

**THE HIGH COURT OF TRIPURA
AGARTALA**

WP(C) NO.448 OF 2012

Sri Ashish Kumar Dey,

Son of Late Sunil Chandra Dey,
Resident of Village-Shiv Bari Road,
PO & PS-Dharmanagar, Sub-Division-Dharmanagar,
District-North Tripura.

Represented by his duly constituted attorney,
Sri Narayan Chandra Dey, Son of Sri Chandan Dey,
Resident of Village-Vidyasagar Colony, Jogendra Nagar,
PS-East Agartala, PO-Agartala College,
Sub-Division-Agartala, District-West Tripura.

... Petitioner

- Vs -

1. Food Corporation of India,

A body corporate, represented by its
Managing Director, having his Office at
16/20 Barakhamba Lane, New Delhi-110001.

2. The General Manager,

Food Corporation of India, having his office at
North East Frontier Region, Midland, PO-Shillong,
Meghalaya-793003.

3. The Senior Regional Manager,

Food Corporation of India, having his office at
Regional Office, NEF Region, PO-Shillong,
Meghalaya-793003.

4. The Area Manager,

Food Corporation of India,
District Office, having his office at Colonel Chowmohani,
PO-Agartala, PS-West Agartala, Sub-Division-Agartala,
District-West Tripura.

....Respondents

BEFORE

THE HON'BLE MR. JUSTICE S.C. DAS

For the petitioner : Mr. Somik Deb, Advocate.

For the respondents : Mr. A. Nandi, Advocate.

Date of hearing : **28.09.2015**

Date of delivery of
Judgment & order : **15.10.2015.**

Whether Fit for reporting : **YES**

JUDGMENT & ORDER

By filing this writ petition under Article 226 of the Constitution of India, the petitioner prayed for the following reliefs:-

*I. ISSUE RULE, calling upon the respondents and each one of them, to show cause as to why a Writ of Certiorari and/or in the nature thereof, for calling for the records, lying with the respondents, for rendering substantive and conscionable justice to the petitioner, for **quashing/setting aside** the impugned Communication dated 19.10.2010, Communication dated 20.10.2010, Order dated 24.11.2010, Order dated 24.02.2011, Demand Notice dated 19.03.2011, Demand Notice dated 02.04.2011, Order dated 01.06.2011, Demand Notice dated 18.06.2011, Demand Notice dated 21.07.2011, and Demand Notice dated 26.08.2011 (Annexure-P4, Annexure-P5, annexure-P/7, Annexure-P10, Annexure-P11, Annexure-P12, Annexure-P16, Annexure-P17, Annexure-P18, and Annexure-P19 respectively supra);*

*II. ISSUE RULE, calling upon the respondents and each one of them, to show cause as to why a Writ of Mandamus and/or in the nature thereof, shall not be issued, for mandating/directing them, to **revoke/rescind** the above referred impugned Communications/Orders/Demands, and to **return** a finding that no penalty, under Clause-XC of the Agreement, nor any compensation, under Clause-XVII of the Agreement, is leviable on to the petitioner;*

*(III) ISSUE RULE, calling upon the respondents and each one of them, to show cause as to why a Writ of Prohibition and/or in the nature thereof, shall not be issued, for **restraining/injuncting** them, from acting in any*

manner, in furtherance of the said impugned Communication dated 19.10.2010, Communication dated 20.10.2010, Order dated 24.11.2010, Order dated 24.02.2011, Demand Notice dated 19.03.2011, Demand Notice dated 02.04.2011, Order dated 01.06.2011, Demand Notice dated 18.06.2011, Demand Notice dated 21.07.2011, and Demand Notice dated 26.08.2011 (Annexure-P4, Annexure-P5, Annexure-P7, Annexure-P10, Annexure-P11, Annexure-P12, Annexure-P16, Annexure-P17, Annexure-P18, and Annexure-P19 respectively supra);

IV) In the Ad-interim, as well as in the interim, an ORDER in terms of ii & iii. above.

V) CALL FOR THE RECORDS appertaining to this petition;

VI) After hearing the parties, be pleased to make the RULE ABSOLUTE in terms of i. to iv. above.

VII) Any other RELIEF(s) as to this Hon'ble High Court may deem fit and proper;..."

2. Heard learned counsel Mr. S. Deb for the petitioner on 28.09.2015. There was no representation on behalf of the respondents at the time when the case was taken up for hearing. Later on learned counsel Mr. A. Nandi appeared but in the meantime Mr. Deb, learned counsel of the petitioner left the Court long before arrival of Mr. Nandi and under such circumstances Mr. Nandi prayed for allowing him to submit a written brief on behalf of the respondents and his prayer was allowed. Learned counsel Mr. Deb at the conclusion of his argument proposed to submit a written brief and he was allowed to submit it within 3(three) days but Mr. Deb did not submit any written brief ultimately. Mr. Nandi

submitted a written brief and that has been taken into consideration.

3. It is an admitted position that the petitioner is a carrying contractor by profession. Pursuant to a notice inviting tender issued by the Food Corporation of India (for short, FCI), Regional office at Shillong, for carrying food grains/sugar/allied materials from Railway siding/FSD, Churaibari to FSD, Chandrapur for a period of 2(two) years. The petitioner and some other carrying contractors participated in the tender process and the tender of the petitioner along with other contractors were accepted and a work order was issued by the Deputy General Manager (NEFR) on 29.04.2009 advising the petitioner and other contractors to start work w.e.f. 30.04.2009. A copy of the work order annexed as Annexure-P/1 to the writ petition. It is also an admitted position that an agreement was signed between the petitioner and the respondents FCI containing the terms and conditions etc. of the work and a model copy of that agreement annexed as Annexure-P/2 to the writ petition. The carrying contract was for a period of two years w.e.f. 30.04.2009. The total value of the contract awarded to the petitioner and two other contractors jointly was Rs.9,48,20,000/-.

4. It is, *inter alia*, contended by the petitioner that Area Manager (Respondent No.4) of the FCI by writing a letter dated 18.10.2010 (Annexure P/3 to the writ petition) asked the petitioner and other contractors for placement of adequate nos. of trucks at the Railway Head Depots for release of Rail wagons and

for transportation of food grains to FCI, Agartala complex within day or two. The contents of that letter read as follows:-

"Sub:- Placement of truck for release of wagons at FCI Railhead Depots to be placed within day or two.

Sir/Madam

With reference to above, you are well aware of the suspension of movement of stock by Rail till date due to landslide resulting in serious food crisis with the FCI Agartala and State of Tripura. It has been intimated by Rail Authority that food grain wagons are to be placed at 3(three) FCI Railheads of Tripura within day or two.

In this juncture, you are urgently intimated and requested to make all out arrangement of supply of adequate no. of trucks at 3(three) FCI Railhead depots for release of wagons and simultaneous transportation to FCI Agartala complex without fail repeat without fail. The detention of wagons for non placement of empty trucks would be viewed seriously if any and such failure would be dealt as per contractual agreement in vogue.

Your best co-operation in this matter is highly accepted."

4.1 On 19.10.2010 and 20.10.2010 the Area Manager consecutively wrote two letters to the petitioner and other contractors (Annexure P/4 and Annexure P/5) with warning to them for placement of truck with a view to carrying the food grains from the Railheads to Agartala/Chandrapur and for ready reference contents of letter dated 20.10.2010 is quoted here which read as follows:-

"Sub- Failure in supply of trucks at FCI Rail siding depots of Dharmanagar & Churaibari on 19.10.2010.

Ref:- This office letter of even no.dtd.18th & 19th October,2010.

Sir/Madam,

With reference to the above, it has been observed with serious concern that inspite of repeated information and requests from this office, you have failed to supply a single trucks at Churaibari & Dharmanagar on 19.10.10, resulting detention and accrual of demurrage of 16 wagons at Churaibari and 06 wagons at Dharmanagar

only 06 wagons have been unloaded at Churaibari against supply of 07 trucks by Sri Ratan Bardhan at 'O' to 'O' point.

It has been reported by Depot In-charges that not a single truck has yet been placed by your end till 10.00 am on date. The above position clearly speaks that you have been not taking action to improve your performance, resulting serious dislocation of release of wagons and movement of food grain for maintenance of P.D.S. of the State. The circumstance obviously has compelled to initiate action as per contractual agreement executed between you and the Corporation for your un-workman performance.

It may be once again noted that your failure for immediate clearance of wagons on priority would surely creates ample scope to go ahead for execution of appropriate contractual clause as deem fit under X(C).

In the light of the above, this may be taken as a 'Notice' that your failure in this regard would be deemed fit to take action under the contract clause of the agreement at any point of time."

4.2 In response to those notices, dated 18.10.2010; 19.10.2010 and 20.10.2010 the petitioner and other contractors submitted a joint representation on 25.10.2010 contending, *inter alia*, that under load capacity is provided to them by the FCI as a result of which the private truck owners and drivers were reluctant to carry stock of FCI. A copy of that letter is annexed as Annexure-P/6 (colly), the contents of which read as follows:-

"Sub- Carrying of foodgrains from Rly. Siding Churaibari/Dharmanagar to Agartala & Chandrapur.

Sir,

With reference to the above mentioned subject, we the following signatories, beg to state that you are allowing under load capacity FCI stock from Churaibari and Dharmanagar Godown to Agartala & Chandrapur Godown at present, keeping in view of implementation of restrictions as per M.V. Act. But private trucks owner and drivers are frequently carrying stock of 20 MT to 22 MT from private Godown. Since, there is no restriction in carrying over load capacity stock in truck by them within the state. Owing to such reason, truck owners are reluctant to carry FCI stock.

We would, therefore, pray & appeal before you kindly to look into the matter personally so as enable the contractors to carry stock smoothly without any hindrance.

Thanking you."

4.3 Thereafter also the petitioner and other contractors made several representations to the FCI but without considering their representations the Deputy General Manager of FCI by order dated 24.11.2010 (Annexure P/7 to the writ petition) invoked Clause 10(c) of the agreement and recorded that the balance contractual works would be done at the risk and cost of the petitioner. The contents of that letter dated 24.11.2010 read as follows:-

"Sub:- Transport contract on regular basis for two years for transportation of foodgrain/sugar/allied materials from Railway Siding/FSD Churaibari to FSD Chandrapur.

Ref:- This office letter no.F9/NEFR/HTC/Misc-Corres/2008-09 dated 18.10.10, 19.10.10, 4/6.11.10 issued by Area Manager, Agartala.

Kindly refer to this office letter of even no. dtd. 29.04.09 appointing you as transport contractor on regular basis for two years for transportation of foodgrains/sugar/allied materials from Railway Siding/FSD Churaibari to FSD Chandrapur, Agartala and you had joined for the work on 30.04.09.

Whereas your performance being not to the satisfaction of the Corporation, you were repeatedly requested/advised to improve your performance. In this connection the communications cited above may be referred. As your performance in executing the work entrusted to you has not been satisfactory, you were repeatedly requested to improve performance by placing trucks to clear the wagons indented to you and to transport stock to the destination depots. Despite repeated requests to you from Area Manager, Agartala you have not paid any heed and the placement of trucks at Churaibari in the month of October & November 2010 has drastically come down thus causing depletion of stock position of foodgrains in the depots at Agartala. FCI has been faced with extreme difficulty to meet the PDS & other requirements of the State Govt. The position has now reached an alarming level and may lead to food crisis in the state of Tripura.

In spite of repeated notices & letters you cared a little to improve your performance and behaved in a most un-workmanlike manner and thus outing the Corporation to

continuous loss and injury whereas because of your un-workmanlike performance and as you have not responded to the repeated requests to improve performance, the undersigned has no other option but to take action as per tender clause.

Whereas the FCI is of the opinion that you have failed to carry out the contract work as per agreement and also there is no chance of any further improvement in your performance and in the process the Corporation, cannot afford to sustain further loss and allow the public Distribution system to suffer due to lack of supply of foodgrains at the depots in Agartala.

Now, in exercise of the power vested upon the undersigned under clause-X hereby invoke upon your clause XI(C) of the contract agreement entered between you and the Corporation for transportation at foodgrain, sugar, allied materials from Railway Siding/FSD Churaibari to FSD Chandrapur and to get the work done at your risk and cost for the remaining period of the contract with you and you shall be liable to make good for the Corporation of all the additional charges/expenses, cost or losses that the Corporation may incur or suffer thereby."

4.4 The petitioner and other contractors thereafter submitted a representation dated 26.11.2010 (Annexure-P/8 to the writ petition), *inter alia*, contending that because of the restriction of load has come into picture the cost has gone up and therefore, they requested to enhance the rate at least 60%. The contents of the annexure-P/8 read as follows:-

"Sub: Transportation of Foodgrains from Churaibari/Dharmanagar to CWC Agartala/ Agartala Complex Requesting for enhancement of rate of transportation.

Sir,

We, the following transport contractors would like to draw your kind attention to the above subject and would like to state that after issuing work order from your end for the above work, we had been doing the job smoothly. But suddenly the factor of restriction of load has come into the picture for which requirement of trucks have gone up more than double. Naturally we have been sustaining huge financial loss. Inspite of this fact we have been trying our best to go ahead with the work.

We requested you earlier to consider our position arisen out for restriction of load and enhance the

rate of transportation by at least 60% from the existing rate.

Again, we would like to draw your kind attention on the above issue and would request you to kindly do the needful for enhancement of rate for the instant work by at least 60% from the existing rate and thus help us to run the work smoothly for the remaining period.”

4.5 The respondents-FCI thereafter invited spot tender for the remaining part of the contractual work and awarded the work to the successful bidder without terminating the contract with the petitioner.

4.6 The Area Manager thereafter by writing letter dated 24.02.2011 (Annexure P/10 to the writ petition) imposed penalty on the petitioner in terms of Clause XII(c) of the agreement. The contents of letter dated 24.02.2011 read as follows:-

"Sub- Consistent poor performance of supply of trucks as per indent.

Sir/Madam,

With reference to the series of letters issued from this office regarding short Supply of truck it has been observed that you are being failed to improve your performance for supply of truck as per indent w.e.f. 11.02.2011 to 22.02.2011 position of which furnished as under

Contractor A.K.Dey
Route Dharmanaga to Chandrapur

<i>Date</i>	<i>indent</i>	<i>Supply</i>	<i>Shortfall</i>
<i>11.2.11</i>	<i>3</i>	<i>2</i>	<i>1</i>
<i>12.2.11</i>	<i>1</i>	<i>1</i>	<i>0</i>
<i>15.2.11</i>	<i>4</i>	<i>2</i>	<i>2</i>
<i>16.2.11</i>	<i>4</i>	<i>1</i>	<i>3</i>
<i>17.2.11</i>	<i>2</i>	<i>1</i>	<i>1</i>
<i>18.2.11</i>	<i>4</i>	<i>1</i>	<i>3</i>
<i>19.2.11</i>	<i>5</i>	<i>1</i>	<i>4</i>
<i>20.2.11</i>	<i>3</i>	<i>0</i>	<i>3</i>
<i>21.2.11</i>	<i>4</i>	<i>1</i>	<i>3</i>
<i>22.2.11</i>	<i>5</i>	<i>1</i>	<i>4</i>
<i>Total</i>	<i>35</i>	<i>11</i>	<i>24</i>

The above position clearly speaks that you are being failed to comply with supply of trucks as per indent resulting detention of wagons and serious disruption of movement of stock to FCI Agartala and FSD Chandrapur which has been viewed seriously by the competent authority of FCI. It is clear enough you are being failed to give importance of the matter and comply with the contract agreement, which becomes fit to take action as per contract agreement as deem fit.

Hence undersigned is compelled to levy the penalty of Rs.300/- per truck per day in the event of failure to provide trucks as per indents as per the clause XII(C) of the M.T.F. Henceforth and same will be deducted from admitted transportation bills.

You are further advised to supply trucks as per indents failing which necessary action will be initiated as per other provisions laid down in the contract agreement."

4.7 It is an admitted position that thereafter by writing demand notice dated 19.03.2011 (Annexure-P/11 to the writ petition) the respondents saddled liability of Rs.22,58,638/- for non performance of the contract by the petitioner from December,2010 to January,2011. Thereafter by issuing another demand notice dated 02.11.2011 (Annexure-P/12 to the writ petition), the respondents saddled liability of Rs.12,80,739/- for the month of February,2011.

4.8 The petitioner thereafter wrote letter dated 26.04.2011 (Annexure-P/13 to the writ petition) requesting the General Manager to review the matter of saddling liability sympathetically on the ground that because of reduction of carrying capacity of the vehicle as per the M.V. Act and because of the reluctance of the vehicle owners at Agartala in supplying the vehicle, the petitioner could not carry out the contract work as per agreement and

prayed for revoking the order of imposition under the liability of risk and cost.

4.9 Subsequently the petitioner wrote another letter dated 03.05.2011 (Annexure-P/14 to the writ petition) seeking exoneration from the liability *inter alia* contending that he has already performed almost 1/3rd of the total work value since he already carried the food grains worth Rs.3,18,27,200/- which was almost 1/3rd of the total value of the contract. Thereafter, also he made representation dated 5.5.2011 (Annexure-P/15 to the writ petition) but the Area Manager by writing letter dated 01.06.2011 (Annexure-P/16 to the writ petition) reiterated imposition of penalty in reply to letters of the petitioner dated 26.04.2011; 03.05.2011; 05.05.2011 and 27.05.2011.

4.10 The respondents thereafter issued demand notice dated 18.06.2011 (Annexure-P/17 to the writ petition) saddling liability of Rs.45,00,493/- for the month March 2011 to May,2011; demand notice dated 27.01.2011 (Annexure-P/18 to the writ petition) saddling liability of Rs.16,20,883/- for the month of June,2011 and demand notice dated 26.08.2011 (Annexure-P/19 to the writ petition) saddling liability of Rs.26,50,860/- for the month of July,2011.

4.11 It is alleged by the petitioner that Clause-X and Clause XII of the agreement may be invoked only by the General Manager of FCI and not by any other officer. Annexure-P/7 Invoking Clause X(c) of the agreement and Annexure-P/10 imposing penalty on the petitioner were not tenable since those were not issued by the

General Manager. It is also alleged that reasons were assigned for not placing the truck pursuant to Notice dated 18.10.2010, 19.10.2010 and 20.10.2010 but those were not considered and the penalty has been imposed without even issuing a show cause notice which is violative of principles of natural justice. It is also contended by the petitioner that there was no scope for engaging a new contractor keeping the agreement with the petitioner alive and so the entire action taken by the respondents-FCI was illegal and violative of the law of Contract. He has also contended that without ascertaining the actual damage the penalty has been imposed which is not tenable in law. Therefore, all those demand notices were liable to be quashed.

5. Respondents contended that the petitioner was bound to conduct in terms of the agreement. But the petitioner conducted un-workman like, negligently and even after issuance of repeated notices failed to perform in terms of the contract and therefore, under compelling situation, the FCI invoked Clause X(c) and XII(c) of the agreement. It is also contended by the respondents that there was an emergency situation arose for carrying the food grains from Railhead, Churaibari to Chandrapur/Agartala to maintain public distribution system in order and therefore, the petitioner and other contractors were given notice to immediately place adequate number of trucks but they failed to provide the trucks in terms of the contract taking frivolous pretext and under that circumstances Clause X(c) of the agreement was invoked and penalty was imposed. It is also contended by the respondents that

General Manager includes other officers of the Corporation and there is nothing wrong in issuing Annexure-P/7 and Annexure P/10 by the Deputy General Manager and the Area Manager. It is further contended by the respondents that the writ petition itself is not maintainable since it relates to a contract between the petitioner and the respondents-FCI and the disputes are to be dealt with in terms of the contract. Actions taken by the respondent since are in terms of the contract, the allegation made by the petitioner is not amenable to writ jurisdiction of this Court.

6. Let us quote here Clause X(c) and XII(c) of the agreement which read as follows:-

"X(c): The contractors shall be responsible to supply adequate and sufficient labour, scales/trucks/carts/any other transport vehicle for loading/unloading, transport & carrying out any other services under the contract in accordance with the instructions issued by the General Manager or an officer acting on his behalf. If the contractors fail to supply the requisite number of labour, scales and trucks/carts, the General Manager shall at his entire discretion without terminating the contract, be at liberty to engage other labour, scales, trucks/carts, etc. at the risk and cost of the contractors, who shall be liable to make good to the Corporation all additional charges, expenses, cost or losses that the Corporation may incur or suffer thereby. The contractors shall not, however, be entitled to any gain resulting from entrustment of the work to another party. The decision of the General Manager shall be final and binding on the contractors."

"XII(c): In the event of default on the part of the contractors in providing labour, weighing scales, weights etc. and/or their failure to perform any of the services mentioned in this agreement efficiently and to the entire satisfaction of the General Manager or any officer acting on his behalf of the General Manager shall without prejudice to other rights and remedies under this agreement, have the right to recover by way of compensation from the contractors"

a sum of rupees fine hundred or such lesser sum per day or part of a day of the default as the Regional Manager in his absolute discretion may determine subject to the total compensation/liquidated damages during the duration of the contract not exceeding 15% of the value of the contract and the decision of the General Manager on the questions whether the constructors have committed such default or have failed to perform any of such services efficiently and are liable to pay compensation/liquated damages and as to the quantum of such compensation/liquidated damages shall be final and binding on the contractors.”

7. A bare reading of the above two clauses of agreement speak that those terms of the contract may be invoked by the General Manager or an officer acting on his behalf. Clause X(c) relates to summary termination of the contract and Clause XII(c) relates to imposition of liability for the losses suffered by the Corporation because of termination of the contract for non compliance. By letter dated 24.11.2010 (Annexure-P/7 to the writ petition, the Deputy General Manager invoked Clause X(c). Annexure P/1 i.e the work order was issued by the Deputy General Manager certainly acting on behalf of the General Manager which was acted upon by the petitioner. Order dated 24.02.2011 (Annexure P/10 to the writ petition) invoking Clause XII(c) was issued by the Area Manager. The definition clause of the agreement i.e. Clause I(iii) defines the term 'General Manager' which reads thus-

"iii. The terms 'General Manager' shall mean the General Manager under the Food Corporation of India under whose administrative jurisdiction, the Food Corporation Depots/Godowns to which the contract relates fall. The term 'General Manager' shall also include the Area Manager and every other Officer authorized for the time being to

execute contract on behalf of Food Corporation of India."

8. In view of the above definition, I am of considered opinion that the Area Manager and the Deputy General Manager have the authority to act on behalf of the General Manager and no illegality can be imputed for issuing Annexure-P/7 and Annexure-P/10 i.e. the letter dated 24.11.2010 and 24.02.2011.

9. Before entering into other issues raised by the petitioner, I think the maintainability issue of the writ petition should be decided first since there is existence of a contractual relation between the petitioner and the respondents.

10. It is a settled position of law that any dispute arising out of the terms of a contract is not amenable to writ jurisdiction unless the contract is a statutory contract by a statutory authority in exercise of statutory power.

11. In the case at hand pursuant to notice inviting tender, the petitioner participated in the process and work order issued to him and other contractors for carrying food grains from Railway siding at Churaibari to Chandrapur/Agartala and in terms of the contract, the petitioner carried out the work from 30.04.2009. It is an admitted position that on 18.10.2010 notice was issued to place trucks on emergency basis for clearance of rail wagons as well as for carrying food grains from Churaibari to Agartala. But the petitioner and other contractors could not place the trucks in terms of the requirement and therefore, the respondents invoked Clause X(c) of the agreement with the risk and cost of the petitioner and

liability also imposed in terms of Clause XII(c) of the agreement. The issue, therefore, arises out of a concluded contract. It is, therefore, a material question as to whether a writ petition under Article 226 of the Constitution is maintainable. The petitioner in the writ petition, *inter alia*, contended that the writ petition in the given facts and circumstances of the case is maintainable and in support of his contention he has referred decisions of the Apex Court in **Civil Appeal No.287 of 1960 in Para 5.15; Civil Appeal No.5201 of 1998 in Para 5.16** and **Civil Appeal No.5409 of 1998 in Para 5.17** of the writ petition but did not produce copy of these judgments. What is contended referring to those judgments in the writ petition, cannot be applied in the given facts and circumstances of this case where there was a concluded contract between the petitioner and the respondents and in the contract the duties and responsibilities of the contractor was also incorporated.

12. In the case of **National Highways Authority of India V. Ganga Enterprises**, reported in **(2003) 7 SCC 410**, the Supreme Court has held that the disputes relating to contracts cannot be agitated under Article 226 of the Constitution. We may gainfully refer here Para **6** of the judgment which reads as follows:-

"6.The Respondent then filed a Writ Petition in the High Court for refund of the amount. On the pleadings before it, the High Court raised two questions viz: (a) whether the forfeiture of security deposit is without authority of law and without any binding contract between the parties and also contrary to Section 5 of the Contract Act;

*and (b) whether the writ petition is maintainable in a claim arising out of a breach of contract. Question (b) should have been first answered as it would go to the root of the matter. The High Court instead considered question (a) and then chose not to answer question (b). In our view, the answer to question (b) is clear. It is settled law that disputes relating to contracts cannot be agitated under Article 226 of the Constitution of India. It has been so held in the cases of *Kerala SEB v. Kurien E. Kalathil*, [2000] 6 SCC 293, *State of U.P. v. Bridge & Roof Co. (India) Ltd.*, (1996) 6 SCC 22 and *Bareilly Development Authority v. Ajai Pal Singh* (1989) 2 SCC 116. This is settled law. The dispute in this case was regarding the terms of offer. They were thus contractual disputes in respect of which a Writ Court was not the proper forum. Mr. Dave however relied upon the cases of *Verigamto Naveen v. Government of A.P.*, [2001] 8 SCC 344 and *Harminder Singh Arora v. Union of India*, [1986] 3 SCC 247. These however are cases where the Writ Court was enforcing a statutory right or duty. These cases do not lay down that a Writ Court can interfere in a matter of contract only. Thus on the ground of maintainability the Petition should have been dismissed."*

13. In the case of **Kerala State Electricity Board v. Kurien E. Kalathil**, reported in **(2000) 6 SCC 293** the Supreme Court has observed that interpretation and implementation of a clause in a contract cannot be the subject-matter of a writ petition. We may gainfully refer here Para **10** and **11** of the judgment which read as follows:-

"10. We find that there is a merit in the first contention of Mr. Raval. Learned Counsel has rightly questioned the maintainability of the writ petition. The interpretation and implementation of a clause in a contract cannot be the subject matter of a writ petition. Whether the contract envisages actual payment or not is a question of construction of contract. If a term of a contract is violated, ordinarily the remedy is not the writ petition under

Article 226. We are also unable to agree with the observations of the High Court that the contractor was seeking enforcement of a statutory contract. A contract would not become statutory simply because it is for construction of a public utility and it has been awarded by a statutory body. We are also unable to agree with the observation of the High Court that since the obligations imposed by the contract on the contracting parties come within the purview of the Contract Act, that would not make the contract statutory. Clearly, the High Court fell into an error in coming to the conclusion that the contract in question was statutory in nature.”

11. A statute may expressly or impliedly confer power on a statutory body to enter into contracts in order to enable it to discharge its functions. Dispute arising out of the terms of such contracts or alleged breaches have to be settled by the ordinary principles of law of contract. The fact that one of the parties to the agreement is a statutory or public body will not by itself affect the principles to be applied. The disputes about the meaning of a covenant in a contract or its enforceability have to be determined according to the usual principles of the Contract Act. Every act of a statutory body need not necessarily involve an exercise of statutory power. Statutory bodies, like private parties, have power to contract or deal with property. Such activities may not raise any issue of public law. In the present case, it has not been shown how the contract is statutory. The contract between the parties is in the realm of private law. It is not a statutory contract. The disputes relating to interpretation of the terms and conditions of such a contract could not have been agitated in a petition under Article 226 of the Constitution of India. That is a matter for adjudication by a civil court or in arbitration if provided for in the contract. Whether any amount is due and if so, how much and refusal of the appellant to pay it is justified or not, are not the matters which could have been agitated and decided in a writ petition. The contractor should have relegated to other remedies.”

14. In the case of **State of U.P. v. Bridge & Roof Co.(India) Ltd.**, reported in **(1996) 6 SCC 22**, the Supreme

Court has held that where dispute is relating to terms of a private contract, proper course should be referred to Arbitration or institution of a Civil Suit and not a writ petition. We may refer here Para **21** of the judgment which reads as follows:-

"21. There is yet another substantial reason for not entertaining the writ petition. The contract in question contains a clause providing inter alia for settlement of disputes by reference to arbitration [Clause 67 of the Contract]. The Arbitrators can decide both questions of fact as well as questions of law. When the contract itself provides for a mode of settlement of disputes arising from the contract, there is no reason why the parties should not follow and adopt that remedy and invoke the extra-ordinary jurisdiction of the High Court under Article 226. The existence of an effective alternative remedy - in this case, provided in the contract itself - is a good ground for the court to decline to exercise its extraordinary jurisdiction under Article 226. The said Article was not meant to supplant the existing remedies at law but only to supplement them in certain well-recognised situations. As pointed out above, the prayer for issuance of a writ of mandamus was wholly misconceived in this case since the respondent was not seeking to enforce any statutory right of theirs nor was it seeking to enforce any statutory obligation cast upon the appellants. Indeed, the very resort to Article 226 - whether for issuance of mandamus or any other writ, order or direction - was misconceived for the reasons mentioned supra."

15. In the case of **Bareilly Development Authority v. Ajai Pal Singh**, reported in **(1989) 2 SCC 116**, the Apex Court while deciding a similar issue has held that when the State or other authority within the meaning of Article 12 enters into ordinary contract with private persons, parties are governed by the terms of the contract and aggrieved party not entitled to seek

redress under Article 226 for breach of contract. We may gainfully refer here Para **20**, **21** and **22** which read as follows:-

"20. Thus the factual position in this case clearly and unambiguously reveals that the respondents after voluntarily accepting the conditions imposed by the BDA have entered into the realm of concluded contract pure and simple with the BDA and hence the respondents can only claim the right conferred upon them by the said contract and are bound by the terms of the contract unless some statute steps in and confers some special statutory obligations on the part of the BDA in the contractual field. In the case before us, the contract between the respondents and the BDA does not contain any statutory terms and/or conditions. When the factual position is so, the High Court placing reliance on the decision in Ramana Dayaram Shetty case (AIR 1979 SC 1628) has erroneously held:

"It has not been disputed that the contesting opposite party is included within the term 'other authority' mentioned under Article 12 of the Constitution. Therefore, the contesting opposite parties cannot be permitted to act arbitrarily with the principle which meets the test of reason and relevance. Where an authority appears acting unreasonably this Court is not powerless and a writ of mandamus can be issued for performing its duty free from arbitrariness or unreasonableness."

21. This finding, in our view, is not correct in the light of the facts and circumstances of this case because in Ramana Dayaram Shetty case there was no concluded contract as in this case. Even conceding that the BDA has the trappings of a State or would be comprehended in 'other authority' for the purpose of Article 12 of the Constitution, while determining price of the houses/flats constructed by it and the rate of monthly instalments to be paid, the

'authority' or its agent after entering into the field of ordinary contract acts purely in its executive capacity. Thereafter the relations are no longer governed by the constitutional provisions but by the legally valid contract which determines the rights and obligations of the parties inter-se. In this sphere, they can only claim rights conferred upon them by the contract in the absence of any statutory obligations on the part of the authority (i.e. BDA in this case) in the said contractual field.

22. There is a line of decisions where the contract entered into between the State and the persons aggrieved is non-statutory and purely contractual and the rights are governed only by the terms of the contract, no writ or order can be issued under Article 226 of the Constitution of India so as to compel the authorities to remedy a breach of contract pure and simple Radhakrishna Agarwal & Ors. v. State of Bihar, [1977] 3 SCR 249; Premji Bhai Parmar v. Delhi Development Authority, [1980] 2 SCR 704 and DFO v. Biswanath Tea Company Ltd., [1981] 3 SCR 662."

16. In the case of **Verigamto Naveen v. Govt. of A.P.**, reported in **(2001) 8 SCC 344**, the Supreme Court has held that where breach of contract involves breach of statutory obligation when the order complained of was made in exercise of statutory power by a statutory authority, in such a situation a writ is maintainable and otherwise not. We may refer here Para **21** of the judgment which reads as follows:-

"21. On the question that the relief as sought for and granted by the High Court arises purely in the contractual field and, therefore, the High Court ought not to have exercised its power under Article 226 of the Constitution placed very heavy reliance on the decision of the Andhra Pradesh High Court in Y.S.Raja Reddy vs. A.P.Mining Corporation Ltd., 1988(2) ALT 722, and the decisions of this Court in

Harshankar vs. Deputy Excise & Taxation Commissioner, 1975 (1) SCC 737; Radhakrishna Agarwal vs. State of Bihar, AIR 1977 SC 1496; Ram Lal & Sons vs. State of Rajasthan, AIR 1976 SC 54; Shiv Shankar Dal Mills vs. State of Haryana, AIR 1980 SC 1037; Ramana Dayaram Shetty vs. International Airport Authority of India, AIR 1979 SC 1628; Basheeshar Nath vs. CIT, AIR 1959 SC 149. Though there is one set of cases rendered by this Court of the type arising in Radhakrishna Agarwals case, much water has flown in the stream of judicial review in contractual field. In cases where the decision making authority exceeded its statutory power or committed breach of rules or principles of natural justice in exercise of such power or its decision is perverse or passed an irrational order, this Court has interceded even after the contract was entered into between the parties and the Government and its agencies. We may advert to three decisions of this Court in Dwarkadas Marfatia & Sons vs. Board of Trustees of the Port of Bombay, (1989) 3 SCC 293; Mahabir Auto Stores & Ors. vs. Indian Oil Corporation, (1990) 3 SCC 752; and Srilekha Vidyarthi (Kumari) vs. State of U.P., AIR 1991 SC 537. Where the breach of contract involves breach of statutory obligation when the order complained of was made in exercise of statutory power by a statutory authority, though cause of action arises out of or pertains to contract, brings within the sphere of public law because the power exercised is apart from contract. The freedom of the Government to enter into business with anybody it likes is subject to the condition of reasonableness and fair play as well as public interest. After entering into a contract, in cancelling the contract which is subject to terms of the statutory provisions, as in the present case, it cannot be said that the matter falls purely in a contractual field. Therefore, we do not think it would be appropriate to suggest that the case on hand is a matter arising purely out of a contract and, therefore, interference under Article 226 of the Constitution is not called for. This contention also stands rejected."

17. The case at hand is a contract between a statutory authority and a private person and the contract is exhaustive containing therein the terms and conditions, the duty and

responsibility of the contractor, the power of the authority giving the works in contract etc. There is nothing to show that there was any breach of statutory obligation by the statutory authority in exercise of statutory power. It was purely a concluded contract between the petitioner and the respondents in respect of carrying of goods and since the petitioner alleged to have violated the contract and acted as alleged in an un-workmanlike manner, the contract was summarily terminated invoking Clause X(c) and consequently penalty imposed in terms of Clause XII(c) of the agreement. The challenge of those actions taken in terms of the contract is not permissible in a writ petition. The proper course for the petitioner was to approach the competent Court of Civil jurisdiction in accordance with law.

18. The petitioner has contended that the total value of the contract was Rs.9,48,20,000/- and he has executed the work valued at Rs.3,18,27,200/- so he has performed almost 1/3rd of the total value of the work and therefore, imposition of penalty on him was not justified. This contention of the petitioner cannot be accepted since the work order was jointly issued to the petitioner and two other contractors for carrying out the transportation works for a period of two years. There was no specification that he was supposed to perform a particular volume of work.

18.1 Clause C (1) of the agreement deals with "volume of work" and it is clearly stated that no definite volume of work to be performed can be guaranteed during the currency of the contract. So, the petitioner claim that he performed almost 1/3rd of the

volume of the work is not acceptable in view of that contents of the agreement. Clause XIV also deals with the context 'volume of work' which reads thus—

"XIV. Volume of work:-

(a) Subject as hereinafter mentioned the Corporation do not guarantee any definite volume of work or any particular pattern of service at any time or throughout the period of the contract. The mere mention of any item of work in this contract does not by itself confirm a right on the contractors to demand that the work relating to all or any item thereof should necessarily or exclusively be entrusted to them. The Corporation will also have the exclusive right to appoint one or more contractors at any time viz at the time of award of the contract and/or during the tenure of contract for any or all the services mentioned hereunder and to divide the work as between such contractors in any manner that the Corporation may decide and no claim shall lie against the Corporation by reason of such division of work."

18.2 In view of the above covenant of agreement, the argument of the petitioner that he has performed almost 1/3rd of the value of work and therefore, levy of penalty on him was not permissible, altogether, is not acceptable.

19. The next argument advanced on behalf of the petitioner is that no opportunity of hearing was given while fixing the penalty and that without ascertaining actual damage the imposition of penalty was not sustainable. It is already discussed hereinbefore that it is a case of concluded contract between FCI, a statutory authority and a private contractor i.e. the petitioner and other contractors. So, it has to be dealt with in terms of the agreement. The respondents invoked Clause X(c) and XII(c) as per

and in terms of the agreement and therefore, the question of giving notice to the petitioner before fixing the penalty does not arise since there was no such term in the agreement that notice should be issued before imposition of penalty.

19.1 The Supreme Court in the case of **State of Gujarat v. M.P. Shah Charitable Trust**, reported in **(1994) 3 SCC 552** dealt with the similar issue and has held that the rule of *audi alteram partem* not attracted in contractual matter. We may refer here Para **22** of the judgment which reads as follows:-

"22. We are unable to see any substance in the argument that the termination of arrangement without observing the principle of natural justice (audi alteram partem) is void. The termination is not a quasi-judicial act by any stretch of imagination; hence it was not necessary to observe the principles of natural justice. It is not also an executive or administrative act to attract the duty to act fairly. It was--as has been repeatedly urged by Shri Ramaswamy--- a matter governed by a contract/agreement between the parties. If the matter is governed by a contract, the writ petition is not maintainable since it is a public law remedy and is not available in private law field, e.g., where the matter is governed by a non-statutory contract (In this connection, see Assistant Excise Commissioner v. Isaac Peter, (1994) 4 SCC 104: 1994 (2) J.T. 140 on the relevance of doctrine of fairness in matters governed by contract, arrived at calling for tenders, auction or by negotiations). Be that as it may, in view of our opinion on the main question, it is not necessary to pursue this reasoning further."

19.2 In the case at hand, the fact is that the petitioner and other contractors were asked to place the trucks on emergency basis to carry food grains from the Railhead but the petitioner

could not place the trucks in terms of the contract and the reasons assigned in Annexure-P/6 to the writ petition was that because of the restriction as per provision of M.V. Act they were compelled to carry the goods under load capacity whereas the private trucks were carrying more goods and therefore, the truck owners were reluctant to provide their trucks, cannot be said to be a good reason in terms of the contract for failure to provide the trucks as per requirement of the respondents and under such circumstances the claim of penalty for the loss incurred by the authority cannot be said to be a liability imposed beyond the periphery of the contract. The petitioner alleged that the respondents without assigning actual damage issued the demand notice whereas the respondents contended that the demand notice has been issued after ascertaining the damage and the issue can be decided only by a competent Civil Court after recording evidence of both sides and not in a writ petition.

19.3 The Supreme Court in the case of **State of Bihar v. Jain Plastics & Chemicals Ltd.**, reported in **(2002) 1 SCC 216** in Para **7** of the judgment has held thus—

"7. In our view, it is apparent that the order passed by the High Court is, on the face of it, illegal and erroneous. It is true that many matters could be decided after referring to the contentions raised in the affidavits and counter-affidavits, but that would hardly be ground for exercise of extraordinary jurisdiction under Article 226 of the Constitution in case of alleged breach of contract. Whether the alleged non-supply of road permits by the appellants would justify breach of contract by the respondent would depend upon facts and evidence and is not required to be decided or dealt with in a writ petition. Such seriously disputed

questions or rival claims of the parties with regard to breach of contract are to be investigated and determined on the basis of evidence which may be led by the parties in an properly instituted civil suit rather than by a Court exercising prerogative of issuing writs."

20. In view of the above discussions made above, the writ petition is found to be devoid of any merit and hence stands dismissed.

21. Parties to bear their own costs.

JUDGE