has approved the Final Variation Statement and accepted the T.C. recommendation after conducting negotiation with the contractor towards final variation statement against CA no.CON/Bogibeel/120 dated 27.02.2007 with the revised value of Rs. 12,86,54,574.39.

A statement showing the brief description of items of works, quantities beyond 50% of CA put for negotiation, negotiated rates, CA rate & amount etc. is shown below in a table for better appreciation.

|                                    |                                                                                                                                                                                                                                                    |
|------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| CA Item No.                        | 13                                                                                                                                                                                                                                                 |
| Brief description work             | Any other item of works not included above but required to be executed for successful completion of the work as deemed necessary by the Engineer and which shall be as per NFSR 1993 edition corrected up to date on the day of opening of tender. |
| Unit                               | % age above below/at par                                                                                                                                                                                                                           |
| Quantity                           | 504929.20                                                                                                                                                                                                                                          |
| Orgl. CA rate                      | 191%                                                                                                                                                                                                                                               |
| CA Rate with Clause 2.8            | 179.36% above                                                                                                                                                                                                                                      |
| Nego. Rate                         | 178% above                                                                                                                                                                                                                                         |
| Amount as per CA rate [In Rs.]     | 1469335.24                                                                                                                                                                                                                                         |
| Amount as per rate with Clause 2.8 | 1410561.83                                                                                                                                                                                                                                         |
| Amount as per nego. Rate [in Rs.]  | 1403694.84                                                                                                                                                                                                                                         |
| Net reduction achieved [in Rs.]    | 6866.99                                                                                                                                                                                                                                            |

On negotiation total reduction achieved = Rs. 6866.99

This is for your information and requested to obtaining 'No Objection Certificate' from contractor to recover the vitiated amount of Rs. 25,21,881.27 please.

- 12.1. In the detail Statement of calculation, appended to the Final Variation Statement, it was mentioned that the Contract Value of the Contract Agreement was Rs. 18,74,69,000.00, but the amount required to be paid to the Contractor i.e. the petitioner after adjustment, would be Rs. 12,86,54,568.71. The Final Variation Statement had, thus, reported the variation in amount as Rs.[-] 5,88,14,431.29 and the percentage of variation as [-] 31.37%. The Final Variation Statement was followed by the Letter no. W/60/CON/NB/Dyke/120/02 dated 03.01.2011 the contents of which were as under :-

**“NORTH EAST FRONTIER RAILWAY**

[Construction Organisation]

Office of the  
Deputy Chief Engineer/Con.  
Bogibeel Bridge Project,  
Silapathar-787059

No.W/60/CON/Bogibeel/NB/North Dyke/120

dated 29.07.2009

To,  
M/s M.K. Dhiroomal Associates [JV],  
West Maligaon, Guwahati.

Sub :- Submission of “No Claim Certificate” for deduction the vitiated amount of Rs.  
25,21,881.21

Ref: CA No. CON/Bogibeel/120 dated 27.02.2007

Dear Sir[s]

In reference to above CA, Competent Authority has approved the final variation statement against CA No. CON/Bogibeel/120 dated 27.02.2007. In this connection, you are requested to deposit the vitiated amount of Rs. 25,21,881.21 or submit No Claim Certificate for deducting the same from your Final bill so that CA can be finalized by this end.

Matter may please be treated most urgent

Yours faithfully,

[S.C. Saikia]

- 12.2. In the Letter no. W/60/CON/Bogibeel/NB-Dyke/SPTR/120 dated 05.01.2011, an inter-departmental communication, it was *inter alia* canvassed that as the Final Variation amount had decreased beyond [-] 25% from the original Contract Agreement Value, 'vitiation' had taken place and the vitiated amount would be Rs. 25,21,881.27. To arrive at the said 'vitiated' amount, a comparison was made between the rates and the amounts offered by the petitioner as the L-1 Bidder and one Jaichand Lal Singhi as the L-2 Bidder in respect of various descriptions of works. It was after carrying out such calculation, a decision was seen to have been taken to obtain a No Claim Certificate from the petitioner in respect of the 'vitiated' amount.
- 12.3. As per the contentions advanced on behalf of the respondent N.F. Railway authorities, the source of the contractual right to recover the vitiated amount from the contractor is relatable to Clause 6.0 of the Additional Special Conditions of Contract. Clause 6.0 of the Additional Special Conditions of Contract reads as under :-

Clause 6.0     VITIATION OF CONTRACT

The contract shall not be vitiated by any inadvertent error of any kind of the surveys, information, specification drawing or schedule of quantities. However, during execution of work if variation of quantities against item of work become inevitable and such variation cause vitiation of the contract, the amount of vitiation will be deducted from the contractor's bill.

- 12.4. As found out from the above discussion, the definition of the term 'vitiation' has not been provided either in the Contract Agreement or in the Additional Special Conditions of Contract. The respondents have not adverted to any definition of 'vitiation' provided elsewhere, which is part and parcel of the Contract Agreement dated 27.02.2007 executed between the parties. In the Affidavit-in-Opposition, a Letter no. 2007/CE-I/CT/18/Pt-13 dated 04.10.2010 of the Railway Board, Ministry of Railways, Government of India, has been annexed and it is contended that it has been laid down therein that in case of vitiation of the tender, sanction of the Competent Authority as per single tender should be obtained. It is further contended that the provision for vitiation is not

automatically applicable but the same is subject to sanction of the Competent Authority and as such, the recovery of the vitiation amount is not discarded in any manner. It has also been canvassed by the learned counsel for the respondent N.F. Railway authorities that the Letter no. 2007/CE-I/CT/18/Pt-13 dated 04.10.2010 has referred to another Circular Letter of the Railway Board bearing no. 94/CET/CT/37 dated 05.05.1995, the same is also applicable in a contract of the nature like in the case in hand. It has been urged that since the Circular Letter no. 94/CET/CT/37 dated 05.05.1995 has contained the methodology how the aspect of vitiation is to be worked out, it is not open to the petitioner to deny the authority of the Railway to recover the amount to the extent the Contract Agreement has got vitiated.

12.5. On a perusal of the Circular Letter no. 94/CET/CT/37 dated 05.05.1995 and the Letter no. 2007/CE-I/CT/18/Pt-13 dated 04.10.2010, it is found that they are in the nature of internal Circular Letters. In the Letter bearing no. W/362/CON/S-L/EMB/2006 dated 28.08.2023 of the Construction Organisation, N.F. Railway, produced before the Court by Mr. Das, learned Additional Standing Counsel, N.F. Railway, it is sought to be explained that in simple terms, 'vitiation' is a process when a contract awarded to the lowest bidder [L-1] and during execution if some variation in quantities are done in that contract agreement and the same excess variation are compared with other bidders like 2<sup>nd</sup> lowest bidder [L-2], 3<sup>rd</sup> lowest bidder [L-3], etc. It is after putting the same variation quantities with the rates of other bidders, if the total contract agreement value becomes less with respect to the lowest bidder [L-1], then the excess amount of lowest bidder [L-1] is deducted from his final bill as the vitiation amount. It is canvassed that vitiation can take place both in case of increase or decrease in quantities, during execution of the contract-work.

12.6. Thus, it clear that the amount of vitiation has been worked out in the case in hand on the basis of the methodology contained in the internal Circular Letters of the Railway Board, Ministry of Railway, Government of India. By applying the methodology to calculate the vitiated amount, the respondent N.F. Railway authorities had arrived at the sum of Rs. 25,21,881.27. From a look at those two internal Circular Letters viz. Circular Letter no. 94/CET/CT/37 dated 05.05.1995 and the Circular Letter no. 2007/CE-I/CT/18/Pt-13 dated 04.10.2010, it does not appear that they are statutory in nature or they have

been framed under any statute. The concept of vitiation explained there may be relevant for the authorities in the respondent N.F. Railway. Since the two Circular Letters neither have any statutory force nor contain any statutory prescription, the same could not automatically be made applicable to or would govern the Contract Agreement dated 27.02.2007. Even it is assumed that the petitioner as the Contractor had knowledge about the two internal Circular Letters containing the methodology of calculating the vitiation amount, the same would not be enough for the respondent N.F. Railway authorities to give effect to them unless they become part of the Contract Agreement dated 27.02.2007 governing the inter se relationship between them. It is pertinent to mention that the Contract Agreement dated 27.02.2007 being a non-statutory contract, the inter se relationship between the parties are governed by the ordinary laws of contract.

- 12.7. In this connection, it is relevant to refer to the observations made in **Bharat Sanchar Nigam Limited and another vs. BPL Mobile Cellular Limited and others**, reported in [2008] 13 SCC 597. The core question involved therein is the effect of the application of internal circulars issued by the Department of Telecommunications [DoT] in the contracts entered into by and between the parties in respect of/as regards inter-connection links provided by it. The DoT authorities sought to charge the respondent therein who obtained leased circuits by executing lease agreements, on flat rate basis purported to be in terms of certain internal circulars having no force of law. It has been observed that the circular letters cannot *ipso facto* be given effect to unless they become part of the contract. If the parties were *ad item* as regards terms of the contract, any change in the tariff could not have been made unilaterally. Thus, when the particular contract is entered into, its novation has to be on fulfillment of all procedural requirements. In other words, any novation in the contract to be done on the same terms as are required for entering into a valid and concluded contract. As such an exercise was not resorted to before seeking to charge the tariff as indicated in the internal circulars, it has been held that the tariff cannot be charged from the respondent on the basis of the internal circular letters in the absence of any agreement. As the lease agreement was non-statutory contract with no statutory rule governing the field, it has been observed that the parties are with the liberty to enter into any contract containing such terms and conditions as regards the rate or the period

stipulating such terms as the case may be. It has been observed that the matter might have been different if the parties had entered into an agreement with their eyes wide open that the circular letter shall form part of the contract. They might have also been held bound if they accepted the new rates or the periods either expressly or sub-silentio. It has been held that a direction contained in the Circular Letters could be relevant for the officers who are authorized but the Circular Letters having no statutory force, they could not govern the contract-work. If some authorities have violated the terms of the said Circular Letters, they might have committed misconduct, but when a contract agreement is entered into, the parties shall be bound thereby. The decision has also observed as follows :-

51. In the instant case, the resources to be leased out were subject to agreement. The terms were to be mutually agreed upon. The terms of contract, in terms of Section 8 of the Contract Act, fructified into a concluded contract. Once a concluded contract was arrived at, the parties were bound thereby. If they were to alter or modify the terms thereof, it was required to be done either by express agreement or by necessary implication which would negate the application of the doctrine of 'acceptance sub silentio'. But, there is nothing on record to show that such a course of action was taken. The respondents at no point of time were made known either about the internal circulars or about the letters issued from time to time not only changing the tariff but also the basis thereof.

As a higher rate was stated to be enforced on the basis of those internal circulars by the DoT/BSNL, the challenge was negated and the appeals preferred by the BSNL as appellant, were dismissed.

13. Even a mere reference to those Circular Letters in the Contract Agreement no. CON/Bogibeel/120 dated 27.02.2007 would not have the effect of making those internal Circular Letters parts of the Contract Agreement. A reference to a document in the contract should be such wherefrom the intention of the parties to incorporate the document into the contract as its part and parcel is clearly visible. It requires a conscious acceptance of such a document as part and parcel of the contract by the parties before such document could be read as a

part of the contract between the parties. It has been observed in **M.R. Engineers and Contractors [P] Ltd. vs. Som Datt Builders Ltd.** reported in [2009] 7 SCC 696, that there is a difference between reference to another document in a contract and incorporation of another document in a contract, by reference. In the first case, the parties intend to adopt only specific portions or part of the referred document for the purposes of the contract. In the second case, the parties intend to incorporate the referred document in entirety, into the contract. Therefore when there is a reference to a document in a contract, the court has to consider whether the reference to the document is with the intention of incorporating the contents of that document in entirety into the contract, or with the intention of adopting or borrowing specific portions of the said document for application to the contract. It bears repetition to state that neither of the above two situations is present in the case in hand as the Contract Agreement no. CON/Bogibeel/120 dated 27.02.2007 does not even contain a reference to the Circular Letters, dated 05.05.1995 & dated 04.10.2010, containing methodology of calculation of the vitiation amount, as documents incorporated into the Contract Agreement by reference.

14. In view of the nature of contract the parties herein have entered into, it has emerged that the inter se relationship between the parties were/are governed by the ordinary laws of contract. It is well settled principle of law of contract that a party to a contract can insist for performance of only those terms and conditions, which are part of the concluded contract. A party to a concluded contract has no right to unilaterally alter the terms and conditions of the contract and neither of the parties has any right to add any additional terms and conditions in the contract unless both the parties agree to add or alter any such terms and conditions in the contract. It is also settled that if any party adds any additional terms and conditions in the contract without the consent of the other contracting party then such unilateral addition is not binding on the other party. A party which unilaterally adds any such terms or conditions, has no right to insist on the other party to comply or abide by such additional term or condition.
15. As the Contract Agreement no. CON/Bogibeel/120 dated 27.02.2007 is in the nature of a non-statutory contract and the inter se relationship between the parties are to be governed by the ordinary laws of contract, a question also arises as to whether the action on the part of the State respondents, that is, the

respondent N.F. Railway authorities seeking to recover the sum of Rs. 25,21,881.27 as vitiation amount from the petitioner as the Contractor, can be brought within the ambit and purview of the power of judicial review as the respondent N.F. Railway authorities have projected that they have sought to enforce their right in terms of the Contract Agreement. It has also emerged from the discussion made above that the methodology to calculate the vitiation amount which is contained in the two Circular Letters, dated 05.05.1995 & dated 04.10.2010, or any other document of the respondent N.F. Railway, which is/are never a part of the Contract Agreement, either by way of incorporation by reference or implication or by any subsequent supplementary agreement. Thus, if such methodology of calculating the vitiation amount is to be treated and read as part of the Contract Agreement dated 27.02.2007, there ought to have been a consensus between the parties who had executed the Contract Agreement no. CON/Bogibeel/120 at an earlier date on 27.02.2007. It is settled that where a mode is prescribed for doing an act and there is no impediment to follow that procedure, the performance of the act otherwise and in a manner which does not disclose any discernible principle which is reasonable, is to be termed as arbitrary and in such situation, the principle enshrined in Article 14 of the Constitution of India comes to the fore.

16. Having regard to the fact situation obtaining in the case in hand, it is apt to refer to the decision of the Hon'ble Supreme Court of India in **Kumari Shrilekha Vidyarthi and others vs. State of U.P. and others**, reported in [1991] 1 SCC 212 wherein it is held that even if the contract is concluded, the State cannot cast off its personality and exercise unbridled power unfettered by the requirements of Article 14 in the sphere of contractual matters and claim to be governed therein only by private law principles applicable to private individuals whose rights flow only from the terms of the contract without anything more. It has been categorically held that the personality of the State, requiring regulation of its conduct in all spheres by requirements of Article 14, does not undergo such a radical change after the making of a contract merely because some contractual rights accrue to the other party in addition. It has been held that the situation does not envisage or permit unfairness or unreasonableness in State actions in any sphere or its activity contrary to the professed ideals and exclusion of Article 14 in contractual matters has not been accepted. The

Hon'ble Supreme Court in *Kumari Shrilekha Vidyarthi* [supra], has gone on to observe as under :-

22. There is an obvious difference in the contracts between private parties and contracts to which the State is a party. Private parties are concerned only with their personal interest whereas the State while exercising its powers and discharging its functions, acts indubitably, as is expected of it, for public good and in public interest. The impact of every State action is also on public interest. This factor alone is sufficient to import at least the minimal requirements of public law obligations and impress with this character the contracts made by the State or its instrumentality. It is a different matter that the scope of judicial review in respect of disputes falling within the domain of contractual obligations may be more limited and in doubtful cases the parties may be relegated to adjudication of their rights by resort to remedies provided for adjudication of purely contractual disputes. However, to the extent, challenge is made on the ground of violation of Article 14 by alleging that the impugned act is arbitrary, unfair or unreasonable, the fact that the dispute also falls within the domain of contractual obligations would not relieve the State of its obligation to comply with the basic requirements of Article 14. To this extent, the obligation is of a public character invariably in every case irrespective of there being any other right or obligation in addition thereto. An additional contractual obligation cannot divest the claimant of the guarantee under Article 14 of non-arbitrariness at the hands of the State in any of its actions.
23. Thus, in a case like the present, if it is shown that the impugned State action is arbitrary and, therefore, violative of Article 14 of the Constitution, there can be no impediment in striking down the impugned act irrespective of the question whether an additional right, contractual or statutory, if any, is also available to the aggrieved persons.
24. The State cannot be attributed the split personality of Dr Jekyll and Mr Hyde in the contractual field so as to impress on it all the characteristics of the State at the threshold while making a contract requiring it to fulfil the obligation of Article 14 of the Constitution and

thereafter permitting it to cast off its garb of State to adorn the new robe of a private body during the subsistence of the contract enabling it to act arbitrarily subject only to the contractual obligations and remedies flowing from it. It is really the nature of its personality as State which is significant and must characterize all its actions, in whatever field, and not the nature of function, contractual or otherwise, which is decisive of the nature of scrutiny permitted for examining the validity of its act. The requirement of Article 14 being the duty to act fairly, justly and reasonably, there is nothing which militates against the concept of requiring the State always to so act, even in contractual matters. There is a basic difference between the acts of the State which must invariably be in public interest and those of a private individual, engaged in similar activities, being primarily for personal gain, which may or may not promote public interest. Viewed in this manner, in which we find no conceptual difficulty or anachronism, we find no reason why the requirement of Article 14 should not extend even in the sphere of contractual matters for regulating the conduct of the State activity.

17. In view of the discussions made above and for the reasons assigned therein, this Court has found the action on the part of the respondent N.F. Railway in seeking to recover the vitiation amount of Rs. 25,21,881.27 in terms of the Final Vitiating Statement dated 08.12.2010 to be an unilateral one as there was no novation of the contract at any time subsequent to 27.02.2007, that is, the date of execution of the Contract Agreement no. CON/Bogibeel/120. Such unilateral decision to recover any amount as vitiation amount cannot be made binding on the petitioner, the other contracting party and any steps taken towards such recovery as vitiation amount is to be treated as arbitrary under Article 14 of the Constitution of India. It is, therefore, ordered that no deduction of the sum of Rs. 25,21,881.27 as vitiated amount in relation to the Contract Agreement no. CON/Bogibeel/120 dated 27.02.2007 shall be made in finalizing the dues of the petitioner as the Contractor. The writ petition is allowed to the extent indicated above.

18. One Jiten Chandra Das pursuant to Tender Notice no. CE/CON/S-L/EMB/2006/07, was awarded a contract-work viz. 'Earthwork in filling for making/widening/raising existing MG formation to BG standard from Chainage 18/400 Km to 191/400 [New Chainage] including rebuilding/construction/strengthening of 7 nos. minor bridges [Br. no. 590, 591, 592, 593, 594, 595 & 596] on same alignment between station Chargola & Karimganj excluding Karimganj station yard and other ancillary works in connection with Gauge Conversion of Badarpur – Baraigram section of Lumding – Silchar Project' [the Contract-Work', for short] at an approximate Contract Value of Rs. 3,25,88,600/-. Similar to the Contract Agreement no. CON/Bogibeel/120 dated 27.02.2007, referred to in W.P.[C] no. 6103/2012, a contract agreement being Contract Agreement no. CON/S-L/98 was entered into on 27.07.2006 between the President of India acting through the Railway Administration, thereafter called the 'Railway' on one part and Jiten Chandra Das thereafter called the 'Contractor' of the other part. Apart from the Contract Agreement, [i] the General Conditions of Contract, [ii] the Specifications of the Northeast Frontier Railway 1998 Edition, and [iii] the Special Conditions and Special Specifications, if any, and drawings were made part of the Contract Agreement. In addition, the Additional Special Conditions of Contract were also made part of the Contract Agreement and the following clause was, *inter alia*, contained in the Additional Special Conditions of Contract :-

#### 6.0 VITIATION OF CONTRACT

6.1 The contract shall not be vitiated by any inadvertent error of any kind of the surveys, information, specification drawing or schedule of quantities. However, during execution of work if variation of quantities against item of work become inevitable and such variation cause vitiation of the contract, the amount of vitiation will be deducted from the contractor's bill.

19. When the Contract-Work awarded to Jiten Chandra Das vide Contract Agreement no. CON/S-L/98 was being executed, Jiten Chandra Das expired on 13.06.2009 leaving the petitioner and three children who were minors at that point of time. It is not in dispute that after the demise of Jiten Chandra Das, the respondent N.F. Railway authorities carried out final measurement in respect of the works executed by Jiten Chandra Das in relation to the Contract-Work till his death. As per the final measurement, the amount payable to the Contractor,

Jiten Chandra Das [since deceased] was found out to be Rs. 1,05,66,415.47. As an amount of Rs. 95,84,676/- had already paid to Jiten Chandra Das on 13.03.2009 during his lifetime, the respondent N.F. Railway authorities found that the balance amount payable to Jiten Chandra Das as the Contractor for the Contract-Work was Rs. 9,81,739.47.

20. The respondent N.F. Railway authorities by taking resort to the vitiation clause, referred above, contained in the Additional Special Conditions of Contract, calculated a sum of Rs. 10,33,671.47 as vitiation amount. After calculation of the vitiation amount, the respondent N.F. Railway authorities had worked out that net amount to be recovered from the Contractor would be Rs. 51,932.01. The respondent N.F. Railway authorities have also stated that an amount of Rs. 16,18,906/- is recoverable towards Forest Royalty Clearance Certificate [FRCC]. The calculation worked out by the respondent N.F. Railway authorities is also reflected in a Letter bearing no. W/362/CON/SCL/B-K/981/357 dated 16.10.2012 of the Deputy Chief Engineer, N.F. Railway as under :-

|                                                                                       |        |                    |
|---------------------------------------------------------------------------------------|--------|--------------------|
| [i] Amount of total work done                                                         | --     | Rs. 1,05,66,415.47 |
| [ii] Less the amount paid vide CC – VII dt. 30.03.09--[-]                             | Rs.    | 95,84,676.00       |
| <hr/>                                                                                 |        |                    |
| [ii] Balance amount to be paid to the Contractor                                      | --     | Rs. 9,81,739.47    |
| [iv] Less amount to be recovered from contractor<br>due to vitiation as per CA clause | -- [-] | Rs. 10,33,671.47   |
| [v] Net amount to be recovered from contractor<br>due to vitiation                    | --     | Rs. 51,932.01      |
| [vi] Add the amount pending for FRCC                                                  | -- [+] | Rs. 6,18,906.00    |
| Thus, total amount to be recovered from<br>Contractor                                 | --     | Rs. 16,70,838.00   |

21. In this writ petition, the petitioner has assailed the action on the part of the respondent N.F. Railway authorities to recover the amount of Rs. 10,33,671.47 as vitiation amount and has sought for a direction to the respondent N.F. Railway authorities to disburse the amount of Rs. 9,81,739.47. The respondent N.F. Railway authorities in this case had worked out the vitiation amount by comparing rates quoted by Jiten Chandra Das as L-1 bidder with the rates quoted by two other bidders. In so far as the claim made by the respondent

N.F. Railway authorities about the sum of Rs. 16,18,906/- is concerned, the petitioner in its rejoinder affidavit, has mentioned that the petitioner would submit/settle the issue of Forest Royalty Clearance Certificate [FRCC] and would sign the necessary no claim dues.

22. In view of such factual matrix and presence of the vitiation clause of exactly similar nature, this Court has found that the factual position of the case in hand is, in essence, similar to that of the writ petition, W.P.[C] no. 6013/2012, meaning thereby, the methodology the respondent N.F. Railway authorities have followed in working out the vitiation amount of Rs. 10,33,671.47 was not a part of the Contract Agreement no. CON/S-L/98 dated 27.07.2006 either by way of any supplementary agreement or by incorporation by reference. As the fact situation obtaining in the case is similar to that of the writ petition, W.P.[C] no. 6103/2012 in so far as working out the vitiation amount is concerned, this Court has found that the reasons assigned in the writ petition, W.P.[C] no. 6103/2012 that the act of seeking recovery of the vitiation amount is arbitrary, irrational and unjust, is also found applicable on all fours in the case in hand also. Though in this writ petition, the respondent N.F. Railway authorities have raised a plea to the effect that the dispute raised is arbitrable, this Court in view of the findings already arrived at in the writ petition, W.P.[C] no. 6103/2012 and elapse of a time period of more than a decade, does not find it appropriate to relegate the parties to arbitration at this distant point of time. Repelling such contention, it is observed that the action on the part of the respondent N.F. Railway authorities in seeking to recover the sum of Rs. 10,33,671.47 from the final bill amount in relation to the Contract Agreement no. CON/S-L/98 dated 27.07.2006 being arbitrary and not in conformity with Article 14 of the Constitution of India, is not to be enforced. The writ petition is allowed to the extent indicated above. It is observed that this Court has not made any observation as regards the claim of the respondent N.F. Railway authorities with regard to Forest Royalty Clearance Certificate [FRCC]. There shall, however, be no order as to costs.

**JUDGE**