

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

**THE HONOURABLE THE CHIEF JUSTICE MR.ASHOK BHUSHAN
&
THE HONOURABLE MR.JUSTICE A.M.SHAFFIQUE**

WEDNESDAY, THE 10TH DAY OF JUNE 2015/20TH JYAISHTA, 1937

WA.No. 1996 of 2014 () IN WP(C).15536/2014

**AGAINST THE ORDER IN RP NO.565/14 DATED 23.10.14 AND INTERIM ORDER DATED
4.7.14 IN WP(C) 15536/2014 of HIGH COURT OF KERALA
APPELLANT(S)/REVIEW PETITIONERS/RESPONDENTS IN WPC:**

- 1. THE SUPERINTENDING ENGINEER,
PUBLIC WORKS DEPARTMENT, (BUILDING DIVISION)
SOUTH CIRCLE, TRIVANDRUM - 695 001.**
- 2. THE EXECUTIVE ENGINEER,
PUBLIC WORKS DEPARTMENT, (BUILDING DIVISION)
PATHANAMTHITTA - 689 645.**
- 3. STATE OF KERALA,
REPRESENTED BY THE SECRETARY
PUBLIC WORKS DEPARTMENT, SECRETARIAT
TRIVANDRUM - 695 001.**
- 4. STATE OF KERALA
REPRESENTED BY THE PRINCIPAL SECRETARY
FINANCE DEPARTMENT, SECRETARIAT, TRIVANDRUM - 695 001.**

BY SPL.GOVERNMENT PLEADER SMT.GIRIJA GOPAL

RESPONDENT(S)/RESPONDENTS/WRIT PETITIONER:

- 1. M/S.DORA INFRASTRUCTURES & PROPERTIES (P) LTD.
KARIMKUTTIYIL BUILDING, ANGADI, RANNY
PATHANAMTHITTA, REPRESENTED BY ITS MANAGING DIRECTOR
ABRAHAM K.THOMAS.**
- 2. THE KERALA STATE CONSTRUCTION CORPORATION LTD
P.M.G., THYCAUD, TRIVANDRUM
REPRESENTED BY ITS GENERAL MANAGER, PIN - 695 014.**

**R1 BY ADV. SRI.PHILIP J.VETTICKATTU
R2 BY SRI.M.V.THAMBAN**

**THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 05.03.2015 ALONG WITH
WA NO.148/15, THE COURT ON 10.06.2015 DELIVERED THE FOLLOWING:**

APPENDIX

APPELLANTS EXHIBITS

ANNEXURE A1: THE PHOTOCOPY OF THE JUDGMENT IN WA NO.850/14 DATED 27.6.14.

ANNEXURE A2: A TRUE COPY OF INTERIM ORDER DATED 28.10.2000 IN CONT.CASE © NO.803/2000.

ANNEXURE A3: TRUE COPY OF THE RELEVANT PORTION OF THE FULL BENCH ORDER dated 11.4.2011 IN WA NO.1590/1999 AND CONNECTED CASES.

ANNEXURE A4: TRUE COPY OF ORDER DATED 6.4.2001 IN CONT.CASE © NO.803/2000.

ANNEXURE A5: A TRUE COPY OF FULL BENCH JUDGMENT DATED 21.12.2001 REPORTED IN 2002(1) KLT 371.

ANNEXURE A6; TRUE COPY OF ORDER DATED 18.10.2002 IN CMP NO.50667/2002 IN CC(C) NO.803/2000.

Rp

//TRUE COPY//

PS TO JUDGE.

ASHOK BHUSHAN, CJ

&

A.M. SHAFFIQUE, J.

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WA Nos. 1996/14 & 148/15

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Dated this, the 10th day of June, 2015

J U D G M E N T

Shaffique, J

Since common issues arise for consideration in these appeals, those are decided together.

2. WA 1996/2014 is filed by the State and its authorities challenging an interim order dated 4/7/2014 in WP(C) No. 15536/2014 and order dated 23/10/2014 in RP No.565/14. The writ petition is filed by the 1st respondent herein *inter alia* alleging that after having awarded several contracts by the Government authorities, though the bill amounts/part bill amounts were admitted, payments were not being made. Hence, the petitioner has approached this Court seeking for a direction to disburse the admitted amount of ₹3,47,96,433/- as per Ext.P12 and Rs.1,87,00,000/- as per Ext.P14. Learned Single Judge by interim order dated 4/7/2014 while admitting the writ petition directed the 1st appellant to pay the admitted amount in terms with

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Exts.P12 and P14 to the petitioner within a period of one month. The 2nd appellant thereafter having filed a statement sought for review of the said interim order *inter alia* contending that the amounts could be disbursed only on priority basis and the said right of the Government to maintain a seniority list for disbursement of amount due to contractors has been upheld by this Court. Learned Single Judge, however, after considering the contentions urged in the review petition, dismissed the same.

3. WA No.148/15 has been filed by the writ petitioner challenging judgment dated 1/12/2014 in W.P (C) No.28108/14. That was also a case where the petitioner sought for payment of admitted amount in respect of contract works undertaken by the petitioner. Mandamus is sought for to pay an amount of ₹8,53,756/-, ₹9,74,414/-, ₹13,31,388/-, ₹6,80,177/- and ₹6,44,383/- with interest @ 12% per annum and covered by separate bills which has been submitted for payment *inter alia* contending that there is no dispute regarding the liability to pay. Statement was filed by the 2nd respondent stating that all the bills were proposed for letter of credit in time. Government released letter of credit up

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to 31/12/2013 and payment is already effected. The bills of the petitioner will be paid after getting letter of credit from Government, observing strict seniority. On the basis of the statement, the learned Single Judge directed to reckon seniority with effect from the date on which bills are registered and to release the bill amount based on the said seniority. In the appeal the petitioner submits that after having completed the work in terms of the contractual provisions, petitioner is entitled for receiving the value of work done and failure to pay the said amount is clear violation of fundamental rights to carry on business and it also affects his livelihood, the amounts being not disputed, the learned Single Judge was not justified in directing the payment to be made on priority basis.

4. Heard the learned senior Government Pleader Smt.Girija Gopal appearing for State and its authorities, Smt.Vaheeda Babu appearing on behalf of the appellant in WA No. 148/15 and Sri.Philip J. Vettickattu appearing on behalf of the 1st respondent in WA No. 1996/14.

5. Two specific issues arise for consideration. The first

issue is whether the writ petition is maintainable on account of the fact that the issue involved is with reference to compliance of contractual obligations covered by separate contracts. The second issue is whether the Government is entitled to delay the payment on the ground that payments are being made on the basis of the seniority list prepared by the respective Government Departments and the payments are effected on the priority so fixed.

6. On facts, the learned Special Government Pleader referred to the counter affidavit filed in W.P (C) No. 15536/14 and contended that every contract contains a clause which was inserted by way of an amendment which reads as under;

"AMENDMENT OF CLAUSE 7 OF CONDITIONS OF CONTRACT ATTACHED TO G.W.D. FORM NO.132 AS PER G.O(M.S.) No.2/2005 PWD, DATED 7.1.2005.

Bills shall be submitted by the contractor for part payments while the work is in progress or final bill on completion of the work as per the specifications, terms and conditions of the contract and the Divisional officer shall take the requisite measures for having the same

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checked and the claim as far as admissible settled according to the availability of budget provision and allotment of funds made with the divisional officer under the respective heads of account under which the work is sanctioned and arranged and also subject to the seniority of such bills. The contractor shall not make any claim for interest or for damages for any delay in settling the bills. No such claims shall be admitted by the Government should the contractor be unable to prepare the bill for himself. The Divisional Officer shall depute a subordinate to measure the work performed in the presence of the contractor whose counter signature to the measurement list will be a sufficient warrant to the Divisional Officer to prepare the bill for him that list.

A NEW CLAUSE IN THE SPECIAL CONDITIONS IN GWD FORM NO.83

NOTICE INVITING TENDERS AS CLAUSE-56.

The tenderer/contractor must clearly understand that the settlement of the claims either by part bills or by final bill will be made only according to the availability of budget provision and allotment of funds made with the Division Officer in charge of the work under the respective head of account in which the work is

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sanctioned and arranged and also subject to the seniority of such bills. No claim for interest or for damages whatsoever shall be made for the belated settlement of claims of bills. No such claims shall be admitted by the Government."

7. Therefore, it is argued that the contractors cannot claim payment overlooking the seniority nor could claim any interest/amnesty. The concerned agreement executed with the petitioner also contains Clause 5 which is extracted as under;

"5. The contractor further assures that it is clearly understood that the settlement of claims either by part bills or by final bills will be made only according to the availability of budget provision and allotment of funds made with the Divisional Officer in charge of the work under the respective heads of account in which the work is sanctioned and arranged and also subject to the seniority of such bills. No claims for interest or for damages whatsoever shall be made for the belated settlement of claims of bills."

8. It is argued that all departmental contracts contain similar clauses. Further, reference is also made to Government

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Order dated 7/1/2005 of the Public Works (H) Department, Government of Kerala relating to incorporation of the clauses aforesaid, which reads as under;

"O R D E R

The Contract Agreement entered into by contractors for taking up works under departments like Public Works, Water Resources etc., clearly stipulates that he agrees "to execute upon and subject to the conditions set forth in the Preliminary Specifications of the Madras Detailed Standard Specifications (MDSS) and such other conditions as are contained in all the specifications forming part of this contract". Clause 69 of the Preliminary Specifications of the Madras Detailed Standard Specifications (MDSS) stipulates that "No omission by the Executive Engineer or the Sub Divisional Officer to pay the amount due upon certificates shall vitiate or make void the contract not shall the contractor be entitled to interest upon any guarantee fund or payments in arrear, or upon any balance which may, on the final settlement of Ms accounts, be found to "be due to him".

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2. It has come to the notice of Government that in spite of the above stipulations, several contractors have been demanding interest on belated payment of bills. Government desire that this position be made clear beyond doubt through suitable clauses in the Notice Inviting Tenders, Preliminary Agreement and in the Contract. Accordingly Government thereby order that specific provisions be made as below;

(i) A new clause as follows will be incorporated in the special conditions in GWD Form No.83 Notice Inviting Tenders as Clause 56.

"The tenderer/contractor must clearly understand that the settlement of claims either by part bills or by final bill will be made only according to the availability of budget provision and allotment of funds made with the Divisional Officer in charge of the work under the respective head of account in which the work is sanctioned and arranged and also subject to the seniority of such bills. No claim for interest or for damages whatsoever shall be made for the belated settlement of claims shall be admitted by the Government."

(ii) In the Preliminary Agreement being

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furnished along with the tender, the following clause will be incorporated as Clause 5:

"5. The contractor further assures that it is clearly understood that the settlement of claims either by part bills or by final bills will be made only according to the availability of budget provision and allotment of funds made with the Divisional Officer in charge of the work under the respective heads of account in which the work is sanctioned and arranged and also subject to the seniority of such bills. No claims for interest or for damages whatsoever shall be made for the belated settlement of claims of bills."

(iii) The existing Clause 7 of Conditions of contract attached to GWD Form No.132 of Agreement will be substituted by the following:

"7. Bills shall be submitted by the contractor for part payments while the work is in progress or final bill on completion of the work as per the specifications, terms and conditions of the contract and the Divisional Officer shall take the requisite measures for having the same checked and the claim as far as admissible settled according to the availability of budget provision and allotment

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of funds made with the Divisional Officer under the respective heads of account under which the work is sanctioned and arranged and also subject to the seniority of such bills. The contractor shall not make any claim for interest or for damages for any delay in settling the bills. No such claims shall be admitted by the Government. Should the contractor be unable to prepare the bill for himself, the Divisional Officer shall depute a subordinate to measure the work performed in the presence of the contractor, whose counter signature to the measurement list will be a sufficient warrant to the Divisional Officer to prepare the bill for him from that list."

3. The above amendments will apply in respect of all works executed by the Public Works Department, Water Resources Department including Major Irrigation works, the Rural Development Department, the Local Self Government Department and all other works where the same forms are used.

4. This order will come into force with immediate effect. Where Notice inviting Tender has been issued and preliminary Agreement already signed, paragraph 2 (iii)

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above alone shall apply. Where only the Notice Inviting Tender has been issued, paragraphs 2(ii) & (iii) above shall apply.

5. While Government would take all possible measures to settle the pending bills, it is likely that the present position (where pendency of two to three years exists) will continue for some more time.

6. Secretary, Local Self Government Department, Commissioner of Rural Development Department, Chief Engineers of Public Works Department and Water Resources Department will issue revised forms incorporating the clauses as directed above."

9. On these facts, it is pointed out that the learned Single Judge committed error in directing payment of the admitted amount. Now coming to the order passed in RP No.565/2014 in W.P (C) No. 15536/2014 which is the subject matter in WA No.1996/14, the learned Single Judge considered the proposition put forward on behalf of the review petitioner as to whether the interim order dated 4/7/2014 was contrary to the directions in CCC No.803/2000. After evaluating the order passed in the said

case and on a perusal of the various clauses in the PWD Manual and after referring to the judgment In **Anirudhan v. Government of Kerala** (1999 (3) KLT 1), the learned Single Judge upheld the interim order passed.

10. The Special Government Pleader referred to the following judgments to substantiate the contentions urged by her:

(i) **Anirudhan v. Government of Kerala** (1999 (3) KLT 1).

In this case, the Division Bench considered the claims made by contractors seeking for payment of admitted amounts due to them from various departments of the Government. Contention was raised that the action of the Government in not making payment to contractors and asking them to wait for months and years together is arbitrary and illegal. It was argued that the Government on account of its acute financial constraints was not in a position to pay the contractors and, therefore, time should be granted for effecting payment. After referring to Art.180 of the Kerala Financial Code, the Division Bench held in paragraphs 18 and 19 as under;

"18. A reading of Art. 180 of the Kerala Financial Code

clearly provides that no Government may enter into a contract for the execution of a work unless funds have been duly provided for it or an assurance has been received from the authority competent to provide the necessary funds that they will be allotted before the liability matures. The fact remains that the above mandatory provision in Art. 180 of the Kerala Financial Code has been given a go bye. Likewise Arts. 15-2.2,10.2.4.1 and 10.2.4.2 of the Kerala P.W.D. Manual provides various procedures to be followed before tenders are invited for a work.

19. It is held by decisions of Court that an executive agency must be vigorously held to the standards by which it professes its action to be judged. This principle has been accepted by the Apex Court in many cases. Having regard to the explicit terms of Art. 180 of Kerala Financial Code and 15 of the Kerala P.W.D. Manual it is clear that Government are duty bound to make payments to the work completed. The aforesaid provision, in our opinion would unambiguously command that no work shall be tendered except with the availability of complete funds, has given rise to a promise or representation and it is on that basis alone the contractors come forward to undertake the work, plan their work programme and arrange for the employment of staff and engagement of machinery and incur large investments. Thus upon the strength of the

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promise and representation the contractors act or change their position by undertaking various steps as aforesaid and also claim 5% security deposit which, according to the contractors, is also made either by borrowings at high rate of interest or from diversion or from their own funds. Non-payment of the amounts due to the contractors will cause grave injustice to them. It is held that the contractors are engaged by the State on their expectation and therefore cannot be denied their legal dues. A citizen is entitled in law to insist that the State will go by the procedure which it has laid down. In all these cases the State has entered into a contract undertaking payment upon satisfactory completion of the work. The Government has also undertaken to pay the other amounts for the work done as per the agreement. Therefore, the Government, in our opinion cannot be permitted to violate the solemn contracts. Such a position would be contrary to the clear mandate under the Constitution for the State to act free from unfairness. We are also unable to accept the argument of the learned Advocate General that the principles of seniority has to be maintained. We are of the opinion that principles of seniority is totally irrational and opposed to the mandate under the Financial Code. P.W.D. Manual and provisions of the agreement. As already noticed, the Financial Code and the P.W.D. Manual provide for complete funding and

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tendering and only thereafter the work is to be called. The arrears, as pointed out by the contractors and also by the State, are accumulating only because of violation of the rules by not providing full funds as provided in the rules. The Government has to make payments strictly in time. The figures furnished to us by the State would show that arrears have gone up steeply as is clear from the statement. The Government of Kerala are duty bound to provide funds by bringing in a supplementary budget or from the contingency fund. It is also stated that there are no arrears in respect of contractors dues in the C.P.W.D. or the railways or even in the Panchayats etc. It may be true that the contractors are aware that there will be some delay of payment in settling some cases. That does not mean that the contractors have to wait indefinitely. Likewise the headwise seniority list and payment is clearly in violation of the spirit of the directions of this court in its judgment in W. A. 1314/93. In the said judgment Jagannadha Rao (C.J.) and K. Sreedharan, J. have directed that the State of Kerala shall disburse the amounts allotted by the Government under various heads based on the seniority of the contractors, such seniority being based on the date of acceptance of the bills for the work coming under that head and as long as different contractors fall under the same head, the State shall follow the seniority of the

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date of acceptance of bills. The Bench also held that the same principle will be adopted in relation to disbursement of monies to contractors also. With this direction the Writ Appeal was disposed of by the said Bench. The Government also will not give any room for complaint that payments are made to some contractors out of turn when various other final bills submitted were pending with the Government for payment. It is alleged that a person who did the work much later is paid immediately and the person who did the work earlier is not paid at all. Though total lack of bonafide and absence of earnestness in solving the problems of the contractors was highlighted, we are not inclined to go into the said question and the illustrations cited with reference to some cases, regarding the discrimination and arbitrariness as reported in the newspapers. We are of the view that irrespective of the various heads of the principle of "first done first paid" should be ensured. The other reason given by the State to justify non-payment of the monies on the ground of pay revision cannot also be accepted. The pay is paid to the Government Servant on the ground of pay revision. However payments made because of pay revision cannot be compared to the payments to be made to the contractors. It is also submitted that there is practice of departmental execution of works and in such works the payments are made without reference

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to seniority and immediate payment is made. Even though interest is asked for, for the delay in payment of the amounts due, we are not now awarding interest in view of the undertaking now given by the State that all the contractors who have filed writ petitions and appeals on or before 23.6.99 will be paid within four months.”

(ii) ***Har Shankar & Ors. v. The Deputy Excise and Taxation Commissioner & Ors. [(1975) 1 SCC 737]***. In this case the Constitution Bench held that a writ petition is not a proper remedy to impeach contractual obligations.

(iii) ***State of UP and ors. v. Bridge and Roof Company (India) Ltd. [(1996) 6 SCC 22]***. The Supreme Court held that in respect of dispute relating to the terms of a private contract, the proper course would be to refer the matter to arbitration or institution of suit and not a writ petition. Para 16 of the judgment is relevant, which reads as under;

"16. Firstly, the contract between the parties is a contract in the realm of private law. It is not a statutory contract. It is governed by the provisions of the Contract Act or, may be, also by certain provisions of the Sale of Goods Act. Any dispute relating to

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interpretation of the terms and conditions of such a Contract cannot be agitated, and could not have been agitated, in a writ petition. That is a matter either for arbitration as provided by the contract or for Civil Court, as the case may be. Whether any amount is due to the respondent from the appellant-Government under the contract and, if so, how much and the further question whether retention or refusal to pay any amount by the Government is justified, or not , are all matters which cannot be agitated in or adjudicated upon in a writ petition. The prayer in the writ petition, viz., to restrain the Government from deducting particular amount from the writ petitioners' bill(s) was not a prayer which could be granted by the High Court under Article 226. Indeed, the High Court has not granted the said prayer."

(iv) **Kerala State Electricity Board and anr. v. Kurien E. Kalathil & Ors. [(2000) 6 SCC 293}**. This judgment is relied upon to emphasis the point that the contract between the parties being in the realm of private law and when it is not a statutory contract, the disputes relating to interpretation of the terms and conditions of such a contract cannot be agitated in a petition under Art.226 of the Constitution of India. Para 11 is relevant, which reads as under;

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"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 of 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

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justified or not, are not the matters which could have been agitated and decided in a writ petition. The contractor should have been relegated to other remedies."

(v) ***State of Kerala and Ors. v. Kottarakkara Public Works Skilled Workers Labour Contract Co-operative Society Ltd.*** (AIR 2001 Kerala 60) was relied upon to contend that as contract was non-statutory in nature, Art.226 cannot be invoked for enforcement of the contractual obligations.

(vi) ***State of Kerala v. Anil*** (2002 (1) KLT 371). In this case Full Bench considered the conflict of views expressed in ***Anirudhan's*** case (supra) and ***Kottarakkara Public Works Skilled Workers Labour Contract Co-operative Society Ltd*** (supra). After referring to the various judgments of the Supreme Court, it is held at paragraphs 9, 10, 11, 17 and 18 as under;

"9. Thus the position is clear that once the State action is attacked to be unreasonable, unfair and against public interest irrespective of the sphere, the State action is amenable to judicial review. In the words of Verma, J. in Shrilekha Vidyarthi's case (supra) :

"The basic requirement of Art. 14 is fairness in action by

the State and we find it difficult to accept that the State can be permitted to act otherwise in any field of its activity, irrespective of the nature of its functions when it has the uppermost duty to be governed by the rule of law. Non-arbitrariness, in substance, is only fair play in action. We have no doubt that this obvious requirement must be satisfied by every action of the State or its instrumentality in order to satisfy the test of validity."

10. It is also now a well settled position following International Airport Authority's case that an executive authority must be vigorously held to the standards by which it professes its action to be judged. In judging the State action thus, the Court can even review whether the State demonstrates its actions to its professed standards.

11. It may not also be out of context to refer to the scope of exercise of the power of the High Court in Art. 226 of the Constitution of India. There also, it is not as if the question is res-integra. Barring the self-imposed limitations, it is well settled that the arm of the Court is long enough to strike at injustice wherever it is found."

"17. We do not think it is necessary to deal with the said issue in more details. Mandamus is an accepted and powerful item in the armoury, particularly of High Court under Art. 226 of the Constitution of India to strike at injustice and reach justice. It is significant, interesting and in a sense heartening to note that the

Division Bench in the State appeal cases granted relief to the Contractors even while holding that the Writ Petition is not maintainable, apparently moved by the constitutional obligation to strike at injustice resulting from unfair and unreasonable conduct on the part of the State.

18. Guided by the salutary principles in the subject matter and as particularly laid down by the Supreme Court, and applying the same on the issue referred to us, it has to be held that it cannot be said in absolute terms that a Writ Petition is not maintainable in contractual matters including where the Contractors seek enforcement of the obligation on the part of the State to pay the bill amounts admitted by the State. Though couched in different terms, all the decisions referred by us above lead to the said conclusion. All the activities of the State are in public interest and for public good. There is public law element in contracts where State is a party, and it naturally follows that there is public duty. And above all, any State action is liable to be tested on the touchstone of Art. 14 of the Constitution of India. Essentially, the only limitation of the High Court is the self imposed restriction. A few relevant factors in exercising the self-imposed limitations under Art. 226 of the Constitution of India in the matter of payment of Contractors' bills are:

- (1) When there is no disputed question of fact*

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requiring adjudication on detailed evidence.

(2) *When no alternate form is provided in the resolution of any disputes pertaining to a contract.*

(3) *When claim by one party is not contested by the other and the contest does not require adjudication requiring detailed enquiry into facts."*

Further, the Full Bench in para 20 observed that during the pendency of the matter before the Larger Bench, certain directions had been issued for payment of bills on 'first done first paid' basis and it is stated that the same will be a guideline for the State in the matter of payment of bills and it will be open to the respective Benches to issue appropriate orders in the interest of justice. Para 20 reads as under;

"20. While the reference was pending before the Larger Bench, certain directions had been issued in the matter of payment of the bills on 'first done first paid' basis. It is made clear that those orders passed by the Larger Bench will be a guideline for the State in the matter of payment of the bills and it will be open to the respective Benches to issue appropriate orders, if required and if found necessary, suitably varying those general directions in the interest of justice. Therefore, answering the reference as stated above, we send back all the cases to the respective Benches for final orders in

the matter."

(vii) ***Tata Cellular v. Union of India*** [(1994) 6 SCC 651] was relied upon to emphasise the scope of judicial review in matters relating to Government contracts.

(viii) ***Directorate of Education and others. v. Educomp Datamatics Ltd. & Ors.*** [(2004) 4 SCC 19] is relied upon again to emphasise the point that the scope of judicial review is only against arbitrariness or favoritism. This judgment is based on the earlier judgment in ***Tata Cellular's case*** (supra).

(ix) ***M/s New Bihar Biri Leaves Co. & Ors. v. State of Bihar & Ors.*** [(1981) 1 SCC 537]. This judgment is relied upon to contend that once the tender is accepted, it is not open for the awardee of the work to challenge the tender conditions. This is based on the principle that one who approbates cannot reprobate.

(x) ***Puravankara Projects Ltd. v. Hotel Venus International & Ors.*** [(2007) 10 SCC 33]. This judgment is also relied upon to contend for the position that the doctrine of fairness cannot be invoked to amend, alter or vary the express

terms of the contract between the parties.

11. On the other hand, Smt.Vaheeda Babu appearing for the appellant in WA No.148/2015 placed reliance on the judgment of the Supreme Court in ***Basheshar Nath v. Commissioner of Income Tax, Delhi and Rajasthan and anr.*** (AIR 1959 SC 149) to contend that the fundamental right of the citizen to carry on business cannot be waived. Reference is made to para 14 of the judgment which reads as under;

"14. Such being the true intent and effect of Art. 14 the question arises, can a breach of the obligation imposed on the State be waived by any person ? In the face of such an unequivocal admonition administered by the Constitution, which is the supreme law of the land, is it open to the State to disobey the constitutional mandate merely because a person tells the State that it may do so ? If the Constitution asks the State as to why the State did not carry out its behest, will it be any answer for the State to make that "true, you directed me not to deny any person equality before the law, but this person said that I could do so, for he had no, objection to my doing it." I do not think the state will be in any better position than the position in which Adam found himself when God asked him as to why

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he had eaten the forbidden fruit and the State's above answer will be as futile as was that of Adam who pleaded that the woman had tempted him and so he ate the forbidden fruit. It seems to us absolutely clear,' on the language of Art. 14 that it is a command issued by the Constitution to the State a matter of public policy with a view to implement its object of ensuring the equality of status and opportunity which every Welfare State, such as India, is by her Constitution expected to do and no person can, by any act or conduct, relieve the State of the solemn obligation imposed on it by the Constitution Whatever breach of other fundamental right a person or a citizen may or may not waive, he cannot certainly give up or waive a breach of the fundamental right that is indirectly conferred on him by this constitutional mandate directed to the State."

12. She relied on another Constitution Bench judgment in ***Olga Tellis v. Bombay Municipal Corporation and Ors*** (AIR 1986 SC 180) to contend for the proposition that the Government is estopped from contending that payments cannot be made despite the terms of the agreement. Specific reference has been made to para 28 of the said judgment to contend that there can

be no estoppel against the Constitutional rights of the citizen.

"28. It is not possible to accept the contention that the petitioners are estopped from setting up their fundamental rights as a defence to the demolition of the huts put up by them on pavements or parts of public roads. There can be no estoppel against the Constitution. The Constitution is not only the paramount law of the land but, it is the source and sustenance of all laws. Its provisions are conceived in public interest and are intended to serve a public purpose. The doctrine of estoppel is based on the principle that consistency in word and action imparts certainty and honesty to human affairs. If a person makes a representation to another, on the faith of which the latter acts to his prejudice, the former cannot resile from the representation made by him. He must make it good. This principle can have no application to representations made regarding the assertion or enforcement of fundamental rights. For example, the concession made by a person that he does not possess and would not exercise his right to free speech and expression or the right to move freely throughout the territory of India cannot deprive him of those constitutional rights, any more than a concession that a person has no right of personal liberty can justify his detention contrary to the terms of Article

22 of the Constitution. Fundamental rights are undoubtedly conferred by the Constitution upon individuals which have to be asserted and enforced by them, if those rights are violated. But the high purpose which the Constitution seeks to achieve by conferment of fundamental rights is not only to benefit individuals but to secure the larger interests of the community. The Preamble of the Constitution says that India is a democratic Republic. It is in order to fulfil the promise of the Preamble that fundamental rights are conferred by the Constitution, some on citizens like those guaranteed by Articles 15, 16, 19, 21 and 29 and, some on citizens and non-citizens alike, like those guaranteed by Articles 14, 21, 22 and 25 of the Constitution. No individual can barter away the freedoms conferred upon him by the Constitution. A concession made by him in a proceeding, whether under a mistake of law or otherwise. that he does not possess or will not enforce any particular fundamental right, cannot create an estoppel against him in that or any subsequent proceeding. Such a concession, if enforced, would defeat the purpose of the Constitution. Were the argument of estoppel valid, an all-powerful State could easily tempt an individual to forgo his precious personal freedoms on promise of transitory, immediate

benefits.,Therefore, notwithstanding the fact that the petitioners had conceded in the Bombay High Court that they have no fundamental right to construct hutments on pavements and that they will not object to their demolition after October 15, 1981, they are entitled to assert that any such action on the part of public authorities will be in violation of their fundamental rights. How far the argument regarding the existence and scope of the right claimed by the petitioners is well founded is another matter. But, the argument has to be examined despite the concession."

13. Yet another judgment relied upon is **Subramanian Swamy v. State of Tamil Nadu** [(2014) 5 SCC 75] to contend for the proposition that the ratio of any decision must be understood in the background of the facts of the case. Para 47 is relevant, which reads as under;

"47. It is a settled legal proposition that the ratio of any decision must be understood in the background of the facts of that case and the case is only an authority for what it actually decides, and not what logically follows from it. "The court should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision

on which reliance is placed.”

14. Sri.Philip while referring to the various terms and conditions of the contract and the PWD Manual supported the stand taken by the learned Single Judge and contended that the Governmental authorities cannot deny payment for the work done relying upon the Full Bench judgment in **Anil's case** (supra). It is contended that any work is being tendered after making provision for the funds as evident from the PWD Manual and therefore petitioner cannot be denied payment based on a pending seniority list prepared by the Government.

15. In fact, the issue projected by the learned Government Pleader is regarding maintainability of the writ petition. The said position is no longer res integra and is covered by the Full Bench judgment in **Anil's case** (supra). The Full Bench was considering the conflicting views expressed in **Anirudhan's case** (supra) and **K.P.W.S.W.L.C Co-operative Society Ltd.'s case**. In **Anirudhan's case**, the Division Bench held that the Government having undertaken to pay the amounts for the work done as per the agreement, it cannot be violated. Violation of such agreement

would be contrary to the mandate under the Constitution. The State is to act free from unfairness and that the principle of seniority is totally irrational and opposed to the mandate under the Financial Code, PWD Manual and the provisions under the agreement. In ***K.P.W.S.W.L.C Co-operative Society Ltd.'s case***, another Division Bench took a different view after forming an opinion that when a contractor moves the Court for payment of dues under the contract, the Court has to enforce the provisions of the contract and not the provisions of the statute or public duty. Since the contract in question is not a statutory contract, a writ of mandamus cannot be issued.

16. In fact, the discretion of the Court to interfere in matters relating to disputed questions of fact, impeaching of contractual obligations and to interpret contracts coming within the realm of private law are all well settled as held by the Supreme Court in ***Har Shankar's case*** (supra), ***Bridge and Roof Co. (India) Ltd.*** (supra) and ***Kurien E Kalathil*** (supra). But the fact remains that in these writ petitions, we are not concerned with giving a decision on any disputed question of fact.

We are concerned with the question as to whether a mandamus can be issued against the Government and its authorities in respect of a contract which has been completed and the liability to pay is admitted. Though the learned Special Government Pleader relied upon the judgments in **Purvankara Projects Ltd.** (supra), **New Bihar Biri Leaves Company** (supra), **Educomp Datamatics Ltd.** (supra) and **Tata Cellular** (supra), the said judgments cannot have application to the subject matter in issue and therefore, there is no reason to elaborate on the applicability of the judgments to the facts of the present case.

17. After having considered the law on the point, the Full Bench in **Anil's case** held that barring the self imposed limitations, it is well settled that the arm of the Court is long enough to strike at injustice wherever it is found. It is further held that all the activities of the State are in public interest and for public good. There is public law element in contracts where State is a party, and it naturally follows that there is public duty. The State action is liable to be tested on the touchstone of Art.14 of the Constitution of India. Further, Full Bench held that in a case

where State admits its liability to pay the bill amounts, the direction that can be issued is only to pay the admitted amount. In such an event, exercise of jurisdiction cannot be bad. Therefore, **Anil's case** is a complete authority in regard to maintainability of the writ petition.

18. The next question to be considered is whether the direction issued by the learned Single Judge is sustainable or not. According to the learned Government Pleader, bills could be paid only on the basis of priority which is approved by the Full Bench in **Anil's case**. A close reading of para 20 of **Anil's case** does not give any such impression. Full Bench only said that the interim orders issued by the Larger Bench with regard to matter of payment of bills on 'first done first paid' basis will be a guideline for the State in the matter of payment of bills. Further, it is observed that it will be open to the respective Benches to issue appropriate orders, if required and if found necessary, varying those general directions in the interest of justice. The reference was answered and the matter was sent back to the respective Benches for final orders in the matter. Para 20 therefore was not

meant for universal application. It was only intended to cover cases which were pending before the Full Bench. Therefore, though the principle 'first done first paid' basis is attractive and should be normally followed, it again depends upon the facts and circumstances of each case.

19. Presently, we are faced with certain contractual provisions which relates to the liability to pay on the basis of availability of funds and seniority. We have to consider whether the contractors are entitled to approach this Court seeking a writ of mandamus for effecting payment in the light of the aforesaid restrictions imposed under the contract itself.

20. In the counter affidavit filed in WPC No.15536/14 reference was made to Clause 7 of the conditions to the contract and Clause 56 of the notice inviting tender. The aforesaid clauses are already extracted above wherein it is indicated that the payment will be made according to the availability of budget provision and allotment of funds made with the Divisional Officer under the respective heads of account under which the work is sanctioned and subject to seniority of such bills. In fact this

provision has probably been incorporated taking into account the delay in the settlement of bills. Further, the contract indicates that claim for interest for any damages for any delay in settling the bills will not be entertained. When such a contractual provision has been incorporated in the contract and the appellant has a case that the parties are bound by the said terms of the contract, it may not be possible for this Court to ignore such a contention. The learned Single Judge however in the order dated 23/10/2014 in the review petition proceeded on the basis that provisions of the contract, if any, which goes contrary to the judgment in **Anirudhan's case** cannot be enforced as the same would be contrary to the decision of the Court and the said clause cannot be an impediment in passing any interim order. Further, it is held that any such agreement will be unlawful and cannot be enforced as a valid contract under Section 10 of the Indian Contract Act. We do not think that the aforesaid finding was warranted under the circumstances. First of all, the writ petitioner did not challenge the terms and conditions of the contract. If the contract contains a provision that the bill amounts will be paid only on priority basis,

the parties are bound by the same unless and until the said provision is challenged and held to be invalid by a Court of law.

21. Parties are bound by the terms of the contract and therefore, when the Government has taken a defense that the liability to pay arises only on non compliance of the said contractual provisions, unless that question is decided, it may not be possible for this Court to issue any direction as such.

22. Therefore, in instances where clauses identical to amended clause 7 are available, in the absence of any challenge to the said contractual provision, it may not be possible for the claimant to demand that a mandamus should be issued overlooking the said contractual provision. In fact, in W.P (C) No. 15536/14 and W.P (C) No.28108/14, the petitioners have not raised any contention regarding the validity of such a clause nor there was occasion for the Court to consider the same.

23. A dispute regarding enforceability of a contract can arise under different circumstances which depends upon the terms and conditions of a contract. In WA No.1996/14 and WA No.148/15, though the amounts payable are admitted, the liability

to pay is disputed on the ground that the payment is deferred and will be made only on seniority basis. Though it is stated by the learned Single Judge in the order dated 23/10/2014 in RP 565/14 that preparation of a seniority list is against **Anirudhan's case**, we do not think that such a view might be correct especially in the light of the contractual provision being incorporated based on a Government Order. Therefore, enforceability of such a clause has to be presumed unless it is declared to be illegal or void under any circumstances. It is in this background that the judgment of the Supreme Court in **Tata Cellular** and other judgments gain importance wherein it is categorically held that once the tender conditions are accepted, it is not open for the tenderer to challenge the same unless such conditions are illegal, arbitrary and unreasonable. When there is no challenge to the said contractual provisions, it has to be enforced until set aside by a Court. A question may further arise whether such an exercise should be adopted by a Court exercising power under Art.226 of the Constitution of India. Since only interim orders have been passed in W.P (C) No. 15536/14, we do not think that we will be

justified in entering into such a controversy at this stage of the proceedings.

24. As far as W.A.No.148/2015 is concerned, the learned single Judge did not consider the matter on merits. The writ petition was disposed of on the basis of the statement filed by the respondent. In fact, neither the petitioner nor the respondents had produced any documents as proof of the contractual obligations. In order to claim performance of any contractual obligation as undertaken by the State or its authorities, necessarily, the contract documents are to be produced. In the absence of any material, being made available, it may not be possible for a writ Court to exercise jurisdiction. For the same reason, the judgments relied upon by the learned counsel for the appellant cannot be made applicable to the facts of the present case. Hence we are of the view that the learned single Judge was justified in disposing the writ petition on the basis of the statement filed by the respondents.

25. Having regard to the findings stated above, we are of the view that the appeals can be disposed of as under;

-:39:-

(1) WA No. 1996/2014 is allowed. The interim order dated 4/7/2014 and order dated 23/10/2014 in RP No.565/2014 are set aside and the parties are directed to approach the learned Single Judge for final disposal of the matter in the light of the observations made above.

(2) WA No.148/2015 is dismissed.

ASHOK BHUSHAN, CHIEF JUSTICE

A.M. SHAFFIQUE, JUDGE

Rp