

IN THE HIGH COURT OF JUDICATURE AT PATNA

Letters Patent Appeal No.2158 of 2015

IN

Civil Writ Jurisdiction Case No. 7259 of 2015

- =====
1. Mora Tollways Limited, a company incorporated under the provisions of the Companies Act, 1956 and having its registered office at 302, Shree Amba Shanti Chambers, Opposite Hotel Leela, Andheri Kurla Road, Andhri (East), Mumbai-400059, a Special Purpose Vehicle created by Atlanta Limited, 101, Shree Amba Shanti Chambers, Opposite Hotel Leela, Andheri Kurla Road, Andhri (East), Mumbai-400059 through its authorized representative and Project In Charge, Mr. Pillai Ponipass Packiriswami, Son of Late C.K. Packiriswami, permanent resident of flat no. 306, Jalalpur City, Gola Road, Police Station- Rupaspur, District-Patna.

.... Appellant

Versus

1. The State of Bihar through Principal Secretary, Road Construction Department, Government of Bihar, Patna.
2. The Principal Secretary, Road Construction Department, Government of Bihar, Patna.
3. Bihar State Road Development Corporation Limited through its Managing Director, office at RCD Central Mechanical Workshop Campus, Sheikhpura, Patna.
4. The Managing Director, Bihar State Development Corporation Limited, office at RCD Central Mechanical Workshop Campus, Sheikhpura, Patna.
5. The Chairman, Bihar State Development Corporation Limited, office at RCD Central Mechanical Workshop Campus, Sheikhpura, Patna.
6. The Directors, Bihar State Development Corporation Limited, office at RCD Central Mechanical Workshop Campus, Sheikhpura, Patna.
7. The Chief General Manager, Bihar State Development Corporation Limited, office at RCD Central Mechanical Workshop Campus, Sheikhpura, Patna.
8. The General Manager, Bihar State Development Corporation Limited, office at RCD Central Mechanical Workshop Campus, Sheikhpura, Patna.
9. The Deputy General Manager, Bihar State Development Corporation Limited, office at RCD Central Mechanical Workshop Campus, Sheikhpura, Patna.

.... Respondents

WITH

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Letters Patent Appeal No. 2084 of 2015
IN
Civil Writ Jurisdiction Case No. 7259 of 2015

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1. Bihar State Road Development Corporation Limited through its Managing Director, office at RCD Central Mechanical Workshop Campus, Sheikhpura, Patna.
 2. The Managing Director, Bihar State Road Development Corporation Limited, office at RCD Central Mechanical Workshop Campus, Sheikhpura, Patna.
 3. The Chairman, Bihar State Road Development Corporation Limited, office at RCD Central Mechanical Workshop Campus, Sheikhpura, Patna.
 4. The Director, Bihar State Road Development Corporation Limited, office at RCD Central Mechanical Workshop Campus, Sheikhpura, Patna.
 5. The Chief General Manager, Bihar State Road Development Corporation Limited, office at RCD Central Mechanical Workshop Campus, Sheikhpura, Patna.
 6. The General Manager, Bihar State Road Development Corporation Limited, office at RCD Central Mechanical Workshop Campus, Sheikhpura, Patna.
 7. The Deputy General Manager, Bihar State Road Development Corporation Limited, office at RCD Central Mechanical Workshop Campus, Sheikhpura, Patna.

.... Appellants

Versus

1. Mora Tollways Limited, a company incorporated under the provisions of the Companies Act, 1956 and having its registered office at 302, Shree Amba Shanti Chambers, Opposite Hotel Leela, Andheri Kurla Road, Andhri (East), Mumbai-400059, a Special Purpose Vehicle created by Atlanta Limited, 101, Shree Amba Shanti Chambers, Opposite Hotel Leela, Andheri Kurla Road, Andhri (East), Mumbai-400059 through its authorized representative and Project In Charge, Mr. Pillai Ponipass Packiriswami, Son of Late C.K. Packiriswami, permanent resident of flat No.38, Triveni Chaul, Police Station Santa Cruz and presently residing at flat no. 306, Jalalpur City, Gola Road, Police Station- Rupaspur, District-Patna.
2. The State of Bihar through Principal Secretary, Road Construction Department, Government of Bihar, Patna.
3. The Principal Secretary, Road Construction Department, Government of Bihar, Patna.

.... Respondents

WITH

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Letters Patent Appeal No. 2131 of 2015
IN
Civil Writ Jurisdiction Case No. 7259 of 2015

- =====
1. The State of Bihar through the Principal Secretary, Road Construction Department, Govt. of Bihar, Patna
 2. The Principal Secretary, Road Construction Department, Govt. of Bihar, Patna

.... Appellants

Versus

1. Mora Tollways Ltd. a Company incorporated under the Provision of the Companies Act, 1956 and having its registered office at 302, Shree Amba Shanti Chambers Opposite Hotel Leela, Andheri Kurla Road, Andhari (East), Mumbai - 400059, a Special Purpose Vehicle Created by Atlanta Limited, 101 Shree Amba Shanti Chambers, Opposite Hotel Leela, Andhari Kurla Road, Andhari (East Mumbai - 400059 through its Authorized representative and Project In Charge, Mr. Pillai Ponipass Packiriswami, Son of Late C.K. Packiriswami, Permanent Resident of Flat No. 38, Triveni Chaul, Police Station Santa Cruz and Presently residing at Flat No. 306 Jalalpur City, Gola Road, Police Station Rupaspur, District - Patna
2. Bihar State Road Development Corporation, Ltd., through its Managing Director, office at RCD, Central Mechanical Workshop, Campus, Sheikhpura, Patna
3. The Managing Director, Bihar State Road Development Corporation, Ltd., office at RCD, Central Mechanical Workshop, Campus, Sheikhpura, Patna
4. The Chairman, Bihar State Road Development Corporation, Ltd., office at RCD, Central Mechanical Workshop, Campus, Sheikhpura, Patna
5. The Director, Bihar State Road Development Corporation, Ltd., office at RCD, Central Mechanical Workshop, Campus, Sheikhpura, Patna
6. The Chief General Manager, Bihar State Road Development Corporation, Ltd., office at RCD, Central Mechanical Workshop, Campus, Sheikhpura, Patna
7. The General Manager, Bihar State Road Development Corporation, Ltd., office at RCD, Central Mechanical Workshop, Campus, Sheikhpura, Patna
8. The Deputy General Manager, Bihar State Road Development Corporation, Ltd., office at RCD, Central Mechanical Workshop, Campus, Sheikhpura, Patna

.... Respondents

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Appearance :
(In LPA No. 2158 of 2015)

For the Appellant : Mr. Y. V. Giri, Sr. Adv.
Mr. Sanjeev Kumar, Advocate

Mr. Dayanand Singh, Advocate
For the Respondents : Mr. Harish Kumar, GP 32
For the BSRDC : Mr. Lalit Kishore, PAAG
Mr. Vikas Kumar, AC to AG

(In LPA No. 2084 of 2015)

For the Appellants : Mr. Lalit Kishore, PAAG
Mr. Vikas Kumar, AC to AG
For the Respondents : Mr. Y. V. Giri, Sr. Adv.
Mr. Sanjeev Kumar, Advocate

(In LPA No. 2131 of 2015)

For the Appellants : Mr. Harish Kumar, Advocate
Mr. Binod Kumar Sinha, Advocate
For the Respondents : Mr. Lalit Kishore, PAAG
Mr. Vikas Kumar, AC to AG
For the BSRDC : Mr. Lalit Kishore, Sr. Adv.

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CORAM: HONOURABLE THE ACTING CHIEF JUSTICE

AND

HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

JUDGMENT AND ORDER

CAV

(Per: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH)

Date: 12-05-2016

These appeals arise out of common judgment and order, dated 22.09.2015, passed by the learned single Judge of this Court on a writ application filed under Article 226 of the Constitution of India by Mora Tollways Limited, a company incorporated under the provisions of the Companies Act, 1956 **(hereinafter referred to as the 'Companies')**. The said Company is the appellant of L.P.A. No. 2158 of 2015. The Bihar State Road Development Corporation Limited and others **(hereinafter referred to as the 'Corporation')** and its functionaries, who were impleaded as respondent Nos. 3 to 9 in the writ proceedings before learned Single Judge, have also

questioned the legality of the same judgment and order passed by the learned single Judge by filing LPA No. 2084 of 2015. The State of Bihar has filed another appeal being L.P. A. No. 2131 of 2015, who were respondent Nos. 1 and 2 in the writ proceedings, being aggrieved by the same judgment and order of the learned single Judge.

2. This is the reason why all the three appeals have been heard together, with the consent of the parties, and are being disposed of by the present common judgment and order.

3. Before I advert to the extensive arguments advanced on behalf of the Company, the Corporation and the State of Bihar, it would be apt to take note of the conclusion arrived at by learned single Judge in the order under appeal, and legal reasoning assigned for such conclusion since sustainability of the said order is in question, in the present batch of appeals. For the said purpose, I have considered it appropriate to take brief note of the admitted facts mentioned by learned single Judge, which are foundation for arriving at the said conclusion.

4. There was a notice/request for qualification, dated 16.07.2010, by the Corporation for the purpose of construction, operation and maintenance of *National Highway* No.30 in the State of Bihar, including the section from km 0.000 to km 116.760 on Mohania-Ara section of *National*



Highway No.30, by Four Laning on Design, Build, Finance, Operate and Transfer ("DBFOT") basis. Atlanta Ltd., a Company incorporating under the Companies Act, 1956 had submitted bit in pursuance thereof and was short listed. Cosequent upon its short listing, the Company was created as special purpose vehicle by parent Company, and registered under the provisions of the Companies Act, 1956 by its parent company, viz, Atlanta Ltd. Consequent upon the short listing of the parent Company, and creation of Mora Tollways Company Limited, as special purpose vehicle for the said purpose, a Concession Agreement was entered into between the Corporation and the company, on 10.09.2011.

5. It is mystery why the Concession Agreement has been described as between "the Governor of State of Bihar, represented by its Managing Director, Bihar State Road Development Corporation Limited through its Managing Director, Central Mechanical Workshop Campus, Sheikhpura, Patna", when the agreement appears to be between the Corporation and the Company. I have not gone into consequence of such recital in the agreement, in view of the nature of dispute involved, as is being discussed hereinabove.

6. The Company, before entering into the agreement had made demands for grant of mining lease for stone quarries as according to it, the bid had been submitted



keeping in mind the facilities that were available of mining of aggregates from stones quarries in possession of the Government of Bihar. The bid period was extended from time to time on four occasions. Finally, the *Company* entered into a *Concession Agreement* on 10.09.2011. It is the case of the *Company* that the bids submitted by it was conditional, subject to making facilities for mining of aggregates from nearby quarries in possession of the Government of Bihar. Alternatively, according to them, procuring aggregates from the neighbouring states would have incurred additional expenditure and, therefore, necessitated reimbursement of extra lead of aggregates, entry tax, toll tax etc, which would need to be reimbursed by the Corporation.

7. The fact remains that there was no such stipulation in the *Concession Agreement* entered into on 10.09.2011. This is also not in dispute that at the time of entering into agreement, mining of stone quarries in the State of Bihar was impermissible.

8. The Corporation, through its Managing Director, made request to the Collector, Rohtas to take necessary action for relaxation of the rules in special cases in terms of Mines & Mineral (Development & Regulation) Act, 1957. Since no decision, to allow mining in the State of Bihar was taken by the State Government of Bihar, the matter was referred to an

independent engineers engaged by the Corporation. The independent engineers, after obtaining legal opinion recommended either for allotment of mines or for the reimbursement of the additional costs of procuring aggregates from neighbouring State, estimated at Rs. 410.13/- crores, to the *Company*.

9. The Corporation, however, rejected the claim of the *Company* for reimbursement of the additional cost to be incurred on procurement of aggregates from neighbouring States through letter, dated 16.06.2014, there being no provisions for extra lead of aggregates in the *Concession Agreement*. This is evident from the minutes of the meeting held on 05.08.2014. This made the Company to take recourse to the provisions of Article 37.2 of the *Concession Agreement* with the issuance of a notice, dated 09.08.2014, for curing the defaults by the respondent authority within a period of 90 days as contemplated thereunder.

10. Since Article 37.2 of the Concession Agreement is at the core of the dispute between the parties, the same is being extracted hereinbelow as the said Article will be required to be discussed at subsequent stages also:-

"37.2. Termination for Authority Default

37.2.1 In the event that any of the defaults specified below shall have occurred, and the Authority fails to cure



such default within a Cure Period of 90 (ninety) days or such longer period as has been expressly provided in this Agreement, the Authority shall be deemed to be in default of this Agreement (the "Authority Default") unless the default has occurred as a result of any breach of this Agreement by the Concessionaire or due to Force Majeure.. the defaults referred to herein shall include:

(a) The Authority commits a material default in complying with any of the provisions of this Agreement and such default has a Material Adverse Effect on the Concessionaire;

(b) the Authority has failed to make any payment to the Concessionaire within the period specified in this Agreement;

(c) the Authority repudiates this Agreement or otherwise takes any action that amounts to or manifests an irrevocable intention not to be bound by this Agreement; or

(d) the State commits a material default in complying with the provisions of the State Support Agreement if such default has a Material Adverse Effect on the Concessionaire and the breach continues for a period of 90 (ninety) days from the date of notice given in this behalf by the Concessionaire to the Authority."



11. It can be noted here that Article 37 of the *Concession Agreement* under which Article 37.2 falls deals with the termination of the agreement. Article 37.1 deals with termination for Concessionaire (in the present case for Corporation) default and Article 37.2 deals with termination for authority (in the present case for Corporation) default. Article 37.3.2 provides the consequence of termination on account of an authority default, and stipulates that the authority shall pay to the Concessionaire, by way of termination payment, an amount equal to:

- (a.) Debt Due; and
- (b.) 150% of the Adjusted Equity.

12. Adjusted equity as defined in Article 48.1 of the *Concession Agreement* means "equity funded in Indian rupees and adjusted on the first day of current month (the "Reference Date"), in the manner set forth, to reflect the change in its value on account of depreciation and variations in WPI, and for any Reference Date as mentioned therein.

13. A team of independent engineers was appointed by the Corporation which, after examining the issue of additional cost of procurement of aggregates held in report, dated 09.09.2014 that the Corporation may take a decision for reimbursement of cost of excess lead of aggregates in public interest and for avoiding delay in the completion of the project,



as according to them, the reimbursement would involve less financial implication to the Government exchequer as compared with the other two options, namely, the Termination Cost payable to the petitioner and Re-tendering cost. After having received the notice under Article 37.2 of the *Concession Agreement*, a meeting appears to have taken place, on 06.11.2014, participated by the officials of the Corporation including Chief General Manager, Chairman-cum-Managing Director of the Company and Team Leader of the independent Engineers (M/s ICT). From serial No. (b) of the minutes of the said meeting, it appears that the representative of the Company took a stand that notice under Article 37.2 of the *Concession Agreement* was not a termination notice, rather, it was notice to the authority to cure all the issues having material adverse effect on the project within 90 days. The Corporation took a plea that the issues raised in the said notice under Article 37.2 shall be cured.

14. As the issue relating to reimbursement of additional cost of aggregates could not be resolved, the Company, considering it to be failure on the part of the respondents to cure the defaults, issued a notice of intent to terminate the *Concession Agreement* in terms of Article 37.2.2 of the agreement. The Corporation, thereafter, vide its letter, dated 07.02.2015, asked the Company to submit the details of



all the materials, stores, plant machinery and equipments available at site for the purpose of Article 37.4(b) of the *Concession Agreement*. Article 37.4 of the Agreement provides for rights and obligations of the Corporation upon termination of agreement for any reason whatsoever which includes the authority to "take possession and controls of all materials, stores, implements, construction plants and equipments or about the site" Article 37.4 (a) of the *Concession Agreement* describes upon termination or any reason whatsoever, the Authority shall "be deemed to have taken possession and control of the project *Highway* forthwith".

15. The Company finally invoked the provisions of Article 37.2.2 by issuing a termination notice by letter, dated 20.02.2015, and thus, terminated the *Concession agreement*, dated 10.09.2011. The Company demanded termination payment of an amount of Rs. 610,52,72,733/- from the Corporation in terms of Article 37.3.2 of the *Concession Agreement*.

16. Before I proceed further, with reference to the facts which have been taken note of, by learned single Judge, in the order under appeal, I consider it appropriate to refer to a communication, dated 16.02.2015, which was issued within 15 days from the date of issuance of notice under Article



37.2.2 of the Concession Agreement, in response to the letter, dated 04.02.2015, issued by the Company of terminating the *concession agreement* by invoking Article 37.2.2. There is a clear provision in Article 37.2.2 for granting 15 days time to inform the authority (in the present case the Corporation) to make representation before issuance of final termination notice, and only after expiry of 15 days, whether or not the Company is in receipt of such representation, the Company could issue termination notice. The said representation of the Corporation is there on record by way of Annexure-16 of the writ application. I will be referring to the contents of the said letter, dated 16.02.2016, at subsequent stage, while dealing with the question as to whether any dispute in fact exists/existed between the Corporation and the Company or not OR every fact having been admitted by the Corporation, this Court exercising writ jurisdiction under Article 226 of the Constitution of India can/could issue a direction for payment of money against compensation on Corporation's default leading to termination of *Concession Agreement*.

17. Thereafter, the Corporation recommended the case of the Company to *Intra Structure Development Authority* for obtaining approval of the Committee presided over by the Secretary for extra demand of carriage of stone aggregates to the Company. It was mentioned in the said letter that though

the Company had terminated the *Concession Agreement*, the said termination was not acceptable to the Corporation and the Company had been requested to resume the work.

18. The Company thereafter, approached this Court by filing writ application on 29.04.2015 (registered on 07.05.2015). Thereafter, the Corporation issued a notice on 16.05.2015, invoking Article 37.1.2 of the *Concession Agreement* which enables the Corporation to terminate the agreement upon occurrence of a Concessionaire (Company) default. The said letter was a notice of intent to terminate the *Concession Agreement* giving the Company. In terms of the said Article of the agreement, the agreement could be terminated after 15 days. I have noticed the similar provision, which is there for termination of the agreement by the concessionaire on the authorities default. Finally, through letter, dated 10.06.2015, after lapse of 15 days, the Corporation issued a letter terminating the *Concession Agreement*.

19. The two letters, dated 16.5.2015, and 10.06.2015, were put to challenge in the writ proceedings by seeking amendment through I. A. Nos. 4607 of 2015 and 4702 of 2015 which were allowed and treated to be the part of the writ petition, by learned single Judge. A *preliminary* objection was taken on behalf of the Corporation and the State of Bihar

over the maintainability of the writ application on the ground of availability of *alternative remedy* of arbitration as contemplated under Article 44 of the *Concession Agreement*. Relevant portion of Article 44 is being extracted hereinbelow since the same will be required to be referred at subsequent stages and are apposite for the present also:-

“44.1 Dispute resolution

44.1.1. Any dispute, difference or controversy whatever nature howsoever arising under or out of or in relation to this Agreement (including its interpretation) between the parties, and so notified in writing by either party to the other party (the “Dispute”) shall, in the first instance, be attempted to be resolved amicably in accordance with the conciliation procedure set forth in Article 44.2.

44.1.2. The parties agree to use their best efforts for resolving all Disputes arising under or in respect of this Agreement promptly, equitably and in good faith, and further agree to provide each other with reasonable access during normal business hours to all non-privileged records, information and data pertaining to any Dispute.

44.2 Conciliation

In the event of any Dispute between the Parties, either party may call upon the Independent Engineer to mediate and assist the Parties in arriving at an amicable



settlement thereof. Failing mediation by the Independent Engineer, or without the intervention of the Independent Engineer, either Party may require such Dispute to be referred to the Chairman of the Authority and the Chairman of the Board of Directors of the Concessionaire for amicable settlement, and upon such reference, the said persons shall meet no later than 7 (seven) days from the date of reference to discuss and attempt to amicably resolve the Dispute. If such meeting does not take place within the 7 (seven) day period or the Dispute is not amicably settled within 15 (fifteen) days of the meeting or the Dispute is not resolved as evidenced by the signing of written terms of settlement within 30 (thirty) days of the notice in writing referred to in Article 44.1.1 or such longer period as may be mutually agreed by the parties, either Party may refer the Dispute to arbitration in accordance with the provisions of Article 44.3.

44.3 Arbitration

Any dispute which is not resolved amicably by conciliation, as provided in Article 44.2, shall be finally decided by reference to Bihar Arbitral Tribunal in accordance with Bihar Public Works Contracts Disputes Arbitration Tribunal Act, 2008, Rules framed thereunder or procedure prescribed by the Bihar Arbitral Tribunal. The award of Bihar Arbitral

Tribunal shall be final and binding on the parties.

44.4 Adjudication by Regulatory Authority or Commission.

Deleted.”

20. The objection was opposed on behalf of the Company before the writ Court on the ground that foundational facts were not in dispute. I find from the judgment and order under appeal that specific stand was taken on behalf of the Corporation that the Corporation cannot treat the Companies' termination notice as illegal and refuse to accept it as this will amount to sitting in judgment in their own case, they themselves being a party to the contract. A plea was also taken on behalf of the Company that action of the Corporation ignoring termination notice issued by the Company, dated 20.02.2015, and instead issuing termination notice, dated 10.06.2015, much after filing of the writ petition was illegal and arbitrary.

21. The learned single Judge turned down the preliminary objection over maintainability of the writ application and recorded in paragraph 12 as follows:-

“12. On the merits of the present case, this Court finds no error in the action of the petitioner in issuing the Termination Notice, and the Respondent's contention that the petitioner ought to have first opted for arbitration cannot be accepted. The



request for aggregates or for reimbursement of cost of procurement thereof remained a claim of the petitioner, and it was only after the Termination notice was given to the Respondents that a dispute within the meaning of Article 44 of the Agreement can be said to have arisen. In other words, the core dispute between the parties relates not to the issue of aggregates, but is concerned with the validity of the Termination Notice, dated 20.02.2015 in accordance with Article 37.2.2 of the Agreement. Moreover, the fact that the petitioner had terminated the Agreement by its Termination Notice cannot be disputed. Once the Agreement had been terminated by the petitioner, the question of the Respondents terminating it over again could not arise as that would amount to termination of an already terminated agreement. The Respondents could only have sought remedy against such termination as may have been available to it. The respondent-Corporation on its part could not negate such notice by unilaterally treating the same as illegal. As held in M/s J. G. Engineer Pvt. Limited Vs. Union of India and Another (AIR 2011 (SC) 2477) as also in para 16 in M/s NCC Limited Vs. The State of Bihar (2013(1) PLJR 952), if the State is a party to the contract, it cannot decide whether there was a breach of contract by the other party. The remedy



available to it had to be found within the terms of the agreement itself to which it was a party. If at all, therefore, the respondents might have taken recourse to Article 44 of the agreement for dispute resolution, including arbitration. Failing to do so and instead sitting in judgment to unilaterally dub the petitioner's Termination Notice as illegal must be as held to constitute arbitrary action on the part of the respondent-Corporation and it can safely be concluded that the respondent-Corporation has acted de hors the terms of the contract between the parties. It would further appear that the respondents' own Termination Notice, dated 10.06.2015 has been issued after filing of the writ petition by the petitioner, possible for the purpose of avoiding the consequences of having to make the Termination payment to the petitioner as a fallout of the Termination Notice issued by the petitioner for authority default.

22. Upon reading of paragraph 12 of the judgment under appeal, I find that the learned single Judge concluded that there was no error in the action of the petitioners in issuing termination notice. Learned single Judge has held that once the agreement has been terminated by the Company, question of the respondents terminating it again could not have arisen and would amount to termination of already



terminated agreement. Learned single Judge also concluded that the Corporation could only have sought remedy against such termination as it might have available to it but it could not, on its own part, negate such notice by unilaterally treating the same as illegal. Such remedy, according to the learned single Judge, was available within the terms of the agreement itself to which the Corporation was a party and the Corporation could have taken recourse to Article 44 of the Agreement of disputes of resolution, including arbitration.

23. Learned single Judge accordingly, quashed the termination notice issued by the Corporation, dated 10.06.2015, which according to the learned single Judge was issued, possibly for the purpose of avoiding the consequence of termination of agreement for Corporation's default by the Company in terms of Article 37.3.2 (supra), of the *Concession Agreement*.

24. Learned Single Judge accordingly, quashed the Corporation's termination notice, dated 10.06.2015, with a liberty to the Corporation to take recourse to Article 44 of the Concession Agreement. As regards quantification of compensation under Article 37.3.1 of the *Concession Agreement*, consequent upon termination for the authority default the learned single Judge held that such exercise would necessarily require detailed investigation into the facts and

adduction of evidence. Learned single Judge also observed that Article 44 of the *Concession Agreement* contains adequate provisions of dispute resolution which the Corporation are at liberty to advert to, if they were aggrieved by the termination notice, dated 20.02.2015.

25. The Company in the present appeals is aggrieved by the decision/conclusion of learned Single Judge as contained in paragraphs 13 and 14 of the order under appeal, which reads thus:-

“13. As regards the quantification of consequent Termination Payment liable to be paid by the respondents with regard to the nature and extent of authority default in terms of Article 37.2.2 of the agreement, the same would necessarily require detailed investigation into facts and adduction of evidence, into the details of which this Court need not travel. There is ample provision for Dispute Resolution detailed in Article 44 of the Concession Agreement referred to above, which the respondents are at liberty to advert to if they be aggrieved by the Termination Notice, dated 20.02.2015 issued by the petitioner.

14. In the result, the respondent-Corporation's Termination Notice as contained in letter No. 1382, dated 10.06.2015 (Annexure-23) is hereby set aside with liberty to the respondents to take recourse to Article 44 of the

Concession Agreement dated 10.09.2011, if so advised. Needless to say, the petitioner shall cooperate in all such proceedings for resolution of the issues in dispute in accordance with law. The writ petition stands disposed of."

26. It is evident from paragraphs 13 and 14 that learned single Judge has allowed the Corporation to take recourse to the arbitration Article as contained in Article 44 of the *Concession Agreement*, if they had any grievance against the termination notice, dated 20.02.2015, issued by the Company. Learned single Judge further held that quantification of amount consequent upon termination of *Concession Agreement* for Authority's default required detailed investigation, and therefore, he refused to go into the questions of fact which would have essentially required detailed investigation and adduction of evidence.

27. On the other hand, the Corporation and State of Bihar have filed the appeals aggrieved by the decision of the learned single Judge setting aside the termination notice, dated 10.06.2015, and holding the writ application to be maintainable, there being arbitration Article in the *Concession Agreement* for the resolution of the disputes between the parties to the agreement.

28. From the *memo* of Appeal and the arguments



advanced by Mr. Y.V. Giri, learned Senior Counsel, appearing on behalf of the Company, it is easily discernible that it is Company's stand that learned single Judge ought not to have given liberty to the Corporation to raise plea against termination notice, dated 20.02.2015, by invoking Article 44 of the Concession Agreement, which provides for conciliation, arbitration and methods for resolution of dispute since, according Mr. Giri, learned Senior Counsel, default on the part of the Corporation, leading to issuance of the letter of intent of termination of agreement and final termination notice were an admitted facts. According to him, validity of termination notice, issued by the Company, dated 20.02.2015, could not be called in question. It is his further case that as regards the quantification of consequent termination payment, the same had already been quantified by the team leader of independent engineers, as contained in Annexure-34 of the writ application, (being part of second supplementary affidavit), wherein Intercontinental Consultants and Technocrats Pvt. Limited's., letter, dated 09.09.2014, addressed to the General Manager (PPP), Bihar State Road Development Corporation Limited, have made detailed conclusion regarding financial implication and reimbursement of cost along with tentative cost implication for re-tendering.

29. It is evident from the grounds taken in the

memo of Appeal that judgment and order of learned single Judge on question of quantification of the amount liable to be paid consequent upon termination for authorities default, is being assailed on the following sole ground:-

“(iv) For that the Hon’ble Single Judge has failed to appreciate that the quantification of the consequent termination payment liable to be paid by the respondents have already been quantified by the team leader of independent engineers as contained in Annexure 34 of the writ application (being the part of second supplementary affidavit), wherein the Intercontinental Consultants and Technocrats Private Limited vide letter dated 09.09.2014 addressed to the General Manager (PPP), Bihar State Road Development Corporation Limited, wherein they have made detailed conclusion regarding financial implication reimbursement of cost of excess lead along with tentative cost implication for re-tendering.”

30. I will first deal with the pleadings on record and submissions advanced on behalf of the Company as to whether direction for payment of Rs. 610,52,72,733/- as sought for in the writ application could be made in exercise of writ jurisdiction of this Court, under Article 226 of the Constitution of India, on the ground that there was no dispute



at all between the parties over the said amount and the said amount was admittedly payable to the Company. As has been noted, for seeking such direction, heavy reliance has been placed on Annexure-34 of the second supplementary affidavit filed on behalf of the Company in the writ proceeding. From the said Annexure-34, dated 09.09.2014, it appears that Intercontinental Consultants and Technocrats Pvt. Ltd. has been engaged as independent engineers for Four Laning of concerned Mohania-Ara Section of NH-30. Paragraph 7 of the said report, dated 09.09.2014, contains the comment/opinion on termination of agreement, concluding as follows:-

“The tentative amount on account of termination works out to about Rs. 602.00 crores, subject to verification of actual expenditure incurred on permanent works by the Concessionaire.”

31. I find from the said report that independent engineers were giving his opinion for the purpose of exploring possibilities of alternative solutions, in view of the dispute which had emerged between the Company and the Corporation in relation to execution and fulfilling the obligation of the Concession Agreement. The said observation of the ICT independent engineers as quoted above, can by no stretch of imagination be treated to be an admitted amount or otherwise



an amount so determined, that would have bound the Corporation to make payment. Evidently, the said conclusion is subject to verification of actual expenditure incurred on permanent works by the Concessionaire. This Court in my considered view cannot hold, on the basis of the materials on record that the said amount is admittedly payable to the Company.

32. This Court's attention has been drawn to a legal opinion, dated 31.10.2014, recorded by Mr. Lalit Kishore, learned Senior Advocate of this Court and Principal Additional Advocate General, as sought for by the Corporation. Much emphasis has been laid on the said opinion of Mr. Lalit Kishore, learned Senior Advocate by Mr. Y. V. Giri, learned Senior Counsel to contend that the quantification of consequent termination payment amount of Rs. 602.00 crores was endorsed by learned Senior Advocate, Mr. Lalit Kishore.

33. Before adverting to the contents of the said legal opinion, I record my strong displeasure over the conduct of the appellant in bringing on record legal opinion, which is essentially a confidentially communication between learned Senior Counsel and the Corporation. It is not evident from the pleadings on record as to how the Company procured a copy of the said legal opinion. The conduct of the Company in this regard is highly reprehensible. It would be apt to refer to

the Supreme Court decision in the case of ***R. C. Jain v. High Court of Patna***, reported in **(1996) 10 SCC 5**, in paragraph 11 whereof, the Apex Court has ruled thus:

"11. Along with the SLP, the appellant has filed a copy of the office note submitted by the Registrar (Inspection) dated 4-4-1996 before the learned Chief Justice for consideration of the Chief Justice. In the affidavit of urgency (available at pp. 52 to 55) filed by Shri Rajendra Kumar Jain, son of the appellant, the said office note (available at pp. 54 and 55 of the paper-book), has been reproduced. We questioned counsel for the appellant as to how the appellant was able to produce a copy of the office note dated 4-4-1996. The appellant having produced the said document, a duty is cast on him to explain the source from which he obtained the said copy and in what circumstances he  could obtain the same. This is all the more so, since reference has been made in the affidavit of urgency dated 14-6-1996 to the said document. Counsel for the appellant declined to disclose the source from where he obtained a copy of the said document. On the other hand, he vehemently stated that this Court should call upon the Registrar of the Patna High Court to explain and it is no part of his duty to explain as to how he obtained a copy of the document. To say the least, we are surprised at the attitude of the appellant's counsel in totally refusing to disclose the source from which the appellant obtained a copy of the document. In our opinion, the appellant and his counsel owe a duty to this Court to



disclose the source or circumstances under which the said document dated 4-4-1996 was obtained. We express our strong displeasure at the attitude of the appellant and his counsel in totally refusing to disclose to the Court the manner in which a document filed in court was obtained. For the present, we do not want to say anything further in this matter, but we want to make it clear that the attitude adopted is totally reprehensible and cannot be countenanced by a court of law."

34. Further, there is nothing in the said legal opinion of learned Senior Counsel, Mr. Lalit Kishore, to show that in his opinion that the Company was liable for making such payment. It contains mere reference of a fact that the independent engineers have pointed out that in case of termination of the contract, the concessionaire would be entitled to payment for 602.00 crores.

35. In my view, the question whether a dispute exists for payment of amount will arise only after an amount has been computed explicitly, by either of the parties to an agreement. The entire case of the Company is based on the said opinion of the independent engineers. Further, there is nothing on record to show that there was any agreement between the parties the amount as might be determined by the independent engineers shall be liable to be paid by the parties concerned, without raising any dispute.



36. I am, therefore, of the considered view that this Court, in the present facts and circumstances of the case cannot issue a direction for payment of amount as claimed by the Company in his writ application. Learned single Judge has rightly held that quantification of the amount would require detailed investigation and adduction of evidence. I do not find any valid reason to interfere with the said order of the learned single Judge.

37. Of course, the question of consequent termination payment, as envisaged under Article 37.1.3 of the Concession Agreement, would arise only if termination of the agreement for authority default is held to be justified. Such termination can be held to be justified, if the other side, i.e., the Corporation, in the present case, does not raise any dispute against such termination and specifically accepts that there has been default on its part. Can this Court, in a proceeding under Article 226 of the Constitution of India, conclusively hold, on the basis of affidavits, that the termination notice, dated 20.02.2015, issued by the Company, is beyond the scope of being questioned by the Corporation or any dispute, arising out of the said notice, is beyond the scope of arbitration Article on the ground that default, on the part of the Corporation, is an admitted fact, is question, which is to be kept in mind while adjudicating the

present matter.

38. Provision for reimbursement of additional cost of procuring aggregates from neighbouring States, in the absence of grant of mining lease, within the State of Bihar, was one of the main issues being consistently raised by the Company. It is to be noted that the issue was raised by the Company, in view of the ban on crushing of stones in the State of Bihar. This was never a part of the agreement that the mining lease shall be granted to the Company for execution of the work. Article 12.1(d) of the Concession Agreement provides thus:-

"Prior to commencement of construction works, the Concessionaire shall make its own arrangements for quarrying of materials needed for the Project Highway under and in accordance with the Applicable Laws and Applicable Permits."

(Emphasis is mine)

39. The case of the Company is based on its plea that his bid was conditional and subject to making provision for extra leads for procuring aggregates from the neighbouring States. It is their case that in the review meeting, held on 25.09.2013, where this issue had been raised, the General Manager of the Corporation had given a signal to go ahead with the installation of crushers and procurement of

aggregates from the neighbouring States.

40. There is a letter, dated 26.09.2013, which has been brought on the record by way of Annexure-2 to the writ petition, written by the authorized signatory of the Company, which is said to be containing the minutes of the review meeting, held on 25.09.2013.

41. I have perused Annexure-2 of the writ petition carefully, paragraph No.2 of which refers to allotment of mines, which is being extracted hereinbelow:-

“Allotment of Mines: Shri Vijay Shankar, GM informed that the Government has not taken a decision to allow mining in the State of Bihar and as such, the Concessionaire has to submitted that the allotment of mines at Sasaram is a precondition before signing the Concession Agreement. The procurement of the aggregate from neighbouring States has got material financial impact of more than Rs. 400 Cr. These has been vetted by the independent Engineer vide their letter No. ICT/IE/BSRDC/IND/NH-30/TL/416 dated 31.05.2013. Procuring aggregate from neighbouring States will necessitate reimbursement of extra lead charges, Entry Tax, Toll Tax etc. as brought out in the earlier correspondence. It is imperative to note that no tangible progress can be achieved without mining and crushing, even if Appointed Date is fixed.



Shri Vijay Shankar, GM wanted to know the view of Shri A.D. Nariain, Independent Engineer on this issue. Shri A.D. Narain stated that ICT have already obtained legal opinion and have also recommended reimbursement of additional cost vide their letter dated 31.05.2013. He further stated that even otherwise, the Concessionaire is entitled for reimbursement of additional cost on account of subsequent legislation.

In view of above, Shri Vijay Shankar, GM requested the Concessionaire to go ahead with installation of crusher and procurement of aggregates from the neighbouring States. Shri Vijay Shankar, GM requested the DGM (CPIU) Shri R.P. Singh and Shri Mahesh Prasad, DGM (PPP) to initiate a note to the Government appraising financial implication.”

42. I have my reservations as to whether the said communication can be said to be containing minutes of the meeting held on 25.09.2013.

43. This is to be noted that the case of the Company that it was given a nod to the General Manager of the Corporation to go ahead, with the installation of crushers and procurement of aggregates, is based on the said communication, dated 26.09.2013. Though, there is denial in the counter affidavit that there was any such assurance by the



General Manager of the Corporation in a meeting held on 25.09.2013, it has been averred in the counter affidavit, filed on behalf of the Corporation, that proceedings of the meeting, as represented by the Company, cannot, under any circumstance, alter specific intent of the Concession Agreement, which clearly specified that exclusive responsibility of procuring input material was that of the Company. The minutes of the said meeting have not been brought on the record. What has been described in the said letter, dated 26.09.2013, to be the minutes of the meeting, cannot be said to be so, as it does not bear the signature of the persons, who had participated in the said meeting. The said document, in my view, cannot lay the basis for coming to a definite conclusion that the Corporation had given any assurance of making provisions for reimbursement of additional cost to be incurred on account of procurement of aggregates from the neighbouring States. At the maximum, this could be a dispute, which could be raised before the forum, prescribed under the agreement.

44. Upon perusal of the documents, which are there on the record, I notice that the minutes of different meetings, held in the office of the Corporation and attended by the officials and representatives of the Company and independent engineer, had been duly prepared and signed by

the persons present. There is no clue, as to why there is no formal minute of the meeting, said to have been held on 25.09.2013, in which the Company was asked to go ahead, as has been noted above.

45. From the minutes of the review meeting, held on 12.05.2014, the Company again raised an issue of payment of extra lead of aggregates. The description of the said meeting, in relation to the concerned item, reads thus:-

"Payment of extra lead of aggregate: The Concessionaire raised the issue of payment of extra lead of aggregate. GM (PPP) reiterated that same is under process and it is a policy matter. The decision shall be taken as per the rules based on CA."

46. Evidently thus, upon an issue having been raised by the Company, it was made clear that the decision shall be taken as per the rules based on CA (Concession Agreement). It does not contain any assurance that the decision shall be taken *de hors* to the terms of Concession Agreement.

47. The dispute, on the question of termination of Concession Agreement, is evident from the correspondence made between the Corporation and the Company. On 04.02.2015, notice of intent to terminate the Concession Agreement, in terms of Article 37.2.2 of the Concession



Agreement, was issued by the Company. Within 15 days of the said notice, the Corporation, on 16.02.2015, responded to the said notice, as contemplated under Article 37.2.2 of the Concession Agreement. In the said communication, dated 16.02.2015, the Corporation dealt with all the points raised by the Company for issuing the notice of intent of termination of agreement. On the question of non-payment of additional cost incurred by the Company for procurement of aggregates, it was pointed out firstly that it was the responsibility of the Company, in terms of Article 12.1(d) of the Concession Agreement. Secondly, it was mentioned as follows:-

“From the above, it is inferred beyond doubt that you shall make all arrangements for procurement of aggregates or any other material needed for the Project Highway. Thus your alleged claim is contrary to the Concession Agreement and denied. Be that as it may, it is informed that the Govt. of Bihar has vide Notification no. 3085/M, Patna dated 11.08.2014 opened the mining lease for procurement of aggregates. The Govt. of Bihar has already allowed the procurement of aggregates in the month of August but you have not made any efforts for procurement of aggregates till now. In such background, your contention to claim additional cost from the BSRDCL is clearly manifests of your intention to wriggle out of



the Concession Agreement. Concessionaire is advised to immediately start the execution of works which are virtually suspended/ abandoned by the Concessionaire. This is in fact an admission by the Concessionaire of its inability to comply with specific contractual obligations.”

48. It was specifically mentioned in the said letter, dated 16.02.2015, that the notice of intent of termination of agreement was illegal and invalid. The Company was asked to withdraw his notices, dated 09.08.2014 and 04.02.2015.

49. Upon perusal of the notice of intent to terminate the Concession Agreement, dated 04.02.2015, and representation, dated 16.02.2015, I find that there are disputed questions of facts with respect to alleged default by the Corporation, which could have given the Company a valid right to invoke Article 44 of the Concession Agreement.

50. An argument has been advanced on behalf of the Company that after issuance of notice, dated 04.02.2015, the Corporation, through a letter, dated 07.02.2015, had asked the Company to submit the details of all material, stores, plants & machineries and equipments available at the site of the Authority, pursuant to Article 37.4(b) of the Concession Agreement and, accordingly, the Company waived the right of representation, under Article 37.2.2 of the

Concession Agreement. The said contention is fit to be rejected. Article 37.4 of the Concession Agreement provides for the rights and obligations of the Authority upon termination for any reason whatsoever.

51. Article 37.4 provides that upon termination, the Corporation will be deemed to have been in possession and control of the Project Highway forthwith. This is a deeming Article and operates automatically once the Concession Agreement stands terminated. Article 37.4(b) further provides for taking possession and control of all materials, stores, implements, construction plants and equipments on or about the site. This provision contemplates taking actual physical possession and control of the Articles, as mentioned above. Issuance of letter, dated 07.02.2015, does not amount to invoking Article 37.4(b) of the Concession Agreement. Through said letter, the Corporation merely sought for the information and details of all materials, stores, construction plants and equipments on or above the site, so that, if needed, possession of the same can be taken over. It will, in no circumstance, amount to waiving right of representation within 15 days of issuance of termination notice, dated 04.02.2015. This is apparent from the fact that within 15 days of the said notice, the Corporation filed its representation, raising the dispute, through letter, dated

16.02.2015.

52. In such circumstance, it cannot be held that there was no dispute between the parties on the question of default on the part of the Corporation, leading to issuance of termination notice, invoking Article 37.2.2 of the Concession Agreement. It cannot be said, in the facts and circumstances and on the basis of materials available on the record, that there was no scope for the Corporation to raise any dispute against termination of Concession Agreement since the facts are not admitted. In my view, in the given facts and circumstances of the case, the learned Single Judge rightly gave the Corporation and the State of Bihar an opportunity to question the validity of the termination notice, issued by the Company.

53. Situated thus, in my considered view, it cannot be held that there is no dispute required to be resolved, invoking Article 44 of the Concession Agreement. The definition of dispute is wide, as given in Article 44 of the Concession Agreement, which can be seen from Article 44.1.1 of the Concession Agreement and it means "any dispute, difference or controversy of whatever nature howsoever arising under or out of or in relation to the agreement". For quick reference, the said Article 44.1.1. of the Concession Agreement is being extracted hereinbelow:-

"Any dispute, difference or



controversy of whatever nature howsoever arising under or out of or in relation to this Agreement (including its interpretation) between the Parties, and so notified in writing by either Party to the other Party (the "**Dispute**") shall, in the first instance, be attempted to be resolved amicably in accordance with the conciliation procedure set forth in Article 44.2."

54. In the present matter there exists dispute/difference/controversy between the parties worth being resolved, in accordance with Article 44 of the Concession Agreement, through the process of conciliation or arbitration, as the case may be. The learned Single Judge, in the judgment and order, under appeal, has set aside the termination notice, issued by the Corporation, on the ground that the Company had already terminated the Concession Agreement and it was not within the jurisdiction of the Corporation to decide that termination of agreement by the Company, alleging default of the Authority, was not valid. If the Corporation had any grievance against the said termination notice, issued by the Company, the same could have been raised before the forum, prescribed under the Agreement, and could not have been unilateral decision to treat the termination notice of the Company to be not acceptable. The said view, adopted by learned Single Judge,

in my opinion, is appropriate in the present facts and circumstances of the case.

55. The question of interference by the High Court in exercise of power, under Article 226 of the Constitution of India, in contractual matters, has been raised on umpteen occasions and has been answered. This is settled now that a settlement of facts, based on the contents of the affidavits, in a proceeding under Article 226 of the Constitution of India, is impermissible in dealing with the contractual disputes, though there is no bar on the High Court. Reference in this regard made to a recent Supreme Court decision, in case of ***State of Kerala and Others vs. M.K. Jose***, reported in **(2015) 9 SCC 433**, paragraph 13 of which reads as thus:-

"13. A writ court should ordinarily not entertain a writ petition, if there is a breach of contract involving disputed questions of fact. The present case clearly indicates that the factual disputes are involved."

56. The said decision, in case of ***State of Kerala*** (supra) has been referred to in almost all Supreme Courts' decisions, on the issue, and the Supreme Court finally held in paragraphs 20 and 21 of the judgment in following terms:-

"20. We have referred to the aforesaid authorities to highlight under what circumstances in respect of



contractual claim or challenge to violation of contract can be entertained by a writ court. It depends upon facts of each case. The issue that had arisen in *ABL International* was that an instrumentality of a State was placing a different construction on the Articles of the contract of insurance and the insured was interpreting the contract differently. The Court thought it apt merely because something is disputed by the insurer, it should not enter into the realm of disputed questions of fact. In fact, there was no disputed question of fact, but it required interpretation of the terms of the contract of insurance. Similarly, if the materials that come on record from which it is clearly evincible, the writ court may exercise the power of judicial review but, a pregnant one, in the case at hand, the High Court has appointed a Commission to collect the evidence, accepted the same without calling for objections from the respondent and quashed the order of termination of contract.

21. The procedure adopted by the High Court, if we permit ourselves to say so, is quite unknown to exercise of powers under Article 226 in a contractual matter. We can well appreciate a Committee being appointed in a public interest litigation to assist the Court or to find out certain facts. Such an exercise is meant for public good and in public interest. For example, when



an issue arises whether in a particular State there are toilets for school children and there is an assertion by the State that there are good toilets, definitely the Court can appoint a Committee to verify the same. It is because the lis is not adversarial in nature. The same principle cannot be taken recourse to in respect of a contractual controversy. It is also surpassing that the respondent, which is nothing but abuse of the process of extraordinary jurisdiction of the High Court. The Appellate Bench should have applied more restraint and proceeded in accordance with law instead of making a roving enquiry. Such a step is impermissible and by no stretch of imagination subserves any public interest.”

57. There cannot be any doubt that mandamus is not a writ of right and is not granted of course but at the discretion of the Court to which an application seeking issuance of mandamus is made. It is equally well settled that a High Court exercising power under Article 226 of the Constitution of India is to be slow in issuing a writ of mandamus if the party concerned has an alternative remedy available. Existence of an alternative remedy, though, is not a bar for the High Court to exercise jurisdiction under Article 226 of the Constitution of India, the High Court may in its discretion entertain claim of a party despite availability of

alternative remedy, depending on facts and circumstances of the case. At the same time, existence of an alternative remedy is a good ground for refusing to exercise discretion under Article 226 of the Constitution of India.

58. In case of State *of Bihar. Vs. Jain Plastics and Chemicals Limited* reported in **(2002)1 SCC 216**, the Supreme Court held in paragraph 3 as follows:-

"It is settled law that when an alternative and equally efficacious remedy is open to the litigant, he should be required to pursue that remedy and not invoke the writ jurisdiction of the High Court. Equally, the existence of alternative remedy does not affect the jurisdiction of the Court to issue writ, but ordinarily that would be a good ground in refusing to exercise the discretion under Article 226."

59. The Supreme Court further, held in the said case in paragraph 7 that non-interference in contractual matter while exercising jurisdiction under Article 226 of the Constitution of India is the general rule and held as follows:-

"7..... 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 a 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 a properly instituted civil suit rather than by a court exercising prerogative of issuing writs."

60. In my opinion, therefore, in the facts and circumstances of the case, it would not be safe to decide the dispute between the parties on the basis of affidavits and counter affidavits in the present proceeding of appeal under the Letters Patent of the High Court more particularly when learned single Judge by the order under appeal, has refused to exercise discretion and has relegated the dispute to the forum of arbitration as contemplated in the contract itself.

61. This is trite that in an *intra* Court appeal of the present nature, the Court of appeal should not interfere with the refusal by learned single Judge to exercise discretion under Article 226 of the Constitution of India on the ground of availability of an alternative remedy of arbitration.

Entertainment of Letters Patent Appeal is discretionary and unless there exist cogent reasons, the Division Bench would not interfere with the reasonings assigned by the learned single Judge.

62. Reference can be made in this regard to a Supreme Court decision in case of ***Asha Devi Vs. Dukhi Sao*** reported in **(1974) 2) SCC 492**.

63. I do not find that any cogent reason which exists for interfering with the decision of the learned single Judge.

64. A submission was advanced that once learned single Judge has held the writ application to be maintainable, he ought not to have relegated the appellant and the parties to the forum of arbitration. According to Mr. Giri, learned Senior Counsel appearing on behalf of the appellant, the learned single Judge ought to have decided the dispute on the basis of admitted facts and materials on record, after having held the writ application to be maintainable. I do not find any force in such submission. Maintainability of an application and grant of relief sought for in the said application are two different aspects. The writ petition filed by the Company could not have been held to be not maintainable in the absence of any bar against filing of such application. Existence of an alternative remedy is not a bar in invoking writ



jurisdiction of the High Court under Article 226 of the Constitution of India. Learned single Judge accordingly, held writ application to be maintainable, despite there being alternative remedy of arbitration. But while considering the relief sought for, learned single Judge refused to decide the question of quantum consequent termination payment as well as justification of termination notice for authority's default issued by the appellant-Company. Learned single Judge rightly observed that the dispute as to whether the said notice issued by the Company was valid or not could not have been unilaterally decided by the Corporation which was itself a party to the contract. Learned single Judge, therefore, rightly held that the termination notice for concessionaire default by the Corporation treating the termination notice for authorities default as invalid, was not proper and the Corporation, for that purpose could have invoked the arbitration Article under Article 44 of the agreement. It is, however, made clear that no observation made by learned single Judge in the order under appeal shall be treated as finding, implied or explicit, on correctness/validity or justifiability of the termination notices issued by the Company.

65. In the background of the facts, as discussed above, and settled legal position, I do not find any reason to interfere with the judgment and order, under appeal, passed

by the learned single Judge. The appeal, preferred by the Company, being L.P.A. No.2158 of 2015, has no merit and is, accordingly, dismissed.

66. Since I have come to a conclusion that learned single Judge has rightly quashed the termination notices, issued by the Corporation, dated 16.05.2015 and 10.06.2015, the appeals, preferred by the Corporation and the State of Bihar, being L.P.A. No. 2084 of 2015 and L.P.A. No.2131 of 2015, have also no merit and are, accordingly, dismissed.

67. Before I part with this judgment, I reiterate my observation that the conduct of the appellant of bringing on record legal opinion tendered by a learned senior counsel of this Court to the Corporation is highly reprehensible. Considering the said conduct of the appellant, I am inclined to impose exemplary cost on the appellant, so that it may have a deterrent effect. Accordingly, I impose a cost of Rs. 5,00,000/- to be paid by the appellant to the Corporation within a period of one month from today.

68. In terms of the above observations and directions, these appeals shall stand disposed of.

(Chakradhari Sharan Singh, J.)

(Per : HONOURABLE THE ACTING CHIEF JUSTICE)

In ***Ramana Dayaram Shetty v. International Airport Authority of India***, (1979) 3 SCC 489, the Supreme Court, while dealing with the diversification of State activities, over the years, observed that today, with tremendous expansion of welfare and social service functions, increasing control of material and economic resources and large scale assumption of industrial and commercial activities by the State, the power of the executive Government to affect the lives of the people is steadily growing. The attainment of socio-economic justice being a conscious end of State policy, there is a vast and inevitable increase in the frequency with which ordinary citizens come into relationship of direct encounter with State power-holders. This renders it necessary to structure and restrict the power of the executive Government so as to prevent its arbitrary application or exercise. Whatever be the concept of the Rule of Law, whether it be the meaning given by Dicey in his "*The Law of the Constitution*" or the definition given by Hayek in his "*Road to Serfdom*" and "*Constitution of Liberty*" or the exposition set forth by Harry Jones in his "*The Rule of Law and the Welfare State*", there is, as pointed out by Mathew, J., in his article on "*The Welfare State, Rule of Law and Natural Justice*" in "*Democracy, Equality and Freedom*" "substantial agreement in juristic thought that the great purpose of the rule

of law notion is the protection of the individual against arbitrary exercise of power, wherever it is found". ***It is indeed unthinkable that in a democracy governed by the rule of law the executive Government or any of its officers should possess arbitrary power over the interests of the individual. Every action of the executive Government must be informed with reason and should be free from arbitrariness. That is the very essence of the rule of law and its bare minimal requirement. And to the application of this principle it makes no difference whether the exercise of the power involves affectation of some right or denial of some privilege.***

(Emphasis supplied)

70. The present batch of appeals raises issues of great public importance, wherein the actions of the respondents, the Instrumentalities of State Government of Bihar, have been alleged to be arbitrary and unreasonable and, therefore, their impugned actions are violative of Article 14 of the Constitution of India.

71. The present appeals have been preferred, under Clause 10 Appendix-E of the Patna High Court Rules, against the judgment and order of a learned single Judge of this Court in CWJC No. 7259 of 2015, whereby and whereunder the learned single Judge has disposed of the writ petition with

certain directions and observations that have been put to challenge by both the sides to the litigation.

72. Considering the fact that these appeals have been filed against the same judgment and since common questions of law arise herein, these appeals have been heard together and are disposed of by this common judgment and order.

73. Before dealing with the rival submissions, made on behalf of the parties, on the merits of these appeals, a brief narration of the facts, leading to the appeals, would be necessary.

Facts in LPA No. 2158 of 2015: -

74. The appellant, in LPA No. 2158 of 2015, filed, as petitioner, a writ petition, giving rise to CWJC No. 7259/2015, invoking Article 226 of Constitution of India praying therein for certain reliefs, the principal, among them, being to issue a writ, in the nature of *mandamus*, commanding the respondent authorities to pay to the appellant company *Termination Payment* amounting to Rs 610,52,72,733 (Rupees Six hundred ten crores fifty two lacs seventy two thousand even hundred thirty three only) with interest at contractual rate on the ground that respondent authorities have acted illegally, arbitrarily and without jurisdiction.

75. The writ petitioner is, admittedly, a Limited Company registered under the Companies Act, 1956, having



been created as a special purpose vehicle by its parent company, Atlanta Limited. It is further stated that pursuant to a notice/request for qualification by the respondents, dated 16.7.2010, for the construction, operation and maintenance of National Highway No. 30 in the State of Bihar, including the section from 0.000 to km 116.760 on the Mohania-Ara section of National Highway No. 30, by four laning on a Design, Build, Finance, Operate and Transfer (DBFOT) basis, Atlanta Limited was shortlisted and, in due course, a Concession Agreement was entered into between the appellant company and the Managing Director, Bihar State Road Transport Corporation, Patna, on 10.09.2010.

76. After submission of its bid, the writ petitioner made demands for a Mining lease for stone quarries to be made available to it inasmuch as the bid had been submitted keeping in mind the facilities of mining aggregates from enumerated quarries in the possession of the Government of Bihar and it was duly indicated that in the absence of the mining lease, it would be practically impossible for it to execute the project. It was only upon the expectation of grant of the Mining lease and on the insistence of the respondents that the validity of the original bid was extended by the writ petitioner from time to time. After extension of the validity of the bid, on four occasions, a Concession Agreement was finally entered into on



10.9.2011. On the other hand, the issue relating to provision of aggregates, through mining leases, continued to be subject matter of discussion. The matter was also referred to an Independent Engineer, chosen and appointed by the respondents, who recommended, by letter, dated 31.05.2013, for either allotment of mines in favour of the writ petitioner or for re-imbursement of additional cost of procuring aggregates from neighbouring States estimated at Rs 410.13 crores to the writ petitioner. However, in the meeting, dated 05.08.2014, between the writ petitioner and the respondent authorities, it was observed that the writ petitioner's claim, with regard to extra lead aggregates, was not sustainable and this event led the writ petitioner to serve a notice upon the respondent authorities, in terms of Clause 37.2 of the Agreement, asking the respondent authorities to cure the *defaults* within the stipulated period of 90 days. Pursuant to the notice so served under Clause 37.2 by the writ petitioner, the respondents, in a meeting, dated 06.11.2014, agreed to cure the *defaults* and the Chief General Manager of the respondent Corporation sent a letter, dated 21.11.2014, addressed to the Principal Secretary, Road Construction Department, Government of Bihar, seeking, in principle, approval for payment of extra cost of carriage of stone aggregates amounting to the tune of Rs. 435 crores to the writ petitioner. Despite correspondences and meetings, the



issue, relating to re-imbursement of cost of aggregates, could not be resolved and considering this failure, on the part of the respondents, to cure the *defaults*, the writ petitioner, on 04.02.2015, issued a notice of its intent to terminate the Concession Agreement in terms of Clause 27.2.2 of the Agreement. Acting upon such notice, the respondent Corporation, vide letter, dated 07.02.2015, directed the writ petitioner to submit details of all materials, etc., for the purpose of Clause 37.4 (b). The respondents, according to the writ petitioner, kept *dilly dallying* the matter in order to avoid their liability compelling the appellant to issue *termination notice*, dated 20.02.2015, thereby terminating the Concession Agreement, dated 10.09.2011, and demanding *termination payment* of an amount of Rs.610,52,72,733 with interest at contractual rate.

77. Some further developments took place after the *termination notice* was issued by the writ petitioner. The respondent No.2, in his letter, dated 23.03.2015, recommended the case of the writ petitioner to the Infrastructure Development Authority for obtaining the approval of the Committee presided over by the Secretary, Road Construction Corporation, Government of Bihar, for payment of extra cost of carriage of stone aggregates to the writ petitioner. It was also observed therein that the writ petitioner had already terminated



the Concession Agreement, on 20.02.2015, in terms of Clause 37.2.2 of the Concession Agreement, which, however, had been termed illegal and not accepted by the respondent Corporation and, accordingly, the writ petitioner was requested to resume the work. The writ petitioner, then, approached this Court by filing the writ petition.

78. During the pendency of the writ petition, the respondent Corporation issued a notice, on 16.05.2015, purportedly in terms of Clause 37.1.2, for termination of the agreement, which, later on, culminated into purported termination of the Concession Agreement by the respondent Corporation in terms of its letter No. 1382, dated 10.06.2015.

79. After the *termination notice* was issued by the respondents, the writ petitioner filed I. A. No. 4702 of 2018 for amendment of the prayer portion in the writ petition and seeking quashment of the letter No. 1180, dated 16.05.2015, as well as the letter No. 1382, dated 10.06.2015. Upon hearing both sides, I. A. 4702 of 2018 was allowed.

80. The respondents contested the writ petition on the ground of maintainability. It was argued that the subject-matter of the writ petition was based on contractual obligations and, hence, a writ would not lie.

81. Upon hearing the rival submissions, the learned single Judge held, in the judgment, dated 22.09.2015, the writ

petition to be maintainable and this finding forms the subject of LPA No. 2084 of 2015, filed by the respondent Corporation, which is being dealt with hereinafter.

82. The writ petition was disposed of by judgment, dated 22.09.2015, whereby the learned single Judge gave liberty to the respondents to advert to provisions of Dispute Resolution Agreement contained in Article 44 of the agreement if the respondents were aggrieved by the *termination notice* issued by the writ petitioner. The learned single Judge also set aside the *termination notice*, dated 10.06.2015, issued by the respondents, but granted liberty to them (respondents) to take recourse to Article 44 of the Agreement.

83. The appellant (i.e., the writ petitioner) has also challenged, in its appeal, some observations of the learned single Judge, particularly, those contained in paragraph 13 and paragraph 14 of the judgment, whereby the dispute has been allowed to be referred to arbitration even though it was specifically held by the learned single Judge that the *termination notice*, issued by the appellant, was valid. It may also be pointed out here that the learned single Judge has also set aside the Termination Notice, dated 10.06.2015, issued by the respondents holding the same to have been issued only for the purpose of avoiding the consequences of having to make *termination payment* to the writ petitioner herein.

Facts in LPA No.2084 of 2015: -

84. LPA No. 2084 of 2015 has been preferred by the respondent Bihar State Road Construction Corporation, who are aggrieved by the decision of the learned single Judge negating the plea, raised by them, that the subject matter of the dispute is covered by Arbitration Clause as contained in Article 44 of the *Concession Agreement* and, hence, no relief can be granted in exercise of writ jurisdiction. The respondent Corporation has also challenged the decision of learned single Judge in setting aside their termination notice, dated 10.06.2015, as illegal and holding that the *termination notice*, dated 10.06.2015, was issued only with the intent to avoid the *termination payment* to the writ petitioner.

Facts in LPA No. 2131 of 2015

85. LPA No. 2131 of 2015 has been preferred by the respondent-State of Bihar, who, too, are aggrieved by the judgment and order, under appeal, of the learned single Judge and have sought to challenge the same on identical grounds as has been sought to be raised by the respondent-Corporation.

86. I have heard the submissions advanced by Mr. Y.V. Giri, learned Senior Counsel, appearing for the appellants in LPA No. 2158 of 2015, and Mr. Lalit Kishore, learned Principal Additional. Advocate General, appearing for the appellants in LPA No. 2084 of 2015 and LPA No. 2131 of 2015.



87. Before I proceed further, I may point out that in order to maintain clarity, the parties to the three appeals are being described hereinafter in the same manner as they stood in the writ petition, which has given rise to the present set of appeals. Consequently, 'the writ petitioner' is being referred to as '*the writ petitioner*', 'the respondent Corporation' is being referred to as '*the respondent Corporation*' and 'the State respondents' are being referred to as '*the State respondents*'.

WHETHER THE WRIT PETITION WAS HEARD ONLY ON A PRELIMINARY POINT: -

88. It has been argued by the learned Principal Additional Advocate General that in view of the Arbitration Clause, the writ petition was heard only on the point of maintainability of the writ petition. However, on perusal of the judgment of the learned single Judge, I do not find any force in the submissions of the learned Principal Additional Advocate General as the learned single Judge has taken into account all factors, including facts and documents, before arriving at the conclusions, which were reached. Hence, the argument, on this count needs to be rejected and is accordingly rejected.

MEANING OF THE EXPRESSION "DISPUTE" VIS-À-VIS ARBITRATION CLAUSE: -

89. The learned Principal Additional Advocate General invited the attention of this Court to Article 44 of the

Concession Agreement and argued that in view of the specific clause in the Concession Agreement that all 'disputes' will be referred to arbitration, the exercise of writ jurisdiction was not tenable.

90. In order to appreciate the above submissions, Article 44 is being reproduced hereinbelow for reference:

"44.1 Dispute Resolution

44.1.1 Any dispute difference or controversy of whatsoever nature howsoever arising under or out of or in relation to this Agreement (including its interpretation) between the parties and so notified in writing by either Party to the other party shall in the first instances be attempted to be resolved amicably in accordance with the conciliation procedure set forth in Clause 44. 2.

44.1.2 The Parties agree to use their best efforts for resolving all Disputes arising under or in 'respect of this Agreement promptly, equitably and in good faith, and further agree to provide each other with reasonable access during normal business hours to all non-privileged records, information and data pertaining to any dispute.

44.2 Conciliation

In the event of any Dispute between the Parties either party may call upon the Independent Engineer to mediate and assist the Parties in arriving at an amicable settlement thereof. Failing mediation by the Independent Engineer to without the intervention of the Independent Engineer either party may require such dispute to be referred to the Chairman of the Authority and the Chairman of the



Board of Directors of the Concessionaire for amicable settlement and upon such reference the said persons shall meet no later than 7 days from the date of reference to discuss and attempt to amicably resolve the dispute. If such meeting does not take place within the 7 days period or the Dispute is not amicably settled within 15 days of the meeting or the Dispute is not resolved as evidenced by the signing of written terms of the settlement within 30 days of the notice in writing referred to in Clause 44.1.1 or such longer period as maybe mutually agreed by the parties either party may refer the Dispute to arbitration in accordance with the provisions of Clause 44.3

44.3 Arbitration

Any dispute which is not resolved amicably by conciliation as provided in Clause 44.2 shall be finally decided by reference to Bihar Arbitral Tribunal in accordance with Bihar Public Works Contracts Disputes Arbitration Tribunal Act, 2008 Rules framed thereunder or procedure prescribed by the Bihar Arbitral Tribunal. The award of Bihar Arbitral tribunal shall be final and binding on the parties.

44.4. Adjudication by Regulatory Authority or Commission.

Deleted."

91. It is the submission of the learned Principal Additional Advocate General that in view of Article 44 of the Agreement, the only remedy available to the writ petitioner, for redressal of its grievances, is to approach the Tribunal constituted under the Bihar Public Works Contracts Disputes

Arbitration Tribunal Act, 2008.

92. In order to appreciate the submissions of the learned Principal Additional Advocate General, it would be necessary to advert to the relevant provisions of the Bihar Public Works Contracts Disputes Arbitration Tribunal Act, 2008.

93. Section 2 of the Bihar Public Works Contracts Disputes Arbitration Tribunal Act, 2008, deals with definitions and Section 2(b) defines "Arbitration Clause" to mean a clause in the works contract to submit *present or future differences* to arbitration. Again, Section 2 (e) defines "*Dispute*" to mean any *difference* relating to any claim arising out of the execution or non-execution of the whole or part of a contract for works or services or both including the act of rescinding the contract.

94. It would be seen from a reading of Section 2 (b) and 2 (e) of the Bihar Public Works Contracts Disputes Arbitration Tribunal Act, 2008, that the condition precedent, for assumption of jurisdiction by the Arbitral Tribunal, is existence of *differences*. Even though the expression "*dispute*" has been defined in the Bihar Public Works Contracts Disputes Arbitration Tribunal Act, 2008, yet the meaning of the "*dispute*" is *differences* relating to any claim arising out of the execution or non-execution of the whole or part of a contract for works or services or both including the rescinding thereof.

95. In other words, no occasion would arise for the



Arbitral Tribunal to adjudicate if no *difference* exists on an issue. Hence, in the facts of this case, the matter could have been decided by the Bihar Public Works Contracts Disputes Arbitration Tribunal Act, 2008, only and only if the writ petition, when read in its entirety, revealed that a *difference* existed between the writ petitioner and the respondents over any claim arising out of the execution or non-execution of the whole or part of a contract for works or services or both including the act of rescission thereof. Conversely, if the averments in the writ petition, when read in its entirety, and the circumstances, preceding the writ petition, show that there existed no *difference* with respect to any issue or claim made by any party, the condition precedent, for referring the matter to the Bihar Public Works Contracts Disputes Arbitration Tribunal Act, 2008, would not be treated to have been satisfied and, in such a case, question of resorting to arbitration by the Bihar Public Works Contracts Disputes Arbitration Tribunal Act, 2008, would naturally not arise.

96. In the case of ***P.K. Ramaiah & Co. v. NTPC, Supp (3)SCC 126***, the Supreme Court had pointed out and held that if there is an arbitrable dispute, it shall be referred to the named arbitrator; but there must exist a subsisting dispute.

97. Similarly, therefore, if it has to be held that the writ petition, in the present case, is amenable to arbitration, it

would not be possible to do so unless I am able to hold that there was a *dispute*, which was real and subsisting and that the plea of dispute has not been raised by the respondents merely as a clog to resist the writ petition by camouflaging the issue.

98. In ***P.K. Ramaiah*** (supra), the Supreme Court considered the ambit of accord and satisfaction by the parties, voluntarily entered into and disputation raised thereunder. The Supreme Court held as follows;

"8. Admittedly the full and final satisfaction was acknowledged by a receipt in writing and the amount was received unconditionally. Thus, there is accord and satisfaction by final settlement of the claims. The subsequent allegation of coercion is an afterthought and a device to get over the settlement of the dispute, acceptance of the payment and receipt voluntarily given.... Having acknowledged the settlement and also accepted measurements and having received the amount in full and final settlement of the claim, there is accord and satisfaction. There is no existing arbitrable dispute for reference to the arbitration."

99. A similar view was expressed in the case of ***Nathani Steels Ltd. v. Associated Constructions, 1995 Supp (3) SCC 324***, wherein the Supreme Court held that once the parties have arrived at a settlement in respect of any *dispute* or *difference* arising under a contract and that the *dispute* or the *difference* is amicably settled by way of a final



settlement by and between the parties, then, unless that settlement is set aside in proper proceedings, it cannot lie in the mouth of one of the parties to the settlement to spurn it on the ground that it was a mistake and proceed to invoke the Arbitration clause. If this is permitted, the sanctity of contract would be wholly lost and it would be open to one party to take the benefit under the settlement and, then, question the same on the ground of mistake without having the settlement set aside.

100. The relevant paragraph of ***Nathani Steels*** (supra), wherein the aforesaid observations were made, is being reproduced as follows;

"3. ... Even otherwise we feel that once the parties have arrived at a settlement in respect of any dispute or difference arising under a contract and that dispute or the difference is amicably settled by way of a final settlement by and between the parties, unless that settlement is set aside in proper proceedings, it cannot lie in the mouth of one of the parties to the settlement to spurn it on the ground that it was a mistake and proceed to invoke the Arbitration clause. If this is permitted the sanctity of contract, the settlement also being a contract, would be wholly lost and it would be open to one party to take the benefit under the settlement and then to question the same on the ground of mistake without having the settlement set aside...."



101. Again, in the case of ***Ramesh Kumar v. Furze Ram***, reported in **(2011) 8 SCC 613**, the Supreme Court held that there can be a reference to arbitration only if there is a *dispute* and there is an agreement to settle the dispute by arbitration. If the parties had already settled the disputes, there was no *dispute* between the parties that could be referred to arbitration. Is this the position in the present case too? This is the question of paramount importance.

102. The analysis of the cases, referred to above, clearly show that condition precedent for referring a *dispute* to arbitration is the existence of *differences* on any claim. A settlement of claim would mean that the *difference* has ceased to exist and, hence, no question would arise for referral of the difference to arbitration. In other words, arbitration, being an adjudicatory process, must be preceded by an existing *dispute*, which requires adjudication. In the absence of an issue, which needs adjudication, question of arbitration would never arise.

103. Mustill and Boyd's *The Law and Practice of Commercial Arbitration in England*, (1989 Ed), observes that a "*dispute*" must be construed by reference to the subject matter of the contract in which they are included. Thus, only by a reference to facts of the case, it can be said whether *dispute* exists or not.

104. It would be apposite to reflect herein on one of



the arguments made by the learned Counsel for the writ petitioner. It has been argued that the respondents have been deliberately confusing the expression "*default*" with the expression "*dispute*". According to the learned Counsel for the writ petitioner, the expression "*default*" has been specifically dealt with in Article 37 of the Concession Agreement and some of the *defaults*, pointed out by the writ petitioner, to the respondents, were never denied by the respondents and, hence, those *defaults* never attained the shape of a *dispute* within the meaning of Article 44 of the Agreement.

105. "*Dispute*", as has been discussed hereinbefore, would mean, in simple expression, *difference* over an issue. "*Default*", on the other hand, is something, which means omission of that which a man ought to do. (Per **Dhan Singh Ramkrishna Chaudhari v. Laxminarayan Ramkishan**, reported in **(1974) 2 SCC 293**).

106. In order to appreciate the rival submission as to whether a *dispute* existed between the writ petitioner and the respondents, it would be necessary to traverse some aspects of the Concession Agreement and the written correspondences.

107. Article 37 of the Concession Agreement deals with the topic of *Termination*. It would appear that termination of the Concession Agreement is possible from either ends, one from the side of the Concessionaire and the other from the side

of the Authority.

108. Clause 37.1 deals with *Concessionaire default* and provides that save as otherwise provided in the Agreement, in the event that any of the *defaults*, as mentioned therein, shall have occurred and the Concessionaire fails to cure the *default* within the cure period set forth or where no cure period is specified, then, within a cure period of 60 days, the Concessionaire shall be deemed to be in *default* of the Agreement and this is known as *Concessionaire default*. Clause 37.1.1 also provides a list of instances, which may be termed as *Concessionaire default*.

109. Clause 37.2, on the other hand, deals with Termination for *Authority default*. It provides that in the event of any of the *default*, specified therein, if the Authority fails to cure such *default* within a period of 90 days or such longer period as has been expressly provided in the Agreement, it shall be termed as *Authority default*.

110. It may be mentioned that Clause 37.1.1, which deals with *Concessionaire default*, lists as many as 23 circumstances, whereunder the Authority can terminate the agreement; whereas Clause 37.2, which deals with *Authority default*, provides a list of only four instances, when the Concessionaire can terminate the agreement.

111. It is apparent from the language of Article 37

that the agreement may be terminated even if one of the *defaults* is not cured.

112. The Agreement also provides a procedure for termination as contained in 37.1.2 and 37.2.2 for *Concessionaire default* and for *Authority default* respectively. The procedure is same for both the parties and the procedure is as follows:

"Upon occurrence of Concessionaire/ Authority default the Concessionaire/Authority shall be entitled to terminate the Agreement by issuing a Termination Notice to the Concessionaire/Authority, as the case may be, provided that before issuing the Termination Notice, the Concessionaire/Authority shall by a notice inform the Concessionaire/Authority of its intention to issue such Termination Notice and grant 15 days to the Concessionaire/Authority to make representation and may after the expiry of such 15 days whether or not it is in receipt of such representation, issue the Termination Notice."

113. It may be pointed out here that so far as *Concessionaire default* is concerned, there is an additional procedure, which is not found in *Authority default*. The Authority can terminate the Agreement only on compliance of Clause 37.1.2, which provides issuance of a copy of termination notice to the Senior Lenders of the Concessionaire. However, in the case of *Authority default*, there is no such requirement.

114. Thus, the process of termination may be

summarized as follows;

- a) Issuance of Notice to cure *defaults* ;
- b) Time period for curing *defaults* elapses;
- c) Notice of Intention to *terminate*;
- d) Consideration of representation, if any, and
- e) Termination of Agreement

115. Along with the process of termination of agreement, it is equally necessary to understand the consequences, which ensue, when Agreement is terminated.

116. Clause 37.3 deals with the Termination Payment. Clause 37.3.1 provides that upon termination on account of *Concessionaire default*, during the operation period, the Authority shall pay to the Concessionaire, by way of *Termination Payment*, an amount equal to 90 per cent of the Debt Due less Insurance Cover provided that if any insurance claims, forming part of the Insurance Cover, are not admitted and paid, then, 80 per cent of such unpaid claims shall be included in the computation of Debt due.

117. Clause 37.3.2 provides that for termination on account of *Authority Default*, the Authority shall pay to the Concessionaire, by way of termination payment, an amount equal to;

- a. Debt due; and
- b. 150 % of the Adjusted Equity



118. Clause 37.4 of the Agreement deals with other rights and obligations of the Authority and it provides, *inter alia*, that upon termination for any reasons whatsoever, the Authority shall be deemed to have taken possession and control of the project Highway forthwith, take possession and control of all materials stores, all implements, construction plants and equipment on or about the site.

119. It would appear from the reading of various clauses, referred to hereinabove, that when there is *default* on the part of any of the parties, the party, suffering from the *default*, must issue a notice to cure the *defaults*. When the notice to cure *default* is issued by a party, the party, called upon to answer the notice, may have three probable options, namely;

- a. *The party, called upon to answer the notice to cure default, may admit the default and cure it. In such an event, no dispute arises;*
- b. *The party, called upon to answer the notice, takes a prevaricating stand. In such an event, no dispute arises, because there is no specific denial of the default and, hence, the party, issuing the notice to cure defect, may proceed to the next stage, that is, issuance of notice of intent to terminate the agreement;*
- c. *The party, called upon to answer the notice to cure, may deny the existence of default. In such an instance, dispute arises.*

120. Thus, in the present set of facts, the question of referring the matter to the Bihar Public Works Contracts Disputes Arbitration Tribunal Act, 2008, would arise only in the third circumstance, because in the first two circumstances, there exist no *difference* or *dispute* within the meaning of the Bihar Public Works Contracts Disputes Arbitration Tribunal Act, 2008, for referral of the matter to the Tribunal.

121. It, now, needs to be determined the circumstances, whereunder the case, set up by the writ petitioner, falls.

122. In order to ascertain whether the *disputes* arose or not, for the purpose of arbitration, it would be necessary to consider all the circumstances preceding the writ petition.

123. The undisputed circumstances, leading to the writ petition, started with a news item, dated 06.06.2011, appearing in *Hindustan Times*, under the caption "**Mining Operations to gradually stop in State**". As the news, regarding ban on mining operations, had a bearing on the proposed *Concession Agreement* between the writ petitioner and the respondents, the writ petitioner wrote a letter, dated 16.06.2011, Annexure 29 to the writ petition, addressed to the respondent No. 7, namely, Chief General Manager, Bihar State Development Corporation Limited, stating therein that while

submitting the bid for construction of four lane highway between *Mohania* to *Ara*, they had envisaged mining of aggregates from the stone quarries in the possession of Government of Bihar. The stone quarries mentioned were as follows:

- a. Plot No. 924 (P)-Rohtas-Aggregates for concrete works*
- b. Plot No. 3(P)-Rohtas-Aggregates for WMM and Bituminous Works*
- c. Plot No. 4084- Kaimur-Aggregates for GSB materials*

124. In the letter (Annexure 29), the writ petitioner mentioned that a mega project of this kind cannot be executed without raw materials like aggregates and it will be practically impossible to execute the project without the mining leases. The writ petitioner also mentioned, in its letter, that importing aggregates from neighbouring States will not only tremendously escalate the project cost, but will also have uncertainty of supplies and inconsistent quality. The writ petitioner categorically stated, in its letter (Annexure 29), that the bid validity would be extended beyond 15th June, 2011, provided the respondent No 3, Bihar State Road Development Corporation Limited, grants mining leases for the three plots mentioned above for a period of 48 months failing which, it

would not be possible to extend the bid validity beyond the period 15.07.2011 in view of spiraling commodity prices like bitumen, steel, cement, etc.

125. After the letter, dated 16.06.2011 (Annexure 29), the writ petitioner issued another letter, dated 17.06.2011 (Annexure 30), addressed to the respondent No. 7, namely, Chief General Manager, Bihar State Development Corporation Limited, raising its concern regarding the availability of mining leases for stone quarrying set out in the letter, dated 16.06.2011 (Annexure 29), and impressed upon the respondent No. 7, namely, Chief General Manager, Bihar State Development Corporation Limited, to resolve the issue before entering into the *Concession Agreement*. It is, now, of immense importance to note that the respondents, thereafter, without advertent to the *conditional bid* by the writ petitioner, accepted the *conditional bid* with the approval of the Cabinet.

126. Pursuant to the requests made, through Annexure 29 and 30 the respondent No. 4, Managing Director, Bihar State Road Development Corporation Limited, wrote a letter, dated 03.11.2011 (Annexure 32), to the Collector, Rohtas, Sasaram, whereby the respondent No. 4 brought to the notice of the Collector that the writ petitioner had been issued letter of award for four laning of *Mohania-Ara* section of NH 30 on Design, Build, Finance, Operate and Transfer (DBFOT) basis



and that the writ petitioner would require approximately 4 million tonnes of aggregate for completion of the project for which a request had been submitted. The respondent No. 4, accordingly, requested the Collector to take necessary action as per the provisions of Mines & Minerals (Development & Regulation) Act, 1957, Rule 36 "Relaxation of rules in special cases".

127. The letter of the respondent No. 4 (Annexure 32), goes to show that acting on the request of the writ petitioner, steps had, indeed, been taken by none other than respondent No.4, who is the Managing Director of the respondent-Corporation, to grant mining leases to the appellant; but as would be seen, later, the mining lease was not granted.

128. Though the days passed by, there was no headway with respect to the request of the writ petitioner for granting mining leases. The respondents, thereafter, sought for the assistance of the Independent Engineers to suggest the course of action to be adopted *vis-a-vis* the grievances of the appellant. It may be pertinent to mention here that an Independent Engineer was appointed by the respondents in terms of the *Concession Agreement* to make necessary comments on issues as and when sought for by the respondents.



129. In the present case, *Intercontinental Consultants and Technocrat Pvt. Ltd* was appointed as Independent Engineer. There was a meeting among the writ petitioner, respondents and the Independent Engineer, on 05.04.2013, to discuss the issues raised by the Concessionaire, the writ petitioner, and accordingly, the respondents directed the Independent Engineer to review the issues raised by the writ petitioner and furnish comments.

130. The Independent Engineer, vide its letter, dated 31.05.2013 (Annexure 3), addressed to the respondent No. 8, namely, General Manager of the respondent-Corporation, laid its comments on the issues raised. The letter (Annexure 3), among others, mentioned that if the writ petitioner is required to bring the aggregates from the identified sources in the districts of Mirzapur, Sonbhadra and Gaya, then, the additional cost, bearing in mind the relevant technical factors, would come to Rs. 410.13 crores. The Independent Engineer impressed upon the respondents to take immediate steps to resolve the issues in the interest of the project.

131. Thereafter, on 25.09.2013 (vide Annexure 2), a review meeting was held in the Conference room of BSRDC in the presence of respondent No. 8, namely, General Manager of the respondent-Corporation, the Independent Engineer, and the representative of the writ petitioner.



132. Among the various issues discussed in the meeting, dated 25.09.2013, the important agenda, having a bearing in the present case, was item No. 2 relating to allotment of mines. It has been recorded in the minutes that the respondent No. 8, namely, General Manager of the respondent-Corporation, had informed in the meeting that the Government had taken a decision not to allow mining in the State of Bihar and, as such, the Concessionaire has to arrange, in the interest of the work, mines outside the State of Bihar. As the minutes reveal, the cost factor, for procurement of aggregates from outside the State of Bihar, was discussed that such a step had got material financial impact of more than Rs 400 cr.

133. The aforementioned minutes further reveal that the respondent No. 8, namely, General Manager of the respondent-Corporation, having discussed the matter with the Independent Engineer, gave a *'go ahead to the writ petitioner with the installation of crusher and procurement of aggregates from the neighboring States'*.

134. The minutes No. 2 (in Annexure 2), being extremely relevant, is reproduced herein;

"Allotment of Mines: *Shri Vijay Shankar, GM informed that the Government has not taken a decision to allow mining in the State of Bihar and as such the Concessionaire has to arrange mines outside the State of Bihar, in the interest of work. Mr. Rajhoo*



Bharot, CMD, submitted that the allotment of mines at Sasaram is a precondition before signing the Concession Agreement. The procurement of the aggregate from the neighbouring States has got material financial impact of more than Rs400 cr. This has been vetted by the Independent Engineer vide their letter no. ICT/ IE/ BSRDC/ IND/ NH-30/ TL/ 416 dated 31.5.2.2013. Procuring aggregate from the neighbouring State will necessitate re-imbursement of extra lead charges, Entry tax, toll tax etc as brought out in the earlier correspondence. It is imperative to note that no tangible progress can be achieved without mining and crushing, even if appointed date is fixed.

Shri Vijay Shankar, GM wanted to know the view of Shri A.D. Narain, Independent Engineer on this issue. Shri A.D. Narain stated that ICT have already obtained legal opinion and have also recommended re-imbursement of additional cost vide their letter dated 31.5.2013. He further stated that even otherwise the Concessionaire is entitled for reimbursement of additional cost on account of subsequent legislation.

*In view of above, **Shri Vijay Shankar, GM requested the Concessionaire to go ahead with the installation of crusher and procurement of aggregates from the neighboring States.** Shri Vijay Shankar, GM requested the DGM (CPIU) Shri R.P. Singh and Shri Mahesh Prasad, DGM (PPP) to initiate a note to the Government appraising financial implication."*

(Emphasis is added)



135. The writ petitioner, thereafter, went ahead with the procurement of aggregates from neighbouring States in view of the *go-ahead* given to him by the respondent No. 8. It may be pointed out here that at the time of making representation, the respondent No. 8 was fully aware of the fact that such a step would burden the respondent Corporation with an extra cost of more than Rs. 400 crores than the amount contracted by the parties for the project; yet the representation was made, which shows that respondent No. 8, namely, General Manager, Bihar State Development Corporation Limited, was seized of all the relevant factors before taking a decision on the procurement of aggregates from outside the State of Bihar.

136. On 05.08.2014, vide Annexure 33, another meeting was held among the respondent No. 8, namely, General Manager, Bihar State Development Corporation Limited, the Independent Engineer, and the representative of the writ petitioner and the proceeding of the meeting was recorded. As against Serial No. 3, the discussion held and decision arrived at with respect to payment of extra lead of aggregates were recorded.

137. It was recorded in the minutes that since there was no provision of extra lead aggregate in the CA (Concession Agreement) and, hence, the claim for extra lead of aggregate

has already been rejected vide letter No. BSRDCL-772/2011/Part-II/2013-1428, dated 16.06.2014. It is further mentioned therein that on the request of the *concessionaire*, BSRDCL shall take legal opinion on this issue.

138. The minutes in Serial No. 3, in Annexure 33, is reproduced herein as follows;

"It has been informed that there is no provision of extra lead aggregate in the CA and the claim for extra lead of aggregate has already been rejected vide their letter no.BSRDCL-772/2011/Part-II/2013-1428, dated 16.6.2014.On the request of the concessionaire, BSRDCL shall think over to take legal opinion on this issue."

139. The fallout of the minutes, vide Serial No. 3, in Annexure 33, was issuance of Notice, dated 09.08.2014, Annexure 6, under Clause 37.2 of the Concession Agreement, whereby the writ petitioner invoked the *Authority default* clause notifying the respondents to cure the *defaults* and issues within a period of 90 days of the notice.

140. Among the various *defaults* and issues raised by the appellant, the *default* and issue against serial No. 1 was with respect to non-payment of additional cost incurred for the procurement of aggregates from longer leads amounting to Rs. 5.63 crores till date.

141. Within one month from the date of issuance of

Annexure 6, a meeting was held, on 04.09.2014, Annexure 7, among the respondent No. 8, the Independent Engineer, and the representative of writ petitioner and the proceedings of the meeting were recorded. The first item of the meeting was regarding the Notice, under Clause 37.2, served by the writ petitioner upon the respondents. As against this item of discussion, the following minutes were recorded;

"The Authority advised IE to examine and submit the proposal for additional cost for procurement of aggregates involving longer leads, by 8th September, 2014 for further consideration and submission to the State Government for approval considering the following aspects:

Cost implication for extra lead to be calculated considering carriage from road 86 rail both.

Carriage cost to be calculated from latest SOR

Quarry considered in PPR to be reflected in the proposal

State support agreement clause to be considered

It is also directed to include the financial implication to the Authority taking into account termination of contract pursuant to the notice of the Concessionaire. The Final decision in this regard will be taken by the Govt. of Bihar

.....

.....

The Damages claimed by the Concessionaire for failure to procure satisfaction

of condition precedent is, now, rejected by the Authority. The Concessionaire may take recourse of Arbitration in this regard."

(Emphasis is supplied)

142. The meeting, dated 04.09.2014, Annexure 7, reveals two important aspects, which have great bearing on this appeal.

143. Firstly, the respondents, again, changed their stance, contrary to the one taken vide Annexure 33, and the respondents agreed to consider the grievance of the writ petitioner with respect to payment of additional cost and directed the Independent Engineer to submit fresh proposal bearing in view the cost implication for extra lead to be calculated considering carriage from road and rail both, carriage cost to be calculated from latest SOR, quarry considered in PPR to be reflected in the proposal, and State support agreement clause to be considered. It was also recorded in the said minute that final decision, with respect to payment of additional cost, would be taken by the Government of Bihar.

144. Secondly, there was another issue discussed in item No. 1 under the title "*Failure to procure satisfaction of condition precedent*". In the minutes, the relevant decision taken against this issue was that the damages, claimed by the Concessionaire for failure to procure satisfaction of condition precedent, is, now, rejected by the Authority; hence, the

Concessionaire may take recourse to Arbitration in this regard.

145. Thus, when the claim, with respect to the issue of failure of the respondents to procure satisfaction of condition precedent, was rejected, it gave rise to a disputed claim and accordingly, the writ petitioner was advised to take recourse to Arbitration; but this was not so with respect to the issue of non-payment of additional cost for procurement of aggregates from longer leads, because there was no denial of such a claim and, hence, no question arose for referral of the matter to Arbitration.

146. The other important aspect of the meeting, dated 04.09.2014 (Annexure 7), was the last recorded minute, which stated as follows;

"Authority advised the Concessionaire to withdraw the termination notice issued by them in the light of discussion/decision held in the meeting. The concessionaire agreed for the same depending upon the recommendation of the proposal of the extra lead by the Authority to the Govt. of Bihar."

(Emphasis is added)

147. Thus, the respondents desired that the notice of cure, issued by the writ petitioner, be withdrawn.

148. Following the minutes, recorded in the meeting, dated 04.09.2014, against the item in serial No. 1, the Independent Engineer submitted a fresh report to the



respondent No. 8, vide letter, dated 09.09.2014 (Annexure 34). It is important to note herein the subject reference of the letter, dated 09.09.2014, which contains a reference to the Notice, issued by the writ petitioner under Clause 37.2 of the Agreement. Among the other technical contents of Annexure 34, the important aspect of the letter having a bearing in the present context, is the observation contained in serial No. 1 by which the assessment of the procurement of aggregates from outside the State of Bihar has been reflected. The observations are as follows;

"Cost implication for carriage of aggregate from Dalla and Dagmagpur mines in UP through Road Transport is Rs 435.28 crores

Cost implication for carriage of aggregate from Dalla and Dagmagpur mines in U.P through Road and rail transport is Rs 277.288 crores."

149. The Independent Engineer also offered his comments on the termination agreement in serial No. 7, which may be reproduced here for the sake of understanding of the issues.

"Article 37.3.2 of the Concession Agreement provides for quantum of payment to the Concessionaire in case of the occurrence of Default on the part of the Authority covered under clause 37.2.1 which is a sum equal to sum total of

- *Debts due on the date of termination/
transfer date: And*

- *150% of the Adjusted Equity*
- *The following are the components of Debt Due payable to the Concessionaire upon occurrence of Default by the Authority:*

The Principal Amount Outstanding to Senior Lenders under the Financing Agreements for financing the Total Project Cost (the principal) i.e the present outstanding amount from the Lenders is Rs 248.49 crores.

All accrued interest, financing fees and charges payable under the Financing Agreements on or in respect of the debt referred to in Sub clause (1) above until the transfer Date;

Any sub-ordinate debt under clause (c), in respect of Debts other than the borrowings from Lenders plus interest accruing @ maximum above the bank rate 5% thereon."

150. While concluding the comments in serial No. 7, the Independent Engineer opined that the tentative amount on account works out to about Rs 602.00 crores. The Independent Engineers further commented that approximate estimated cost for re-tendering of this project worked out to Rs 1472.50 crores if the project is finally terminated.

151. Among the various opinions, given in the letter, dated 09.09.2014 (Annexure 34), one of the important observations was that BSRDC could consider paying the additional cost due to extra lead as it will, in the overall position, involve less financial implication to the Government

Exchequer as compared to other two options, viz., termination cost payable to the Concessionaire and re-tendering cost.

152. On 06.11.2014, vide Annexure 8, another tripartite review meeting was held at the Office of BSRDCL, Patna, in the presence of the respondents, the writ petitioner and the Independent Engineer. In the said meeting, vide item (b), the issue of withdrawal of termination notice was discussed. Against this item, the following minutes were recorded :

"It has been informed by the Concessionaire that their notice under Clause 37.2 of CA is not a termination notice since it is the notice to the Authority to cure all the issues having material adverse effect on the project within 90 days.

The Authority stated the issues raised in the Termination Notice are promised to be cured by the Authority.

Hence the Concessionaire assured that they will not issue Termination notice as per clause 37.2.2 of the Concession Agreement"

(Emphasis is supplied)

153. It is seen that by an explicit language, used in the minutes, the respondents promised to cure the issue raised in the Termination Notice.

154. A reading of issue, mentioned in item no. (1) (Annexure 8), further reveals that aggregate for longer leads



was also discussed. A verbal representation was made by the writ petitioner to the respondents stating that Rail cum Road route is not feasible to complete the work within the stipulated construction period. Hence, it requested to consider only road route for the proposal of payment of excess cost for procurement of aggregates from longer leads. The respondents, as is learnt from the minutes, informed that they would write to the concerned Railway Authority at, Allahabad, to confirm the availability of rakes/wagons and that the decision will be taken accordingly.

155. Situated thus, it is clear that the proposal, for procurement of aggregates from outside the State of Bihar, was accepted by the respondents and that is why, they had considered writing a letter to the Railways.

156. In the meanwhile, on 28.10.2014, opinion from Principal Additional Advocate General was also obtained and he, too, opined that payment of extra lead for stone aggregates can be allowed subject to approval by the Cabinet.

157. On 21.11.2014, the respondent No. 7 addressed a letter to the respondent no. 2 (vide Annexure 35), on the subject, seeking, *in principle*, approval of Rs 435 crores with regard to extra cost carriage of stone aggregate for N.H. 30 Mohania-Ara section.

158. In the meanwhile, a joint meeting was



convened, wherein the lenders of the writ petitioner, namely, Union Bank of India, Bank of Baroda, Oriental Bank of Commerce and Punjab and Sindh Bank, were present along with the respondent No. 8 and the writ petitioner to discuss the progress of the project and the issues raised by the writ petitioner. It has been recorded in the minutes that the respondent No. 8 advised the Bank authorities that the writ petitioner should arrange extra funds, required for procurement of aggregates from longer leads for the project, from the lenders, or internally, by the Company, as the State government has not granted approval to the Authority to bear the extra cost. However, the Authority will consider extending *concession period* for the extra cost incurred by the company based on revised cash flow.

159. It is seen that even in the joint meeting with Bank officials, the respondents did not deny entitlement of extra cost by the writ petitioner.

160. By now, neither the respondents paid the additional cost to the writ petitioner nor did they deny, in principle, that the claim of the writ petitioner is illegitimate. In these circumstances, as is understood from the letter, dated 04.02.2015 (Annexure 11), the writ petitioner invoked Clause 37.2.2 of the Concession Agreement and issued a notice of intent to terminate the Agreement asking the respondents to

make representation within the stipulated period of 15 days.

161. It may be mentioned that Notice to cure *defaults* required that *defaults* be cured within 90 days and even though it has been noticed hereinbefore that on record, the respondents promised to cure the *defaults*, yet the *defaults* were not cured since the date of 09.08.2014, when the notice to cure *default* was, first, issued by the writ petitioner.

162. Among the list of *defaults* , mentioned along with Annexure 11, item No. 1 referred to Non-payment of additional cost incurred for the procurement of aggregates from longer leads amounting to Rs 9,15,20,314/- till 31.12.2014 and non-granting of permission to procure aggregates from longer leads for road works as had been decided in the meeting, dated 25.09.2013.

163. Not barely three days had passed after the issuance of the letter, dated 04.02.2015. Annexure 11, that the respondents, through respondent no. 9, issued a letter, dated 07.02.2015 (Annexure 12). The contents of the letter, dated 07.02.2015, being relevant, are being reproduced *ad verbatim*.

"Dear Sir,

The Concessionaire given NOTICE and invoke the provisions of clause 37.2.2 of the Concession Agreement with intension of the Concessionaire to issue Termination Notice and calls upon the Authority to make representation within 15 days from the

receipt of this Termination Notice.

In this connection, the Authority is directed to the concessionaire to submit the details all the materials stores, plant and machineries and equipment available at site to the Authority pursuant to clause 37.4 (b) of C.A for taking further action by the Authority”

(Emphasis is added)

164. It is evident from the contents of Annexure 12 that pursuant to the invocation of Clause 37.2.2 of the Concession Agreement by the writ petitioner, and the issuance of notice of intent to terminate the Agreement, the respondents did not even submit a representation in terms of the rights, conferred by the said clause; rather, they straightaway proceeded to Clause 37.4 (b), the occasion for which would have had arisen only when the agreement had been terminated after exhausting the process. Therefore, a right to representation, which existed, had been waived by the respondents. Thus, on principle, the respondents agreed to the termination of the agreement.

165. Ordinarily, after the issuance of the letter, dated 07.02.2015, Annexure 12, no issue, with respect to the payment of additional cost for procurement of aggregates from longer leads, remains alive; nonetheless; it transpires from the letter, dated 16.02.2015, that in para 3.1, under the heading

Non-payment of additional cost incurred by the Concessionaire for procurement of aggregates, the respondents referred to Clause 12.1(d) of the Agreement, which provides as follows;

"Prior to commencement of Construction works, the Concessionaire shall make its own arrangement for quarrying the materials needed for the project highway under and in accordance with applicable laws and applicable permits".

166. By referring to Clause 12.1(d), the respondents stated that it is the responsibility of the writ petitioner to procure aggregates or any other materials needed for the project highway.

167. Apparently, it seems that contents of Clause 12.1(d) have not been construed in proper perspective. It mentions that the Concessionaire, the writ petitioner, shall make its own arrangement for quarrying the materials needed for the project highway under, and in accordance with, applicable laws and applicable permits. Quarrying is an act of removal of aggregates from the quarry, which the writ petitioner had been demanding all along; but despite repeated applications from the writ petitioner, the respondents had done nothing to allow quarrying in the State of Bihar by granting mining lease; rather, they permitted the writ petitioner to bring aggregates from outside the State of Bihar, which the writ petitioner, admittedly, did. Hence, quarrying, in the present

context, does not mean quarrying even though, when the quarrying is prohibited law.

168. A further reading of paragraph 3.1 of Annexure 16 would show that respondents contended that by then, the Govt. of Bihar had, vide Notification No. 3085/M, Patna, dated 11.08.2014, opened the mining lease for procurement of aggregates and even then, the writ petitioner had not made any efforts for procurement of aggregates.

169. However, it is not understood as to how removal of prohibition on mining would automatically lead to an inference that the writ petitioner would have been granted mining lease, had he made such efforts. In fact, it would not be proper to even suggest that writ petitioner had not put up efforts to get a mining lease within the State of Bihar. The letters, vide Annexure 29 and 30, indicate that writ petitioner was pressing hard for a mining lease in the State of Bihar, pursuant to which the letter, vide Annexure 32, was written by respondent No. 4 to the Collector, Rohtas, Sasaram, for considering the request of the writ petitioner in view of Rule 36 of the Rules under the Mines & Minerals (Development & Regulation) Act, 1957, as a special case.

170. It, thus, clearly emerges that the plea of lifting of prohibition on mining and alleging the writ petitioner of not putting up efforts to get an allotment of mining lease was taken

only with a view to subverting the Notice of Intent to *Terminate* issued by the writ petitioner. In any view of the matter, such a reply, as contained in Annexure 16, was issued only after the issuance of Notice of Intent to terminate in view of Authority *default*.

171. Having induced the writ petitioner, by various representations to procure aggregates from outside the State of Bihar, a representation, as have been noticed, on which the writ petitioner had acted upon, it was not open to the respondents to turn around and say that it is the responsibility of the writ petitioner to procure aggregates.

172. Nonetheless, the writ petitioner issued a termination notice by invoking the provisions of Clause 37.2 of the Agreement.

173. It is noteworthy that more than a month after the issuance of Termination Notice, dated 20.02.2015, the respondent No. 2, namely, Principal Secretary, Road Construction Department, in his letter, dated 23.03.2015, Annexure 26, informed the respondent No. 4, namely, Managing Director, Bihar State Development Corporation Limited, that the matter, as regards payment of extra cost of carriage of stone aggregate, is being submitted for review by Assembled Authorized Committee under the Chairmanship of the Chief Secretary. It may be further pointed out that this



letter, Annexure 26, was in response to the request made by the respondent No. 7, namely, Chief General Manager, Bihar State Development Corporation Limited, on 21.11.2014, by a letter to the respondent No. 2, namely, Principal Secretary, Road Construction Department, vide Annexure 35, for granting, in principle, approval for payment of Rs. 435 crores With regard to extra cost carriage of stone aggregate for N.H. 30 *Mohania-Ara* section.

174. The writ petitioner, then, approached the Court by filing a writ petition, on 29.04.2015, subsequent to which the respondents issued notices, dated 26.05.2015 and 10.06.2015, vide Annexure 22 and 23 respectively, purporting to terminate the agreement.

175. In view of the above sequence of events, the first question, which needs an answer is whether, till the filing of the writ petition, a *dispute* existed on the point that the writ petitioner is not entitled to payment of additional cost for procurement of aggregates from longer leads. If the answer to this question is in the affirmative, the writ petition would not be maintainable in view of Article 44 containing a clause of Arbitration. On the other hand, if the answer to the question, so posed, is in the negative, the writ petition would be maintainable to the extent that no *dispute* existed for referral to arbitral Tribunal.



176. Recalling, at this stage, the process for termination of agreement, as discussed hereinbefore, the party called upon to cure the *defects* has two options; namely, he may admit the *defaults*, or he may deny that *defaults* exist. A *dispute* would arise only when there is a specific denial of *defaults* as mentioned in the Notice to Cure *defaults*.

177. In the sequence of events, pointed out above, it would be noticed that the writ petitioner had been urging the respondents cure the *defect* with respect to procurement of aggregates from longer leads. The respondents prevaricated on this issue and, on one occasion, made an explicit promise to cure the *default*.

178. Thus, the claim, as to additional cost, was admitted, and, hence, the writ petitioner was asked to procure aggregates from longer leads. A promise, on which the writ petitioner acted and incurred financial expenditure under the impression additional cost issue would be cured, has to be held against the respondents. However, as no solution could be arrived at nor was the claim denied, it amounted to a *default* on the part of the respondents having a material adverse effect on the project implementation. Once the notice to cure the *defaults* was issued by the writ petitioner, on the ground of, amongst others, additional cost, and the *default* was not denied by the respondent, the stage for disputing the claim was over.



Thereafter, the only recourse, which the writ petitioner could have taken, was to issue Notice of Intent to Terminate, which the writ petitioner did issue. As the facts reveal, even after the Notice of Intent to Terminate, the respondents did not deny the contents of notice; rather, they took the follow up steps for termination of agreement for taking possession and control of the project in terms of Clause 37.4. Thus, a dispute was not raised even after the Notice of Intent to terminate was issued. Logically extended, it would mean that the stage for raising *dispute* was already over.

179. Indeed, the respondent, vide letter, dated 16.02.2015 (Annexure 16), served a representation against the Notice of Intent to Terminate issued by the writ petitioner; but by then, the scope for raising *dispute* was over. If the representation, vide Annexure 16, is construed as creating a *dispute* on the claims made by the writ petitioner, then, on the face of Annexure 12, it would amount to allowing the respondents to approbate and reprobate. It is not permissible for the respondents to once admit the *default* and take follow up action in termination of the contract and, then, to turn around and say that the Notice of Intent to Terminate, issued by the writ petitioner, is illegal. It would be evident from the conduct of the respondents that even though settlement of financial claims was not arrived, yet so far as the termination of

agreement is concerned, the letter, dated 04.02.2015 (Annexure 11), amounted to accord and satisfaction so far as the issue of termination of agreement is concerned.

180. It is, thus, found that so far as the issue raised by the writ petitioner, regarding payment of additional cost, for procurement of aggregates from longer leads, is concerned, the respondents not only admitted the *default* by promising to cure it, but they also omitted to cure the *default* and this act of the respondents amounts to *default* and not a *dispute*. The writ petitioner had the liberty to initiate the process of termination of agreement in the event of any one of the *default* occurring within the meaning and scope of Clause 37.2.1.

181. Thus, it would be seen that there remains no issue for adjudication by the Arbitration Tribunal as regard the issues relating to payment of additional cost for procurement of aggregates from longer leads and consequential termination of agreement. In any view of the matter, if the respondents were aggrieved by the act of the writ petitioner in issuing Notice of intent to Terminate, and term it as '*dispute*' within the meaning of Article 44, then, even they were at liberty to approach the Arbitration Tribunal; but, as the records would show, the respondents, too, never approached the Tribunal.

182. Having not approached the Arbitration Tribunal and having admitted the *default* by promising to cure the

default, it does not lie in the mouth of the respondents to say that disputes are arbitrable. It is accordingly held, on the facts of this case, that no occasion arose for invocation of Article 44 of the Concession Agreement.

183. Moreover, as held by the Supreme Court, in the case of ***Union of India v. Tania Construction (P) Ltd., (2011) 5 SCC 697***, while making an observation on arbitration clause, that it is, now, well established that an alternative remedy is not an absolute bar to the invocation of the writ jurisdiction of the High Court or the Supreme Court and that without exhausting such alternative remedy, a writ petition would be maintainable. It was further held, in ***Tania Constructions*** (supra), that injustice, whenever and wherever it takes place, has to be struck down as an anathema to the rule of law and the provisions of the Constitution. The relevant observations, appearing in ***Tania Constructions*** (supra), read:

"33. *Apart from the above, even on the question of maintainability of the writ petition on account of the arbitration clause included in the agreement between the parties, it is now well established that an alternative remedy is not an absolute bar to the invocation of the writ jurisdiction of the High Court or the Supreme Court and that without exhausting such alternative remedy, a writ petition would not be maintainable. The*

various decisions cited by Mr Chakraborty would clearly indicate that the constitutional powers vested in the High Court or the Supreme Court cannot be fettered by any alternative remedy available to the authorities. Injustice, whenever and wherever it takes place, has to be struck down as an anathema to the rule of law and the provisions of the Constitution."

SCOPE OF JURISDICTION UNDER ARTICLE 226 OF THE CONSTITUTION OF INDIA WITH RESPECT TO CONTRACTS BY OR ON BEHALF OF STATE: -

184. The learned Principal Additional Advocate General strenuously argued that the claims, made in the writ petition, fall within the realm of contract and in view of the several pronouncements of Supreme Court, it is, now, well settled that contractual obligations cannot be enforced by resorting to extraordinary jurisdiction of the High Court under Article 226 of the Constitution. Learned Principal Additional Advocate General placed reliance on the case of **Radhakrishna Agarwal v. State of Bihar**, reported in **(1977) 3 SCC 457**, to buttress his argument that a writ petition, under Article 226 of the Constitution of India, cannot, in the present case, be maintained for enforcing contractual obligations.

185. The basic question, which needs to be addressed, in the present appeal, is: whether the remedy

available, under Article 226 of the Constitution of India, can legitimately be resorted to in order to obtaining a direction from the High Court for payment of amounts due and payable by the State Government in contractual matters and if so, in what circumstances, such a remedy can be made available?

186. While considering the question, posed above, what needs to be noted is that a government contract, even if commercial in nature, involves, broadly speaking, four stages. The first stage relates to the floating of tenders by publishing notice inviting tenders. At this stage, the authorities concerned are required to formulate the terms and conditions subject to which the tenders would be invited and also the terms and conditions of the contract, which, if entered into, would govern the parties. These terms and conditions would obviously include all the eligibility criteria for a person to participate in the tender process. After the notice inviting tender is published and the tenders are received, the second stage of such a contract commences. This stage involves the process of taking of the decision to allot or not to allot the contract at all and cancel the entire process. This stage would include selection of the person or the party to whom the contract shall be allotted. This stage ends with the allotment of the contract or with the decision not to allot the contract at all and cancel the entire tender process. The third stage of the contract essentially covers the stage of



performance of the contract. This stage would include commencement of the performance of the allotted contract and would, normally, end with the completion of the allotted contract. During this stage, there may arise the question of breach of the contract, because of non-fulfilment of the terms and conditions of the contract by either party to the contract. The fourth stage of such a contract arises, when, on completion of his part of the contract, the contractor or supplier raises his demand for making payment of his bills. This fourth stage can, however, be divided into two categories. There may be a case, where the amount demanded is not disputed and yet the dues of the contractor are not paid compelling thereby the contractor to seek avenues for obtaining payment of his dues. In this fourth stage, there may, however, be a case, where the correctness of the demand for payment raised by the contractor is disputed, denied or challenged by the authority, who had allotted the contract. In such a case, too, the contractor may be driven to take recourse to such avenues as may be open to him, in law, for the purpose of enabling him to obtain his dues in terms of the demand that he may have made.

187. It may, now, be pointed out that at the first stage of a contract, which requires the authorities concerned to formulate the terms and conditions subject to which the tenders would be invited or the contract would be allotted, many factors



are taken into account. The decision as to what terms shall be included in the tender is really a policy decision, for, it is the authority, issuing the notice inviting tender, which is the best judge to determine as to what terms and conditions would be required for successful completion of the work or the project concerned. Thus, it is, primarily, for the authority issuing the NIT to decide what particular terms and conditions should be incorporated in the NIT. However, when the invitation to tender is floated, the second stage, which consists of the process of selection of the person for awarding the contract, commences and this process comes to an end, when a decision either awarding the contract or cancelling the entire tender process is taken. The decision to award the contract to a person, who participates in a tender process, is not open to judicial review, but the decision making process, which leads to the ultimate decision, is, according to the law laid down in ***Tata Cellular v. Union of India***, reported in, **(1994) 6 SCC 651**, open to judicial review. In ***Raunaq International Ltd. v. I.V.R. Construction Ltd. and Ors.***, **(AIR 1999 SC 393)**, the Apex Court has made it clear that though the decision to award a contract is not open to judicial review, the decision making process, which leads to the ultimate decision, is, indeed, open to judicial review provided that there is an element of public interest involved in the case requiring a review by the court of

the administrative decision to allot the contract.

188. What may be further noted is that at the first and the second stage of the contracts, when the government or any of its instrumentalities sets up the terms and conditions of the contract or takes a decision to allot the contract, it acts purely in its executive capacity and its action is, therefore, open to judicial review, though in a limited way, as indicated hereinabove. However, when the third stage is reached and a contract is entered into by the government or its instrumentality, on the one hand, and the contractor, on the other, the parties are no longer governed by constitutional provisions, but by the terms of the contract. Hence, when a State, purporting to act within the field allotted to it under the terms and conditions of a contract, performs an act, the rights and obligations of the parties would be, ordinarily, governed by the law that governs the terms and conditions of the contract.

189. What logically follows from the above discussion is that in the third stage, which consists of the performance of the contract, the remedy of the parties to the contract for breach of any of the terms and conditions of the contract would, ordinarily, lie in the civil court of competent jurisdiction unless the parties have, under the terms of the contract, agreed to refer such a dispute to arbitration. Thus, ordinarily, no writ would be issued, under Article 226 of the

Constitution of India, for a mere breach of the terms and conditions of the contract, particularly, when, for settlement of such a dispute, there is a provision for arbitration.

190. In the fourth stage of a contract, which arises on completion of the contract, a demand for payment of bills or Clues, raised by the contractor, may not be amenable to arbitration proceedings, for, the authorities concerned, who had allotted the contract, may dispute entitlement of the contractor to receive the dues, which the contractor has demanded, or there may be a case, wherein although no dispute is raised by the authorities concerned that the bills are due and payable to the contractor, the payment is not made.

191. In a case, wherein demands are not disputed, but payment is not made, the demand for payment may or may not be amenable to arbitration proceeding, for, it would essentially depend upon the terms and conditions of the contract inasmuch as the terms and conditions of the contract would determine if, even for realization of an admitted amount or even when there is no dispute as regards the dues claimed, an arbitration proceeding can or must be resorted to. If no provision for arbitration of such a claim has been made in the contract agreement, the remedy of the person, who demands payment, lies, ordinarily, in instituting suit in civil courts and not in filing petition under Article 226 of the Constitution of

India, seeking enforcement of the State's obligation to pay its dues.

192. What is, now, of immense importance to note is that there may be a case, where the demand for payment made by a contractor is disputed or there may be a cross-claim raised by the State against the contractor. There may, however, be cases, wherein the claim made by the contractor is admitted and there is no cross-claim between the parties to be determined. In such cases, there is really no dispute as regards the facts. Would it, in such a case, be necessary for the writ court to revert the party to the remedies available through the civil court?

193. The answer to the crucial question, posed above, hinges on the principle that if an alternative efficacious remedy is available, writ jurisdiction shall not be exercised. What is, of course, necessary to point out is that existence of an alternative remedy is not an absolute bar to the jurisdiction of the court under Article 226 of the Constitution of India, but is always a matter of exercise of discretion and remains, therefore, in the realm of prudence. What is, however, of great relevance to note is that though a disputed question of fact is not, normally, entertained by a High Court in its writ jurisdiction, it will not, as a corollary, follow that if there is no disputed question of fact, remedy under Article 226 of the



Constitution of India would be available. The mere fact, therefore, that in a writ petition, the bills, raised by a contractor, are admitted to be due and payable by the State cannot, in itself, be a ground for issuing a writ of *mandamus* to the State respondents commanding them to make payment of the dues of such a contractor. Conversely put, a State cannot refuse to pay its dues without any good and sufficient cause or else, its refusal would amount to its act being arbitrary and a remedy under Article 226 of the Constitution of India, in such a case, may not remain as an absolute bar. Necessarily, therefore, it is the facts of a given case, which would decide whether a writ of *mandamus* can be issued or not.

194. It may be further noted that a writ of *mandamus* is a public remedy and this remedy lies, when a public authority fails to perform the duty entrusted to it by law. In other words, a writ of *mandamus* is issued against a person, who has a legal duty to perform, but has failed or neglected to do so. Distinguishing a case, wherein a public duty of a State is sought to be enforced, and a case, wherein a contractual obligation of a State is sought to be enforced, *Professor Wade*, in his well-known treatise, '*Administrative Law*', makes it clear that while a public duty is enforceable by the public law remedy of a writ of *mandamus*, a contractual duty is enforceable, as a matter of private law, through the avenues of civil courts. The

observations made, in this regard, by *Professor Wade* read thus:

"...A distinction which needs to be clarified is that between public duties enforceable by mandamus, which are usually statutory and duties arising merely from contract. Contractual duties are enforceable as matters of private laws by the ordinary contractual remedies, such as damages, injunction, specific performance and declaration. They are not enforceable by mandamus, which in the first place is confined to public duties and secondly is not granted where there are other adequate remedies."

195. What, now, needs to be noted is that howsoever thin and subtle may be, there is, indeed, a real and definite line demarcation not only between a public wrong and a private wrong, but also between a public law remedy and private law remedy. Article 226 of the Constitution of India is pre-eminently a public law remedy and is not, generally, available as a remedy against private wrongs. Resort to Article 226 of the Constitution of India can be had to enforce various rights of the public or to compel the public or statutory authorities to discharge their public duties and/or to act, in the realm of their public function, within the bounds of law. The remedy under Article 226 of the Constitution of India can, no doubt, be availed of even against a private body or person; but the scope of the writ of *mandamus*

is limited to, enforcement of public duty. In minimum possible words, but with extreme exactitude, clarified the Supreme Court, in ***Binny Limited and Anr. v. V. Sadasivan and Ors.***, reported in **MANU/SC/0470/2005**, the position of law, in this regard, in the following words:

"29. Thus, it can be seen that a writ of mandamus or the remedy under Article 226 is pre-eminently a public law remedy and is not generally available as a remedy against private wrongs. It is used for enforcement of various rights of the public or to compel public/ statutory authorities to discharge their duties and to act within their bounds. It may be used to do justice when there is wrongful exercise of power or a refusal to perform duties. This writ is admirably equipped to serve as a judicial control over administrative actions. This writ could also be issued against any private body or person, specially in view of the words used in Article 226 of the Constitution. However, the scope of mandamus is limited to enforcement of public duty. The scope of mandamus is determined by the nature of the duty to be enforced, rather than the identity of the authority against whom it is sought. If the private body is discharging a public function and the denial of any right is in connection with the public duty imposed on such body, the public law remedy can be enforced. The duty cast on the public body may be either statutory or

otherwise and the source of such power is immaterial, but, nevertheless, there must be the public law element in such action."

196. Thus, in the face of succinctly laid down position of law with regard to the issuance of a writ of *mandamus* under Article 226 of the Constitution of India, what one has to bear in mind is that in order to invoke the writ jurisdiction under Article 226 of the Constitution of India, two conditions, in a case of private wrong, must be satisfied, namely;

- (i) *the identity of the person, against whom the writ is sought, as a person or body, which is amenable to writ jurisdiction, and*
- (ii) *the nature of duty, which is sought to be enforced, is a public duty or has an element of public interest.*

197. In a given case, one may, perhaps, ignore the first pre-requisite, namely, the identity of the person or body as a person or body amenable to writ jurisdiction, but the second prerequisite, as indicated hereinbefore, cannot be ignored, for, in the absence of public interest or in the absence of breach of public duty or in the absence of any public wrong having been committed, no recourse to Article 226 of the Constitution of India is possible.

198. What also needs to be cautiously noted is that constitutional or statutory duty is a public duty and enforceable



by a writ of *mandamus*. To put it differently, the rights and duties go hand-in-hand. When a right is given to a person by a State, the State casts upon itself a duty to enforce such a right. Logically, therefore, when a person is given fundamental right by the Constitution, a duty rests on the State to ensure that the person realizes his fundamental rights.

199. In a given case, therefore, if a person, aggrieved by a breach of contract, shows that though the breach is in the realm of a contract, the duty, sought to be enforced, is a constitutional or statutory duty, the remedy of a writ of *mandamus* may not be refused, for, it is the constitutional obligation of the High Court, under Article 226 of the Constitution of India, to enforce the constitutional and statutory duties of the State and its instrumentalities.

200. The question, therefore, is as to whether every breach of governmental obligation to pay its dues, under a contract, falls outside the purview of Article 226 of the Constitution of India. This brings us to a more important question and the question is: Will the constitutional remedy of Article 226 of the Constitution of India never be available against a State even if the State refuses to carry out its contractual obligations with ulterior motives, irrationally, arbitrarily, unreasonably, unfairly, whimsically or when its denial suffers from *mala fide*, or when the State,



demonstratively discriminates, while making payment of its dues? Shall the writ court withdraw its hand resignedly and helplessly by saying that a writ of *mandamus* is a public law remedy and no writ of *mandamus* would be issued to any State directing it not to discriminate or act irrationally, arbitrarily, unreasonably, unfairly, whimsically, or with ulterior motives, while refusing or omitting to make payment of its dues arising out of contracts or when the State's denial is *mala fide*? Imperative, therefore, for us to ask: Can a breach of contract ever give rise to any constitutional obligation of the State to make payment of its dues?

201. Coming, now, to the case of ***Radhakrishna*** (supra), as referred to by the learned Principal Additional Advocate General, it becomes necessary to discuss, herein, the circumstances whereunder the decision, in ***Radhakrishna*** (supra), was rendered.

202. This was an appeal from the judgment of Patna High Court. In ***Radhakrishna*** (supra), the petitions were directed against orders of the State Government, passed in 1974, revising the rate of royalty payable by the petitioners-appellants under a lease of 1970, and, thereafter, cancelling the lease by a letter of March 15, 1975. The petitioners' case was that the revision of the rate of royalty payable by the petitioners for the lease to collect and exploit *Sal* seeds from

the forest area was illegal during the subsistence of the *lease* and, thereafter, cancellation of the lease itself was illegal for various reasons.

203. The relevant clause, relating to revision of royalty in the written contract, read as follows:

"The rate of royalty will be revised every three years cycle in consultation with the lessee and the decision will be binding on the lessee."

204. The Supreme Court found that there was no restriction, under the terms of the contract, upon the amount by which the royalty could be increased by a revision after a three years' cycle under the relevant clause. The lessee was only entitled, under the contract, to be consulted before a revision. But the decision of the Governmental authorities to enhance royalty was binding. It was in these circumstances that the Supreme Court, held, in ***Radhakrishna*** (supra), that the questions, which apparently arose, appertained to action, alleged by the State, that fall within the terms of the agreement between the parties, regulated by the duly signed contract, which was presumably executed in compliance with the provisions of Article 299 of the Constitution of India and, accordingly, the petitioners could only get their remedies, if they can obtain any at all, through ordinary suits for damages or for injunctions to restrain breaches of contract provided they could show how the contracts were broken or were going to be

broken.

205. While considering the scope of Article 226 of the Constitution of India with respect to contractual matters, the Supreme Court approved, in principle, the three circumstances, laid down by the Patna High Court, in **Radhakrishna** (supra), which are likely to arise *vis-a-vis* a contract.

206. The circumstances were stated as follows:

b. Where a petitioner makes a grievance of breach of promise on the part of the State in cases where on assurance or promise made by the State he has acted to his prejudice and predicament, but the agreement is short of a contract within the meaning of Article 299 of the Constitution;

c. Where the contract entered into between the person aggrieved and the State is in exercise of a statutory power under certain Act or Rules framed thereunder and the petitioner alleges a breach on the part of the State; and

d. Where the contract entered into between the State and the person aggrieved is non-statutory and purely contractual and the rights and liabilities of the parties are governed by the terms of the contract, and the petitioner complains about breach of such contract by the State.

207. The Patna High Court had held, in **Radhakrishna** (supra), that so far as the first category of

cases are concerned, it could be held that public bodies or the State are as much bound as private individuals and are to carry out obligations incurred by them, because parties, seeking to bind the authorities, have altered their position to their disadvantage or have acted to their detriment on the strength of the representations made by these authorities.

208. According to the Patna High Court, in **Radhakrishna** (supra), the obligation could, sometimes, in such cases, be appropriately enforced by filing of a writ petition even though the obligation was equitable only.

209. As against the proposition, laid down by the Patna High Court, with respect to the first category of cases, in **Radhakrishna** (supra), the Supreme Court held that they do not propose to express any opinion on the question whether such an obligation could be enforced in a proceeding under Article 226 of the Constitution. However, the Supreme Court did hold that dispute, raised in **Radhakrishna** (supra), does not fall within the first category of cases. The relevant extract of the observations made by the Supreme Court, in **Radhakrishna** (supra), in this regard, are reproduced herein as follows;

"13. The High Court thought that in such cases the obligation could sometimes be appropriately enforced on a writ petition even though the obligation was equitable only. We do not propose to express an opinion here on the question whether such an obligation could be enforced in proceedings under

Article 226 of the Constitution now. It is enough to observe that the cases before us do not belong to this category.”

210. On an analysis of the **Radhakrishna** (supra), it is found that even though Supreme Court gave its stamp of approval on the categorization of cases with respect to contractual rights, yet chose not to express any opinion on the question whether, for contractual obligations, falling under the first category, a writ under Article 226 of the Constitution of India would lie or never lie?

211. Thus, the *ratio* of **Radhakrishan** (supra) cannot be held to be a law of universal principle that under no circumstances, a writ, under Article 226 of the Constitution of India, would lie for enforcement of contractual obligation of the State or its instrumentalities.

212. In order to ascertain the judicial trend, it would be proper to examine some of the relevant judicial pronouncements, wherein the issues of contractual obligations vis-a-vis role of the State action were involved.

213. One of the principle cases, which dealt with the issue of enforcement of contractual obligations was the case of **Divl. Forest Officer v. Bishwanath Tea Co. Ltd.**, reported in **(1981) 3 SCC 238**, the facts of which may be taken note of

214. The facts of the case of **Bishwanath Tea Co. Ltd.** (supra) was that the respondent had filed a writ petition



questioning the action of the appellant, the Divisional Forest Officer, Darrang Division, for recovering Rs 7069.37 as royalty for cutting and felling trees from Tezalpatty Grant 1 held under lease, dated September 27, 1932, and for a *mandamus* directing the appellant to issue permits without insisting upon payment of royalty for the trees cut and felled from the area under lease. As against the writ petition, a preliminary objection was raised by the appellant that the right, claimed by the respondent, flowed from the contract of lease and such contractual rights and obligations can only be enforced in civil court. It was contended that apart from the fact that interpretation of the contract of lease is, generally, not undertaken by the High Court in exercise of its extraordinary jurisdiction under Article 226 of the Constitution of India, it was further contended that even if interpretation of the relevant clause of the lease, as alleged on behalf of the respondent, finds favour with the court, yet facts will have to be investigated before any refund could be ordered or a blanket injunction could be granted for all times to come against the appellant from performing his duty, namely, of granting permit and recovering royalty.

215. The preliminary objection was overruled and the writ petition was allowed by Gauhati High Court.

216. In appeal, the Supreme Court, at the outset,

held, in ***Bishwanath Tea Co. Ltd.*** (supra), that the respondent, being a juristic person, was not entitled to any relief for enforcement of rights guaranteed under Article 19 of the Constitution of India and, on this count, alone, the writ petition would fail.

217. In order to further appreciate the ruling of the Supreme Court, in ***Bishwanath Tea Estate*** (supra), it would be necessary to set out the some of the other facts involved.

218. Bishwanath Co. Ltd. had taken on lease land measuring 1107.26 acres from the Government. The lease was to be exploited for cultivation and raising tea-garden. The manager of the company approached the appellant seeking permission to cut 7000 cubic feet of timber from grant N.C. Tezalpatty 1 of Nagshankar Mouza for utilising the same for building of staff and labourer's houses. By a reply, the appellant noted that the timber was to be cut for constructing houses in Partabghur and Dekorai Tea Estates and that it was necessary to ascertain whether any of the aforementioned two tea estates was situated within the grant evidenced by lease of N.C. Tezalpatty 1. It was made clear that if it was not so, full royalty will be payable by the company for cutting, felling and removing timber. The manager, by his letter, informed the appellant that as the lessee is Bishwanath Tea Co. Ltd., it can cut and fell timber from any of its leased area to 'be utilised for its purposes



in any other division. Therefore, the manager suggested that the permit must be issued without insisting on payment of royalty. The appellant, by his letter, informed the manager that as the timber was required for use in Partabghur and Dekorai Tea Estates, which were not within N.C. Tezalpatty Grant 1 of Nagshankar Mouza from which timber was to be felled and cut, full royalty will be payable on timber so cut and removed, because it was to be utilised for the purpose unconnected with the grant. For this assertion, the appellant relied upon a portion of clause 2 of Part IV of the lease deed, dated September 27, 1932. Correspondence further ensued between the parties and, ultimately, the respondent Company paid an amount of Rs 7069.37 as and by way of royalty under protest and, then, filed a petition under Article 226 of the Constitution in the High Court alleging that upon a true construction of the relevant clause of the grant as also the proviso to Rule 37 of the Settlement Rules, since the timber was required for the purpose connected with the exploitation of the grant, the company, as lessee, was entitled to cut and remove timber without payment of royalty and, therefore, the recovery of royalty being not supported by law, the appellant was liable to refund the same. The company also prayed for a *mandamus* directing the appellant, who was respondent in the High Court, to issue permits without insisting on payment of royalty, whenever timber was to be cut from the

leased area for the purposes connected with the exploitation of the grant.

219. The Supreme Court, on appreciation of facts, found, in ***Bishwanath Tea Estate*** (supra), that the relief, claimed by the respondent, was referable to nothing else but the term of the lease viz. clause 2, Part IV and that a bare perusal of clause 2 of Part IV of the indenture of lease and the proviso to Rule 37 would, at a glance, show that the proviso enables a grantee to take benefit of it by fulfilling certain conditions, namely, by paying a reduced valuation representing only the profit, which it is likely to derive from the use of timber for purposes connected with the exploitation of the grant. It is, thus, an enabling provision and the grantor of the lease may permit this option to be enjoyed by the grantee. But whether that has been done or not is always a question of fact. If the pre-condition is satisfied, the benefit can be taken. That again is a matter to be worked out by the parties to the indenture of lease.

220. The Supreme Court held, on facts, in ***Bishwanath Tea Estate*** (supra), that it can be demonstrably established that the respondent was trying to enforce, through the writ petition, the right to remove timber without the liability to pay royalty not under the proviso to Rule 37, which was merely an enabling provision, but on the basis of the specific

term of lease agreed to between the parties.

221. The Supreme Court, in ***Bishwanath Tea Estate*** (supra), held that ordinarily, where a breach of contract is complained of, a party, complaining of such breach, may sue for specific performance of the contract, if contract is capable of being specifically performed, or the party may sue for damages. Such a suit would, ordinarily, be cognizable by the civil court. The High Court, in its extraordinary jurisdiction, would not entertain a petition either for specific performance of contract or for recovering damages. A right to relief, flowing from a contract, has to be claimed in a civil court, where a suit for specific performance of contract or for damages could be filed. In this regard, the Supreme Court, in ***Bishwanath Tea Estate*** (supra), relied upon the case of ***Har Shankar v. Deputy Excise & Taxation Commissioner***, reported in **(1975) 1 SCC 737**, wherein the petitioners had offered their bids in the auctions held for granting licences for the sale of liquor. Subsequently, the petitioners moved to invalidate the auctions challenging the power of the Financial Commissioner to grant liquor licences. Rejecting this contention, the Constitution Bench, at page 263 observed as under:

"16. Those who contract with open eyes must accept the burdens of the contract along with its benefits. The powers of the Financial' Commissioner to grant liquor licences by auction and to collect licence fees through the medium of auctions cannot by writ

petitions be questioned by those who, had their venture succeeded, would have relied upon those very powers to found a legal claim. Reciprocal rights and obligations arising out of contract do not depend for their enforceability upon whether a contracting party finds it prudent to abide by the terms of the contract. By such a test no contract could ever have a binding force."

222. The Supreme Court, in ***Bishwanth Tea Estate*** (supra), already found that the subject matter, involved in the writ petition, required evidence of facts, which could not have been decided in writ petition. The relevant observations are reproduced as follows;

"12....To be more specific, following facts will have to be proved for obtaining relief:

The area covered by the grant.

Felling of the trees from the area covered by the grant.

Use to which the felled timber was to be put to.

Such use will have to be one connected with the exploitation of the grant.

What is meant by the exploitation of the grant?

Could these facts be assumed without evidence? Was the High Court justified in observing that it was not

called upon to decide complicated questions of facts? Some averments in the petition were disputed. The appellant contended that clause 2 of the indenture of lease only means that if there is some use of timber which is being felled and removed from the area covered by the grant for the purpose connected with the exploitation of that very grant, then and only then the relief can be claimed under clause 2."

223. It will, thus, be seen from an analysis of ***Bishwanath Tea Estate*** (supra) that since the facts involved required assumption of evidence, the performance of contract could not have been enforced without recording evidence. Hence, the *ratio* laid down, in ***Bishwanath Tea Co. Ltd.*** (supra), was that breach of contract, which requires detailed inquiry of facts, cannot be enforced by resorting to extra ordinary jurisdiction under Article 226.

224. I may, now, refer to the case ***of Life Insurance Corporation of India v. Escorts Ltd.,*** reported in, **MANU/SC/0015/1985**, wherein a Constitution Bench held that though the field of constitutional law, administrative law and public law has forged ahead of the law in England, uninhibited by the technical rules, which have hampered the development of the English Law, and though every action of the State or an instrumentality of the State must be informed by reason and that, in appropriate cases, actions, uninformed by reason, may be questioned as arbitrary in proceedings under



Article 226 or Article 32 of the Constitution, Article 14 cannot be construed as a charter for judicial review of all State actions and to call upon the State to account for its actions in its manifold activities by stating reasons for such actions. The Constitution Bench made it clear, in ***Escorts Ltd.*** (supra), that if the action of the State is political or sovereign in character, the court will keep away from it. The court will not debate academic matters or concern itself with the intricacies of trade and commerce. If the action of the State is related to contractual obligations or obligations arising out of tort, the court may, not, ordinarily, examine it unless the action has some public law character attached to it. The Constitution Bench further made it clear, in ***Escorts Ltd.*** (supra), that broadly speaking, the court will examine actions of the State if they pertain to the public law domain and refrain from examining them if they pertain to the private law field, though the difficulty will lie in demarcating the frontiers between the public law domain and the private law field. Made it, however, explicit the Supreme Court, in ***Escorts Ltd.*** (supra), that it is impossible to draw the line, with precision, between the frontiers of the public law domain and the private law field and that the question must be decided, in each case, with reference to the particular action, activity which the State or the instrumentality of the State is engaged, when performing the

action, the public law or private law character of the action and a host of other relevant circumstances. Cautioned, however, the Constitution Bench, in **Escorts Ltd.** (supra), that Article 14 cannot be used as a charter for judicial review of all actions of the State. The relevant observations made, in this regard, in **Escorts Ltd.** (supra), read as follows:

"101. It was, however, urged by the learned Counsel for the company that the Life Insurance Corporation was an instrumentality of the State and was, therefore, debarred by Article 14 from acting arbitrarily. It was, therefore, under an obligation to state to the court its reasons for the resolution once a rule nisi was issued to it. If it failed to disclose its reasons to the court, the court would presume that it had no valid reasons to give and its action was, therefore, arbitrary. The learned Counsel relied on the decisions of this Court in *Sukhdev Singh; Maneka Gandhi; International Airport Authority; and Ajay Hasia*. The learned Attorney General, on the other hand, contended that actions of the State or an instrumentality of the State which do not properly belong to the field of public law but belong to the field of private law are not liable to be subjected to judicial review. He relied on *O'Reilly v. Mackman* (1982) 3 All ER 1124; *Davy v. Spelthorne* (1983) 3 All ER 278; *I Congress del Partido* (1981) 2 All ER 1064; *R. v. East Berkshire Health Authority* (1984) 3 All ER 425; and *Radhakrishna Agarwal and Ors. v. State of Bihar* MANU/SC/0053/1977 : [1977] 3 SCR 249. While we do find considerable force in the contention of the



learned Attorney General it may not be necessary for us to enter into any lengthy discussion of the topic, as we shall presently see. We also desire to warn ourselves against readily referring to English cases on questions of constitutional law, administrative law and public law as the law in India in these branches has forged ahead of the law in England, guided as we are by our Constitution and uninhibited as we are by the technical rules which have hampered the development of the English Law. While we do not, for a moment, doubt that every action of the State or an instrumentality of the State must be informed by reason and that, in appropriate cases, actions uninformed by reason may be questioned as arbitrary in proceedings under Article 226 or Article 32 of the Constitution, we do not construe Article 14 as a charter for judicial review of State actions and to call upon the State to account for its actions in its manifold activities by stating reasons for such actions.

102. For example, if the action of the State is political or sovereign in character, the court will keep away from it. The court will not debate academic matters or concern itself with the intricacies of trade and commerce. If the action of the State is related to contractual obligations or obligations arising out of the tort, the court may not ordinarily examine it unless the action has some public law character attached to it. Broadly speaking, the court will examine actions of State if they pertain to the public law domain and refrain from examining them if they pertain to the private law field. The difficulty will lie in demarcating the



frontier between the public law domain and the private law field. It is impossible to draw the line with precision and we do not want to attempt it. The question must be decided in each case with reference to the particular action, the activity in which the State or the instrumentality of the State is engaged when performing the action, the public law or private law character of the action and a host of other relevant circumstances. When the State or an instrumentality of the State ventures into the corporate world and purchases the shares of a company, it assumes to itself the ordinary role of a shareholder, and dons the robes of a shareholder, with all the rights available to such a shareholder. There is no reason why the State as a shareholder should be expected to state its reasons when it seeks to change the management, by a resolution of the company like any other shareholder."

225. From the above observations made in ***Escorts Ltd.*** (supra), it becomes clear that though Article 14 cannot be used as a charter for judicial review of all actions of the State and that every action of the State in contractual field may not, ordinarily, be examined by a writ court, the fact remains that there is no absolute bar to the exercise of writ jurisdiction under Article 226 of the Constitution of India. Whether a High Court will exercise such a jurisdiction or not is a question, which must be decided in each case on the basis of its own facts, though,



generally, the High Court will not entertain if the action of the State does not have any element of public interest involved. The question as to whether a High Court would interfere or not would depend, in the light of the decision of the Apex Court, in ***Escorts Ltd.*** (supra), on the nature of the action, which is impugned in the writ petition; but the exercise of writ jurisdiction is not possible without determining the distinction between public law and private law character of the duty, sought to be enforced, and a host of other relevant circumstances.

226. Closely following the decision of the Constitution Bench, in ***Escorts Ltd.*** (supra), is the case of ***Dwarkadas Marfatia and Sons a Board of Trustees of the Port of Bombay***, reported in, **[1989] 2 SCR 751**. In this case, the appellant, M/s. Dwarkadas & Sons, had been a tenant on a portion of a land of the respondent corporation, namely, Bombay Port Trust, for over 40 years, Bombay Port Trust having been constituted as a statutory corporation under the Major Ports Act. The structures, standing on the said land, were used as a part of a rice mill. Pursuant to a Town Planning Scheme of 1957, the plots were reconstituted and the port trust framed a policy to let out the reconstituted plot to the person, who was in occupation of the major portion of the plot. In terms of this policy, the trust initiated eviction proceeding against the



appellant by giving them one month's notice sometime in October 1977. As the appellant had not vacated the said structures, the trust instituted a suit in December 1977, in the small causes court. The appellant pleaded mala fide and favouritism and also that the one month notice was bad in law. The trial court dismissed the suit on the ground of improper notice and did not enter into the question of mala fide. When the appellate court reversed the decision upholding the validity of the notice and also held that the question of mala fide or arbitrariness was not relevant for the eviction proceeding, a writ petition under Article 227 was filed in the High Court. As the High Court concurred with the decision of the appellate court, the matter was carried to the Supreme Court.

227. In its decision, in ***Dwarkadas Marfatia*** (supra), a Three Judge Bench of the Supreme Court, having taken note of ***Rampratap Jaydayal v. Dominion of India***, reported in, **MANU/MH/0096/1953: AIR 1953 Bona 170** and ***Escorts Ltd.*** (supra) , held that though the field of letting and eviction of tenants is, normally, governed by the Rent Act and port trust is statutorily exempted from the operation of the Rent Act on the basis of its public/ government character, legislative assumption or expectation, as noted in the observations of Chagla, C.J in ***Rampratap Jaydayal*** (supra), cannot make such conduct a matter of contract pure and simple and that



these corporations must act in accordance with certain constitutional conscience and whether they have so acted, must be discernible from the conduct of such corporations. The Apex Court clarified, in **Dwarkadas Marfatia** (supra), that it is not correct to suggest that in the light of the decision in **Radhakrishna** (supra), a State's contractual dealings do not ever fall under public law domain and is not subject to judicial review. The court, in **Dwarkadas Marfatia** (supra), also clarified that even the Constitution Bench decision, in **Escorts Ltd.** (supra), does not wholly exclude State's all actions, in contractual matters, from the court's power of judicial review.

228. The Apex Court further made it clear, in **Dwarkadas Marfatia** (supra), that every action/activity of the trust, which is a State within the meaning of Article 12, must be subject to Article 14 and must be reasonable and taken only upon lawful and relevant grounds of public interest and whenever there is arbitrariness in the State's action, Article 14 springs in and judicial review strikes such an action down. Making its views emphatic, the Supreme Court further made it clear, in **Dwarkadas Marfatia** (supra), that whatever be the activity of the public authority, it should meet the test of Article 14 and that the decision in **Escorts Ltd.** (supra), if read properly, does not detract from the aforesaid principles.

229. The Apex Court further made it clear, in



Dwarkadas Marfatia (supra), that every action/activity of the trust, which is a State within the meaning of Article 12, must be subject to Article 14 and must be reasonable and taken only upon lawful and relevant grounds of public interest and whenever there is arbitrariness in the State's action, Article 14 springs in and judicial review strikes such an action down. Making its views emphatic, the Supreme Court further made it clear, in **Dwarkadas Marfatia** (supra), that whatever be the activity of the public authority, it should meet the test of Article 14 and that the decision in **Escorts Ltd.** (supra), if read properly, does not detract from the aforesaid principles.

230. The observations made, in this regard, by the Apex Court, in **Dwarkadas Marfatia** (supra), read as under:

"22. Our attention was drawn to the observations of this Court in Radhakrishna Agarwal and Ors. v. State of Bihar and Ors.[1977] 3 SCR 249. Reliance was also placed on the observations of this Court in Life Insurance Corporation of India v. Escorts Ltd. and Ors. 1985 Suppl. (3) SCR 909 in support of the contention that the public corporations' dealing with tenants is a contractual dealing and it is not a matter for public law domain and is not subject to judicial review. However, it is not the correct position. The Escorts' decision reiterated that every action of the State or an instrumentality of the State, must be informed by reason. Indubitably, the respondent is an organ of the State under Article 12 of the Constitution. In



appropriate cases, as was observed in the last mentioned decision, actions uninformed by reason may be questioned as arbitrary in proceedings under Article 226 or Article 32 of the Constitution. But it has to be remembered that Article 14 cannot be construed as a charter for judicial review of State action, to call upon the State to account for its actions in its manifold activities by stating reasons for such actions.

23. The contractual privileges are made immune from the protection of the Rent Act for the respondent because of the public position occupied by the respondent authority. Hence, its actions are amenable to judicial review only to the extent that the State must act validly for a discernible reason, not whimsically for any ulterior purpose. Where any special right privilege is granted to any public or statutory body on the presumption that it must act in certain manner, such bodies must make good such presumption while acting by virtue of such privileges. Judicial review to oversee if such bodies are so acting is permissible.

24. The field of letting and eviction of tenants is normally governed by the Rent Act. The port trust is statutorily exempted from the operation of Rent Act on the basis of its public/ government character. The legislative assumption or expectation as noted in the observations of Chagla, CJ in Rampratap Jaidayal's case cannot make such conduct a matter of contract pure and simple'. These corporations must act in accordance with certain constitutional conscience and whether they have so acted, must be discernible from the conduct

of such corporations. In this connection, reference may be made to the observations of this Court in *S.P. Rekhi v. Union of India*, reiterated in *M.C. Mehta and Anr. v. Union of India and Ors.* 1VIA.NU/ SC/ 0092/ 1986: [1987] 1 SCR 819, wherein at p. 148, this Court observed:

It is dangerous to exonerate corporations from the need to have constitutional conscience; and so, that interpretation, language permitting, which makes governmental agencies, whatever their mien, amenable to constitutional limitations must be adopted by the court as against the alternative of permitting them to flourish as an imperium in imperio.

25. Therefore, Mr. Chinai was right in contending that every action/activity of the Bombay Port Trust which constituted "State" within Article 12 of the Constitution in respect of any right conferred or privilege granted by any statute is subject to Article 14 and must be reasonable and taken only upon lawful and relevant grounds of public interest. Reliance may be placed on the observations of this Court in *E.P. Royappa v. State of Tamil Nadu* MANU/ SC/ 0380/ 1973: (1974) ILLJ 172 SC; *Maneka Gandhi v. Union of India* MANU/ SC/ 0133/ 1978: /1978 12 SCR 621 *Ramana Dayaram Shetty v. International Airport Authority of India and Ors.* MANU/ SC/ 0048/ 1979 *Kasturi Lai Lakshmi Reddy v. State of J&K and another*, MANU/ SC/ 0079/ 1980 : [1980] 3 SCR 1338; and *Ajay Hasiay. Khalid Mujib*

Sehravardi and Ors.etc. MANU/ SC/ 0498/ 1980. Where there is arbitrariness in State action, Article 14 springs in and judicial review strikes such an action down. Every action of the Executive Authority must be subject to rule of law and must be informed by reason. So, whatever be the activity of the public authority, it should meet the test of Article 14. The observations in paras 101 and 102 of the Escorts' case, read properly, do not detract from the aforesaid principles.

27. We are inclined to accept the submission that every activity of a public authority, especially in the background of the assumption on which such authority enjoys immunity from the rigours of the Rent Act, must be informed by reason and guided by the public interest. All exercise of discretion or power by public authorities as the respondent, in respect of dealing with tenants in respect of which they have been treated separately and distinctly from other landlords on the assumption that they would not act as private landlords, must be judged by that standard. If a governmental policy or action even in contractual matters fails to satisfy the test of reasonableness, it would be unconstitutional. See, the observations of this Court in *Kasturi Lai Lakshmi Reddy and RamanaDayaram Shetty v. International Airport Authority of India and Ors. MANU/SC/0048/1979.*"

(Emphasis is supplied)

231. If the decision, in **Dwarkadas Marfatia** (supra), is carefully read, it becomes more than abundantly clear that though at the first blush, the decision, in **Radhakrishna** (supra), appears to have laid down that the remedy of every breach of contract lies in civil suits and writ jurisdiction would never be applicable to enforce even constitutional obligations of the State in contractual matters, the later decision of the Apex Court, in **Dwarkadas Marfatia** (supra), clearly shows that having considered the decision, in **Radhakrishna** (supra), and also the Constitution Bench decision, in **Escorts Ltd.** (supra), it has clearly held that there is no absolute bar to the exercise of jurisdiction under Article 226 in a contractual matter, particularly, when the act or conduct of the State or its instrumentality is challenged on the anvil of Article 14. It is also clear from **Dwarkadas Marfatia** (supra) that a writ court will enforce even a contractual obligation of the State if the breach of obligation by the State fails to satisfy the test of reasonableness under Article 14, for, in such a case, what the writ court would be enforcing is the constitutional duty of the State, though such a duty might have arisen in the realm of contractual obligation. It has been further made clear, in **Dwarkadas Marfatia** (supra), that even in contractual matters, the State's action must be reasonable, lawful and on relevant ground of public interest.



232. What emerges from the above discussion is that when a writ petition is filed alleging breach of contractual obligation by the State or its instrumentality, the High Court shall determine whether the writ petitioner is merely demanding to enforce his contractual rights or he has raised some important questions of law and/or constitutional issues. If he aims at merely enforcing his contractual rights and raises no important question of law or constitutional issue, writ jurisdiction will not be invoked; but if the writ petitioner raises a constitutional issue, there is no absolute bar to the exercise of jurisdiction under Article 226 even in a contractual matter. This position of law was made clear in ***Life Insurance Corporation of India v. Asha Goel***, reported in, **(2001) 2 SCC 160**, wherein the court observed as under:

"10. Article 226 of the Constitution confers extraordinary jurisdiction on the High Court to issue high prerogative writs for enforcement of the fundamental rights or for any other purpose. It is wide and expansive. The Constitution does not place any fetter on exercise of the extraordinary jurisdiction. It is left to the discretion of the High Court. Therefore, it cannot be laid down as a general proposition of law that in no case the High Court can entertain a writ petition under Article 226 of the Constitution to enforce a claim under a life insurance policy. It is neither possible nor proper to enumerate exhaustively the circumstances in which such a claim can or cannot be enforced by filing a



writ petition. The determination of the question depends on consideration of several factors like, whether a writ petitioner is merely attempting to enforce his/her contractual rights or the case raises important questions of law and constitutional issues, the nature of the dispute raised; the nature of inquiry necessary for determination of the dispute, etc. The matter is to be considered in the facts and circumstances of each case. While the jurisdiction of the High Court to entertain a writ petition under Article 226 of the Constitution cannot be denied altogether, courts must bear in mind the self-imposed restriction consistently followed by High Courts all these years after the constitutional power came into existence in not entertaining writ petitions filed for enforcement of purely contractual rights and obligations which involve disputed questions of facts. The courts have consistently taken the view that in a case where for determination of the dispute raised, it is necessary to inquire into the facts for determination of which it may become necessary to record oral' evidence, a proceeding under Article 226 of the Constitution is not the appropriate forum. The position is also well settled that if the contract entered between the parties provides an alternate forum for resolution of disputes arising from the contract, then the parties should approach the forum agreed by them and the High Court in writ jurisdiction should not permit them to bypass the agreed forum of dispute resolution. At the cost of repetition it may be stated that in the above discussions we have only indicated some of the circumstances in which the High Courts



have declined to entertain petitions filed under Article 226 of the Constitution for enforcement of contractual rights and obligations; the discussions are not intended to be exhaustive. This Court from time to time disapproved of a High Court entertaining a petition under Article 226 of the Constitution in matters of enforcement of contractual rights and obligations particularly where the claim by one party is contested by the other and adjudication of the dispute requires inquiry into facts. We may notice a few such cases--Mohd. Hanif U. State of Assam MANU/ SC/ 0370/1969 : [1970] 2 SCR 197 ; Banchhanidhi Rath v. State of Orissa MANU/ SC/ 0652 / 1971 : AIR 1972 SC 843 ; Rukmanibai Gupta v. Collector, Jabalpur MANU/ SC/ 0002/ 1980 : AIR 1981 SC 479 ; Food Corporation of India v. Jagannath Dutta 1993 Suppl. (3) SCC 635; and State of H.P. v. Raja Mahendra Pal MANU/ SC/ 0227/ 1999 : [1999] 2 SCR 323."

233. The position that emerges from the discussions in the decided cases is that, ordinarily, the High Court should not entertain a writ petition, filed under Article 226 of the Constitution, for mere enforcement of a claim under a contract of insurance. Where an insurer has repudiated the claim, in case such a writ petition is filed, the High Court has to consider the facts and circumstances of the case, the nature of the dispute raised and the nature of the inquiry necessary to be made for determination of the questions raised and other relevant factors before taking a decision whether it should



entertain the writ petition or reject it as not maintainable. It has also to be kept in mind that in case an insured or nominee of the deceased insured is refused relief merely on the ground that the claim relates to contractual rights and obligations and he/she is driven to a long drawn litigation in the civil court it will cause serious prejudice to the claimant/ other beneficiaries of the policy. The pros and cons of the matter in the context of the fact situation of the case should be carefully weighed and appropriate decision should be taken. In a case where claim by an insured or a nominee is repudiated raising a serious dispute and the court finds the dispute to be a bona fide one which requires oral and documentary evidence for its determination then the appropriate remedy is a civil suit and not a writ petition under Article 226 of the Constitution. Similarly, where a plea of fraud is pleaded by the insurer and on examination is found prima facie to have merit and oral and documentary evidence may become necessary for determination of the issue raised, then a writ petition is not an appropriate remedy.

234. Moreover, when a writ court finds that the refusal to extend constitutional remedy of Article 226 of the Constitution of India to enforce a contractual right or obligation would drive a person, knocking at the doors of a writ court, to a long drawn litigation in the civil court causing serious prejudice to the person seeking relief against the State, the

writ court may not, according to Asha Goel decline to interfere in such a matter and hence, reminds the Apex Court, in **Asha Goel** (supra), thus:

“The pros and cons of the matter in the context of the fact situation of the case should be carefully weighed and appropriate decision should be taken.”

235. From the law, as laid down, in **Asha Goel**, (supra), it becomes transparent that when non-interference by a writ court would drive a person to a long drawn civil litigation causing serious prejudice to him, the writ court's interference is not only desirable, but even necessary. As a corollary to this proposition of law, one can safely say that when a contractor's dues are admitted by a State and the fact situation of a given case satisfies the writ court that asking the contractor to take recourse to the civil court would cause serious prejudice to the contractor, the writ court should step in.

236. From the decision, in **Asha Goel** (supra), what emerges is that ordinarily, a High Court should not entertain a writ petition, under Article 226 of the Constitution of India, for mere enforcement of claims under a contract of insurance; however, the Constitution having not placed any fetters on the exercise of extraordinary jurisdiction by the High Court under Article 226 of the Constitution of India, it is in the discretion of the High Court to interfere or not to interfere in a



contractual matter. No exercise of discretionary power can be unfettered, unguided, unsettled or arbitrary, and, hence, the position of law, on a given subject, should not be completely unforeseen and legal decisions must have some standards or parameters in order to enable the people at large to know as to what the position of law, on a given subject, is. Considered thus, exercise of jurisdiction under Article 226 of the Constitution of India cannot be unfettered or arbitrary. However, it is not possible to enumerate exhaustively the circumstances in which a writ application even in contractual matter would lie, for exercise of jurisdiction would depend upon a considerable number of factors, such as, the question as to whether the writ petitioner is merely attempting to enforce his or her contractual rights or has raised important questions of law or constitutional issues, the nature of the dispute raised and the nature of enquiry necessary for determination of the dispute, etc. In short, exercise of jurisdiction would depend on the facts and circumstances of each given case. While jurisdiction of the High Court to entertain a writ petition, under Article 226 of the Constitution of India, cannot be denied altogether, the courts must bear in mind the self-imposed restrictions constitutionally followed by the High Courts not to, ordinarily, entertain writ petitions for enforcement of purely contractual rights and obligations, particularly, when

determination of such questions necessitates taking of oral evidence or when the parties had agreed to resolve their disputes arising out of the contract, in the alternative forum selected by them.

237. I, now, turn to the case of ***Shrilekha Vidyarthi (Kumari) v. State of U.P., (1991) 1 SCC 212.***

While considering the case of ***Kumari Shrilekha Vidyarthi*** (supra) what may be borne in mind is that it was a case in which the Government of Uttar Pradesh terminated, with the help of a general order, appointments of all the government counsel in all the districts of the State of Uttar Pradesh with effect from 28.02.1990 and directed preparation of fresh panel to make appointments in place of existing incumbents irrespective of the fact whether the term of the incumbent had expired or was subsisting. Validity of this action of the State was challenged by way of a number of writ petitions. In the backdrop of these facts, a Two Judge Bench of the Supreme Court, speaking through J.S. Verma, J. (as His Lordship then was), posed the question as to whether guarantee of non-arbitrariness, which is basic to the rule of law under Article 14, stands excluded from the State's action in contractual field.

238. In answer to the momentous question, posed above, the Court made it clear, in ***Kumari Shrilekha Vidyarthi*** (supra), that the Constitution does not envisage or



permit unfairness in State actions in any sphere of its activity. Leaving no room open for doubt, the Apex Court held, in ***Kumari Shrilekha Vidyarthi*** (supra), that it would be alien to the constitutional scheme to accept the argument of exclusion of Article 14 in contractual matters. The Court, however, hastened to add that the scope and grounds on which judicial review would be permissible in contractual matters may be a different matter, but contractual matters cannot be wholly excluded from the purview of judicial review.

239. Drawing distinction between the contracts to which the State is a party, and the contracts to which the private parties are involved, the Court, in ***Kumari Shrilekha Vidyarthi*** (supra), pointed out that while private parties are concerned with their personal interest, the State, while exercising its powers and discharging its functions, acts indubitably for public good and in public interest, for, the impact of every State action is also on the public interest and this factor alone is sufficient to import, at least, the minimal requirements of public law obligations even in the actions of the State in contractual matters.

240. The Court also pointed out, in ***Kumari Shrilekha Vidyarthi*** (supra), that though the scope of judicial review in respect of disputes, falling within the domain of contractual obligations, may be limited, the fact remains that



to the extent that a challenge is posed on the ground of violation of Article 14 by alleging that the impugned action is arbitrary, unfair or unreasonable, the mere fact that the dispute also falls within the domain of contractual obligations would not relieve the State of its obligation to comply with the basic requirements of Article 14. To this extent, reiterated the Court, in ***Kumari Shrilekha Vidyarthi*** (supra), the obligation of a State is of a public character and that contractual obligation cannot divest the person aggrieved of the guarantee under Article 14 of non-arbitrariness at the hands of the State in all its actions.

241. Symbolizing the nature of character of the State, when it enters into contractual relationships, the Apex Court made it clear, in ***Kumari Shrilekha Vidyarthi*** (supra), that the State cannot be attributed the split personality of Dr. Jekyll and Mr. Hyde in the contractual field so as to impress on it all the characteristics of the State at the threshold, while entering into a contract, and, thereafter, casting off its garb of a State and adorn the new robe of a private body during the subsistence of the contract enabling it thereby to act arbitrarily subject only to the contractual obligations and the remedies flowing from it. The requirement of Article 14 being the duty to act fairly, justly and reasonably, there is nothing, observed the Court, in ***Kumari Shrilekha Vidyarthi*** (supra), which militates

against the concept of requiring the State always so to act, even in contractual matters.

242. Drawing strength for the conclusion, reached above, from the decision in **Dwarkadas Marfatia** (supra), the Court, in **Kumari Shrilekha Vidyarthi** (supra), further held that if the State is unable to produce materials to justify its action as fair and reasonable, burden on the person, alleging arbitrariness, must be held to have been discharged and the scope of judicial review, howsoever limited in contractual matters, must remain open to ensure that State action is not vitiated by the vice of arbitrariness.

243. In **Kumari Shrilekha Vidyarthi** (supra), the Court also took the view that even assuming that it is necessary to import the concept of presence of some public element in a State action, in the realm of contractual obligations, to attract Article 14, the fact remains that the ultimate impact of all actions of the State or a public body being on public interest, requisite public element is also present in contractual matters. Held, therefore, the Court, in **Kumari Shrilekha Vidyarthi** (supra), that it finds it difficult and unrealistic to exclude from the purview of judicial review the State actions in contractual matters after the contract has been made, in order to test the validity of the actions of the State on the anvil of Article 14. The relevant observations, made at

paras 21, 22, 23, 24, 28, 29, 30 and 33, in **Kumari Shrilekha Vidyarthi** (supra), are reproduced hereinbelow:

"21. The Preamble of the Constitution of India resolves to secure, to all its citizens, justice, social, economic and political and equality of status and opportunity. Every State action must be aimed at achieving this goal. Part IV of the Constitution contains 'Directive Principles of State Policy' which are fundamental in the governance of the country and are aimed at securing social and economic freedoms by appropriate State action which is complementary to individual fundamental rights guaranteed in Part III for protection against excesses of State action, to realise the vision in the Preamble. This being the philosophy of the Constitution, can it be said that it contemplates exclusion of Article 14 non-arbitrariness which is basic to rule of law from State actions in contractual field when all actions of the State are meant for public good and expected to be fair and just? We have no doubt that the Constitution does not envisage or permit unfairness or unreasonableness in State actions in any sphere of its activity contrary to the professed ideals in the Preamble. In our opinion, it would be alien to the constitutional scheme to accept the argument of exclusion of Article 14 in contractual matters. The scope and permissible grounds of judicial review in such matters and the relief which may be available are different matters but that does not justify the view of its total exclusion. This is more so when the modern trend is also to examine the unreasonableness of a term in such contracts where the bargaining power is unequal so that these are not negotiated contracts but

standard form contracts between unequals.

22. *There is an obvious difference in the contracts between private parties and contracts to which the State is a party. Private parties are concerned only with their personal interest whereas the State while exercising its powers and discharging its functions acts indubitably, as is expected of it, for public good and in public interest. The impact of every State action is also on public interest. This factor alone is sufficient to import at least the minimal requirements of public law obligations and impress with this character the contracts made by the State or its instrumentality. It is a different matter that the scope of judicial review in respect of disputes falling within the domain of contractual obligations may be more limited and in doubtful cases the parties may be relegated to adjudication of their rights by resort to remedies provided for adjudication of purely contractual disputes. However, to the extent, challenge is made on the ground of violation of Article 14 by alleging that the impugned act is arbitrary, unfair or unreasonable, the fact that the dispute also falls within the domain of contractual obligations would not relieve the State of its obligation to comply with the basic requirements of Article 14. To this extent, the obligation is of a public character invariably in every case irrespective of there being any other right or obligation in addition thereto. An additional contractual obligation cannot divest the claimant of the guarantee under Article 14 of non-arbitrariness at the hands of the State in any of its actions.*

23. *Thus, in a case like the present, if it is shown that*

the impugned State action is arbitrary and, therefore, violative of Article 14 of the Constitution, there can be no impediment in striking down the impugned act irrespective of the question whether an additional right, contractual or statutory, if any, is also available to the aggrieved persons.

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

even in the sphere of contractual matters for regulating the conduct of the State activity.

28. *Even assuming that it is necessary to import the concept of presence of some public element in a State action to attract Article 14 and permit judicial review, we have no hesitation in saying that the ultimate impact of all actions of the State or a public body being undoubtedly on public interest, the requisite public element for this purpose is present also in contractual matters. We, therefore, find it difficult and unrealistic to exclude the State actions in contractual matters, after the contract has been made, from the purview of judicial review to test its validity on the anvil of Article 14.*

29. *It can no longer be doubted at this point of time that Article 14 of the Constitution of India applies also to matters of governmental policy and if the policy or any action of the government, even in contractual matters, fails to satisfy the test of reasonableness, it would be unconstitutional. See **Ramana Dayaram Shetty v. International Airport Authority of India** MANU/SC/0048/1979 : (1979) II LLJ 217 SC and **Kasturi Lal Lakshmi Reddy v. State of Jammu and Kashmir** MANU/SC/0079/1980 : [1980] 3 SCR 1338 . In **Col. A.S. Sangwan v. Union of India** 1980 Suppl. SCC 559 : 1981 SCC (L&S) 378 while the discretion to change the policy in exercise of the executive power, when not trammelled by the statute or rule, was held to be wide, it was emphasized as imperative and implicit in Article 14 of the Constitution that a change in policy must be made fairly and should not give the impression that it was so done arbitrarily or by any*

ulterior criteria. The wide sweep of Article 14 and the requirement of every State action qualifying for its validity on this touchstone, irrespective of the field of activity of the State, has long been settled. Later decisions of this Court have reinforced the foundation of this tenet and it would be sufficient to refer only to two recent decisions of this Court for this purpose.

30. In *Divarkadas Marfatia and Sons v. Board of Trustees of the Port of Bombay* MANU/SC/0330/1989 : [1989] 2 SCR 751 , the matter was re-examined in relation to an instrumentality of the State for applicability of Article 14 to all its actions. Referring to the earlier decisions of this Court and examining the argument for applicability of Article 14, even in contractual matters, Sabyasachi Mukharji, J. (as the learned Chief Justice then was), speaking for himself and Kania, J. reiterated that: (SCC p. 304, para 22) "every action of the State or an instrumentality of the State, must be informed by reason...actions uninformed by reasons may be questioned as arbitrary in proceedings under Article 226 or Article 32 of the Constitution". Ranganathan, J. did not express any opinion on this point but agreed with the conclusion of the other learned judges on the facts of the case. It is obvious that the conclusion on the facts of the case could not be reached by Ranganathan, J. without examining them and this could be done only on the basis that it was permissible to make the judicial review. Thus, Ranganathan, J. also applied that principle without saying so. In view of the wide ranging and, in essence, all pervading sphere of State activity in discharge of its welfare functions, the question



assumes considerable importance and cannot be shelved. The basic requirement of Article 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.

*33. No doubt, it is true, as indicated by us earlier, that there is a presumption of validity of the State action and the burden is on the person who alleges violation of Article 14 to prove the assertion. However, where no plausible reason or principle is indicated nor is it discernible and the impugned State action, therefore, appears to be ex facie arbitrary, the initial burden to prove the arbitrariness is discharged shifting onus on the State to justify its action as fair and reasonable. If the State is unable to produce material to justify its action as fair and reasonable, the burden on the person alleging arbitrariness must be held to be discharged. The scope of judicial review is limited as indicated in **Dwarkadas Marfatia** case to oversee the State action for the purpose of satisfying that it is not vitiated by the vice of arbitrariness and no more. The wisdom of the policy or the lack of it or the desirability of a better alternative is not within the permissible scope of judicial review in such cases. It is not for the courts to recast the policy or to substitute it with another which is considered to be more appropriate, once the attack*

*on the ground of arbitrariness is successfully repelled by showing that the act which was done, was fair and reasonable in the facts and circumstances of the case. As indicated by Diplock, LJ in **Council for Civil Services Union v. Minister of Civil Service** (1984) 3 All ER 935 the power of judicial review is limited to the grounds of illegality, irrationality and procedural impropriety. In the case of arbitrariness, the defect of irrationality is obvious."*

244. What emerges from the observations made, in **Kumari Shrilekha Vidyarthi** (supra), is that even after having entered into a contract, the State cannot act arbitrarily, unreasonably or unfairly merely because of the fact that its actions are in the realm of a contract.

245. In the case of **Biman Krishna Bose v. United India Insurance Co. Ltd.**, (2001) 6 SCC 477, the appellant and his wife had taken a mediclaim policy from the United India Insurance Company. During the subsistence of insurance policy, the wife of the appellant fell ill and, on the advice of doctor, she was admitted to hospital and, for her treatment, a certain amount was spent. When the appellant staked a claim with the Insurance Company,' it refused to honour the bill leading a series of litigations before the Consumer Forum. Eventually, when the matter went to the Supreme Court, a direction was given to the Insurance Company to pay Rs 20,000.00 to the appellant. In the meantime, the Insurance policy fell due for



renewal. Under such circumstances, the appellant sent a letter along with a cheque of Rs 1,796.00 to the Insurance Company requesting for renewal of his existing mediclaim policy. However, the Insurance Company declined to renew the mediclaim policy as per the advice of the competent authority of the Company.

246. Under the aforesaid circumstances, the appellant filed a writ petition, under Article 226 of the Constitution before the Calcutta High Court, challenging the order passed by the respondent Insurance Company refusing to renew the mediclaim policy. The said writ petition was allowed and the order, refusing to renew the policy, was set aside and a direction was issued to the Insurance Company to renew the mediclaim policy earlier taken out by the appellant. Aggrieved, the Insurance Company filed an appeal against the judgment of learned Single Judge. The Division Bench of the Calcutta High Court while agreeing with the view taken by the learned Single Judge, substantially, dismissed the appeal; yet, the High Court directed the appellant to take a fresh mediclaim policy on the ground that the renewal of mediclaim policy cannot be granted with retrospective effect, as the period, for which renewal, was required has already expired. It is against this part of that the order the appellant preferred an appeal to the Supreme Court.

247. The Supreme Court held, in ***Biman Krishna***



Bose (supra), that where an insurance company under the provisions of the General Insurance Business (Nationalisation) Act, 1972, has assumed monopoly in the business of general insurance in the country and, thus, acquired the trappings of the "State" being other authorities under Article 12 of the Constitution. It must satisfy the requirement of reasonableness and fairness, while dealing with its customers. Even in an area of contractual relations, observed the Supreme Court, in **Biman Krishna Bose** (supra), that the State and its instrumentalities are enjoined with the obligations to act with fairness and, in doing so, can take into consideration only the relevant materials and that they must not take any irrelevant and extraneous consideration, while arriving at a decision. Further observed the Supreme Court, in **Biman Krishna Bose** (supra), that arbitrariness should not appear in their actions or decisions of the State or its instrumentalities.

248. Biman Krishna Bose (supra) can be considered as an authority on the point that State, in its contractual obligations, cannot take an arbitrary decision; rather, the decision must be taken considering only relevant materials devoid of any arbitrariness.

249. In the case of **ABL International Ltd. v. Export Credit Guarantee Corpn. of India Ltd., (2004) 3 SCC 553**, the facts were that there was an export contract



between two companies wherein Kazakhstan Government was also involved. In this regard the appellants had approached the respondent, Export Credit Guarantee Corporation of India Ltd, (**EGCIL**, in short) for a risk cover, which was granted. Later on, upon the failure of Kazakhstan Government to fulfil its guarantee, the appellants made a claim before the first respondent, which had covered the said risk of compensating the loss. **EGCIL**, however, repudiated the claim on the ground that the appellants had changed the terms of the contract of payment without first consulting it and, therefore, it had no obligation to compensate the appellants for the loss suffered by it.

250. The appellant, then, filed a writ petition before the Calcutta High Court, *inter alia*, praying for quashing of the letters of repudiation issued by the **EGCIL** with consequential direction to the first respondent to make payment of the dues to it under the contract of insurance. The learned Single Judge came to the conclusion that though the dispute between the parties arose out of a contract, **EGCIL**, being a State for the purpose of Article 12, was bound by the terms of the contract and, therefore, a writ was maintainable for such non-performance, and, upon considering the arguments of the parties, with regard to the liability under the contract of insurance, allowed the writ petition and issued the writ and

directions as prayed for by the appellants in the writ petition.

251. In an appeal filed by the **EGCIL** before the Appellate Bench of the Calcutta High Court, the Bench reversed the findings of the learned single Judge and held that the claim of the appellant, involving disputed questions of fact, cannot be adjudicated in a writ proceeding under Article 226 of the Constitution; hence, the judgment of the learned single Judge was set aside.

252. In the Supreme Court, **EGCIL** carried the same arguments on which the Division Bench of the Calcutta High Court had ruled. It was argued that the subject-matter is a dispute arising out of a contract and is not a matter falling under the purview of administrative law. It was also argued that the doctrine of fairness and reasonableness applies only in the exercise of statutory or administrative actions of a State and not in the exercise of a contractual obligation and issues, arising out of contractual matters, will have to be decided on the basis of the law of contract and not on the basis of the administrative law. It was further argued that at the most, in matters, involving statutory contracts, where action of the State involves a public duty, a writ may lie; but in the instant case, the contract was neither a statutory contract nor did the duty of the **EGCIL**, under the contract, have any public law element involved in it.

253. In view of the submissions made by the **EGCIL**, the same question, once again, stared at the Supreme Court as to whether a writ petition, under Article 226 of the Constitution of India, is maintainable to enforce a contractual obligation of the State or its instrumentality by an aggrieved party.

254. Placing reliance on **K.N. Guruswamy v. State of Mysore, (AIR 1954 SC 592)**, the Supreme Court held that it is clear from its observations, in **K.N. Guruswamy** (supra), that on a given set of facts, if a State is found to have acted in an arbitrary manner even in a matter of contract, an aggrieved party can approach by way of writ under Article 226 of the Constitution of India and the Court, depending on facts of the case, is empowered to grant relief.

255. Having taken note of the case of **Ram Sanehi Singh** (supra), which followed **K.N. Guruswamy** (supra) and also **Gujarat State Financial Corporation v. Lotus Hotels Pvt. Ltd.** reported in MANU/SC/0036/1983 : AIR 1983 SC 848 , which followed **Ramana Dayaram Shetty v. International Airport Authority of India**, reported in MANU/SC/0048/1979 : (1979) II LLJ 217 SC and, then, having referred to the case of **Escorts Ltd.** (supra), the court, in **ABL International Ltd.** (supra), has pointed out that the decision in **Escorts Ltd.** (supra) does not lay down, as a rule, that in matters of contract, the courts' jurisdiction under Article 226 stands wholly

ousted. On the contrary, points out the Supreme Court, in **ABL International Ltd.** (supra), the Constitution Bench's use, in **Escorts Ltd.** (supra), of the words '*court may not ordinarily examine it unless the action has some public law character attached to it*' indicates that in a given case, on the existence of the required factual matrix, a remedy under Article 226 will be available.

256. Having analysed several other pronouncements governing the field, the Supreme Court, in **ABL International Ltd.** (supra), laid down the following legal principles:

(a) In an appropriate case, a writ petition as against a State or an instrumentality of a State, arising out of a contractual obligation, is maintainable.

(b) Merely because some disputed questions of fact arise for consideration, same cannot be a ground to refuse to entertain a writ petition in all cases as a matter of rule.

(c) A writ petition involving a consequential relief of monetary claim is also maintainable.

(Emphasis is added)

257. Striking, however, a word of caution, the Supreme Court, in **ABL International Ltd.** (supra), held that while entertaining an objection as to the maintainability of a writ petition, under Article 226 of the Constitution of India, the court should bear in mind the fact that the power to issue



prerogative writs, under Article 226 of the Constitution, is plenary in nature and is not limited by any other provisions of the Constitution. The High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. The Court has imposed upon itself certain restrictions in the exercise of this power and this plenary power of the High Court to issue a prerogative writ will not, normally, be exercised by the Court to the exclusion of other available remedies unless such action of the State or its instrumentality is arbitrary and unreasonable so as to violate the constitutional mandate of Article 14 or for other valid and legitimate reasons for which the Court thinks it necessary to exercise the said jurisdiction.

258. It will be seen that the decision, in ***ABL International Ltd.*** (supra), follows the line of reasoning as propounded in ***Shrilekha Vidyarthi*** (supra).

259. The relevant observations, appearing in ***ABL International Ltd*** (supra), are being reproduced hereinbelow:

"27. From the above discussion of ours, the following legal principles emerge as to the maintainability of a writ petition:

In an appropriate case, a writ petition as against a State or an instrumentality of a State arising out of a contractual obligation is maintainable.

Merely because some disputed questions of fact arise for consideration, same cannot be a ground to refuse to entertain a writ petition in all cases as a matter of rule.

A writ petition involving a consequential relief of monetary claim is also maintainable.

28. However, while entertaining an objection as to the maintainability of a writ petition under Article 226 of the Constitution of India, the court should bear in mind the fact that the power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provisions of the Constitution. The High Court having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. The Court has imposed upon itself certain restrictions in the exercise of this power. (See Whirlpool Corpn. V. Registrar of Trade Marks.) And this plenary right of the High Court to issue a prerogative writ will not normally be exercised by the Court to the exclusion of other available remedies unless such action of the State or its instrumentality is arbitrary and unreasonable so as to violate the constitutional mandate of Article 14 or for other valid and legitimate reasons, for which the Court thinks it necessary to exercise the said jurisdiction."

(Emphasis is supplied)

260. In the case of **Gujarat State Financial Corpn. v. Lotus Hotels (P) Ltd., (1983) 3 SCC 379**, the question before the Supreme Court was whether a writ of *mandamus* can be issued for enforcement of contractual obligations. The facts of this case were that respondent had applied before the appellant for financial assistance to set up a 5 star hotel. The terms and conditions were settled and the



respondent wrote a letter accepting the terms and conditions on which the Corporation had agreed to advance the loan. As a part of the deal, the Company had to create an equitable mortgage in favour of the Corporation for securing the loan. All the documentations had taken place for the purpose of loan and, in order to materialize the project, the respondent invested huge sum of money for the project. Later, due to complaints against the promoter of the company, the appellant refused to advance the loan on the ground that loan was dependent on refinance, by the Industrial Development Bank of India and since the said Bank has refused to refinance it would not be possible to advance the loan to the respondent.

261. Ultimately, the respondent moved a petition under Article 226 of the Constitution in the High Court of Gujarat. A learned Single Judge issued a *mandamus* directing the appellant to disburse the promised loan to the Company, forthwith, in accordance with its letter of offer followed by the agreement. The appellant Corporation preferred a Letters Patent Appeal. The Division Bench, hearing the Letters Patent Appeal, agreed with the conclusion reached by the learned Single Judge and dismissed the appeal.

262. In the Supreme Court, one of the contentions raised by the appellant, ***Gujarat State Financial Corpn. v. Lotus Hotels (P) Ltd.*** (supra), was that the dispute, raised in

the writ, falls within the realm of contract and at best, the Corporation can be charged with breach of contract for which the remedy was by way of damages or any other remedy available to the respondent for breach of contract; but, in no case, a writ of *mandamus* can be issued compelling the Corporation to perform its part of the contract.

263. Repelling the arguments, the Supreme Court held, ***Gujarat State Financial Corpn. v. Lotus Hotels (P) Ltd.*** (supra), that it is too late in the day to contend that the instrumentality of the State, which would be "*other authority*" under Article 12 of the Constitution, can commit breach of a solemn undertaking on which other side has acted and, then, contend that the party, suffering by the breach of contract, may sue for damages, but cannot compel specific performance of the contract.

264. It further held that in the back drop of incontrovertible fact situation, the principle of promissory estoppel would also come into play and, subsequently, placed reliance on the case of ***Motilal Padampat Sugar Mills Co. (P) Ltd. v. State of U.P.***, (1979) 2 SCC 409. The observations, in ***Motilal*** (supra), were reproduced as follows;

8. "*The true principle of promissory estoppel, therefore, seems to be that where one party has by his words of conduct made to the other a clear and unequivocal promise which is intended to create legal relations or affect a legal relationship*



to arise in the future, knowing or intending that it would be acted upon by the other party to whom the promise is made and it is in fact so acted upon by the other party, the promise would be binding on the party making it and he would not be entitled to go back upon it, if it would be inequitable to allow him to do so having regard to the dealings which have taken place between the parties, and this would be so irrespective of whether there is any pre-existing relationship between the parties or not."

265. The concluding remarks, in ***Lotus Hotels*** (supra), are very important, wherein the Supreme Court held that if appellant entered into a solemn contract in discharge and performance of its statutory duty and the respondent acted upon it, the statutory corporation cannot be allowed to act arbitrarily so as to cause harm and injury, flowing from its unreasonable conduct, to the respondent. In such a situation, the court is not powerless from holding the appellant to its promise and it can be enforced by a writ of *mandamus* directing it to perform its statutory duty. A petition, under Article 226 of the Constitution, would certainly lie to direct performance of a statutory duty by "other authority" as envisaged by Article 12 and accordingly, the High Court was fully justified in issuing a writ of *mandamus* to disburse the loan.

266. The relevant observations, appearing in ***Gujarat State Financial Corpn. v. Lotus Hotels (P) Ltd.,*** (supra), are quoted as follows;

"13. Now if appellant entered into a solemn contract in discharge and performance of its statutory duty and the respondent acted upon it, the statutory corporation cannot be allowed to act arbitrarily so as to cause harm and injury, flowing from its unreasonable conduct, to the respondent. In such a situation, the court is not powerless from holding the appellant to its promise and it can be enforced by a writ of mandamus directing it to perform its statutory duty. A petition under Article 226 of the Constitution would certainly lie to direct performance of a statutory duty by "other authority" as envisaged by Article 12.

14. The High Court accordingly was fully justified in issuing a writ of mandamus to disburse the loan and therefore the appeal fails."

267. In the case of ***United India Insurance Co. Ltd. v. Manubhai Dharmasinhbhai Gajera, (2008) 10 SCC 404,*** the Supreme Court had the occasion to deal with various grievances of the public with respect to their Insurance claims.

268. The Supreme Court, while dwelling on the role of State and its instrumentalities, held, in ***Manubhai Dharmasinhbhai Gajera*** (supra), that one important facet of the matter, which must be taken note of, is the duty, on the part of a State, to act fairly. Such a fair dealing is expected at

the hands of State within the meaning of Article 12 of the Constitution of India. It further held that there cannot be any doubt whatsoever that Article 14 of the Constitution of India, which encompasses, within its fold, obligations on the part of the State to act fairly, operates also in the contractual field.

269. The other important aspect of the case of ***Manubhai Dharmasinhbhai Gajera*** (supra) was that the Supreme Court analysed several previous cases of Supreme Court, which dealt with the issue of contractual obligations of State.

270. Among the various cases analyzing, in ***Manubhai Dharmasinhbhai Gajera*** (supra), one was the case of ***Excise Commissioner vs. Issac Peter, (1994) 4 SCC 450***. It was pointed out that a bare perusal of the decision would show that the same was rendered in the context of contracts entered into between the State and its citizens pursuant to public auction of tenders or by negotiation. The respondents therein sought to get new term incorporated in the contract on the specious plea of fairness. The said plea was rightly rejected. The fact, however, remains that the *ratio*, in ***Issac*** (supra), is not applicable to the facts of the present case not because the duty to act fairly on the part of a State has no application in the field of a contract, but the same would not apply for the purpose of alterations or modifications of a term of

contract.

271. Elaborating further, on the contention that the writ court would, ordinarily, not grant specific performance of a contract even if it is found that there exists a renewal clause or there has been a breach of contract on the part of the appellant the Supreme Court observed, in **Manubhai Dharmasinhbhai Gajera** (supra), that, ordinarily, it is so. A writ of *mandamus* shall not issue in case of a breach of contract. The court shall also not, ordinarily, issue a writ of *mandamus* directing a party to perform a specific performance of the contract in exercise of its writ jurisdiction, however, as would be noticed that this is the ordinary law as has been held in **Hardesh Ores (P) Ltd. v. Hede & Co. (2007) 5 SCC 614**, and **Divl. Forest Officer v. Bishwanath Tea Co. Ltd. (1981) 3 SCC 238**. In **Bishwanath Tea Co.** (supra), the Supreme Court had used the word "ordinarily" whereas **Hardesh** (supra), was a case arising out of a civil suit. The question, which arose therein was as to whether exercise of option for renewal by company was itself sufficient where the execution of a fresh document is necessary.

272. The Supreme Court, thereafter, in **Manubhai Dharmasinhbhai Gajera** (supra), went on to observe that while determining a *lis* having public law domain, the courts would be entitled to take a broader view. It would not consider it to be a case involving contract-qua-contract question only.

Even cases, involving contracts, may be determined by the High Court in exercise of its jurisdiction under Article 226 of the Constitution of India.

273. Coming, now, to the case of ***Central Bank of India v. Devi Ispat Ltd., (2010) 11 SCC 186***, I may point out that it related to a dispute between an individual with respect to non-furnishing of "No objection certificate" by the Bank. As the facts reveal, in terms of the advice of the appellant Bank, the respondent had shifted its account to another Bank and all pending dues with the appellant Bank were cleared. The respondent, thereafter, applied for a return of the security documents and, for issuance of "no-objection certificate" and "no-dues certificate". Thereafter, the respondent filed a writ petition before the Calcutta High Court. A learned Single Judge of the High Court allowed the writ petition and directed the appellant Bank to release the security documents. Challenging the said decision, the appellant Bank filed an appeal before the Division Bench of the High Court but the appeal was dismissed.

274. The argument, before the Supreme Court, in ***Devi Ispat Ltd,*** (supra), was that the direction of the learned Single Judge, affirmed by the Division Bench, for return of the title deeds deposited by the respondent Company, as a security, cannot be a subject-matter of Article 226 of the

Constitution of India and that the right to retain a mortgage deed is a civil dispute and proper forum is the Debts Recovery Tribunal or civil court.

275. Appreciating the submissions of the appellant in the light of previous pronouncements of the Supreme Court, it was held, in ***Devi Ispat*** (supra), that it is settled law that the disputes, relating to interpretation of terms and conditions of a contract, could not be examined/challenged or agitated in a petition filed under Article 226 of the Constitution. It is a matter for adjudication by a civil court or in arbitration, if provided for in the contract or before DRT or under the Securitisation Act. However, when the relief, sought for, does not relate to interpretation of any terms of contract, the Bank being a nationalised bank, a writ court can issue appropriate direction.

276. What follows from the judgment of ***Devi Ispat*** (supra) is that when a contractual dispute against the State is raised in a writ, then, the writ Court would have jurisdiction to pass necessary direction provided that the relief sought for does not relate to interpretation of any terms of contract.

277. Eventually, the Supreme Court, in ***Devi Ispat*** (supra), having discussed several cases, most of which have been discussed hereinbefore, laid down the following principles:

(a) in the contract, if there is a clause for arbitration, normally, a writ court should not invoke its

jurisdiction;

(b) the existence of effective alternative remedy, provided in the contract itself, is a good ground to decline to exercise its extraordinary jurisdiction under Article 226; and

(c) if the instrumentality of the State acts contrary to the public good, public interest, unfairly, unjustly, unreasonably discriminatory and violative of Article 14 of the Constitution of India in its contractual or statutory obligation, writ petition would be maintainable. However, a legal right must exist and corresponding legal duty on the part of the State and if any action on the part of the State is wholly unfair or arbitrary, writ courts can exercise their power. In the light of the legal position, writ petition is maintainable even in contractual matters, in the circumstances mentioned in the earlier paragraphs.

278. The relevant paragraph of ***Devi Ispat*** (supra), containing the directions, is reproduced as follows;

"28. It is clear that (a) in the contract if there is a clause for arbitration, normally, a writ court should not invoke its jurisdiction; (b) the existence of effective alternative remedy provided in the contract itself is a good ground to decline to exercise its extraordinary jurisdiction under Article 226; and (c) if the instrumentality of the State acts contrary to the public



good, public interest, unfairly, unjustly, unreasonably discriminatory and violative of Article 14 of the Constitution of India in its contractual or statutory obligation, writ Petition would be maintainable. However, a legal right must exist and corresponding legal duty on the part of the State and if any action on the part of the State is wholly unfair or arbitrary, writ courts can exercise their power. In the light of the legal position, writ petition is maintainable even in contractual matters, in the circumstances mentioned in the earlier paragraphs.”

279. In a recent decision rendered by the Supreme Court in the case of ***State of Kerala v. M.K. Jose, (2015) 9 SCC 433***, the Supreme Court has taken into consideration all the cases, discussed hereinbefore, and has held that it depends upon facts of each case, under what circumstances contractual claim or challenge to violation of contract can be sustained in a writ court.

280. Having discussed the trend of authorities discussed hereinbefore, the following principles may be suitably culled out;

- (a) *Where a petitioner makes a grievance of breach of promise on the part of the State in cases, where, on assurance or promise made by the State, he has acted to his prejudice and predicament, but the agreement is short of a contract within the meaning of Article 299 of the Constitution, a writ petition would not be maintainable. **Radhakrishna** (supra).*

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- (b) *Where for granting relief, disputed questions of fact would be required to be gone into a writ cannot be maintained* **Biswanath T. E.** (supra).
- (c) *If the right to relief arose out of an alleged breach of contract, because of any breach of duty imposed upon a statutory power, a writ petition, under Article 226, would be maintainable* **Ram Sanehi Singh**, (supra)
- (d) *If appellant entered into a solemn contract in discharge and performance of its statutory duty and the respondent acted upon it, the statutory corporation cannot be allowed to act arbitrarily so as to cause harm and injury, flowing from its unreasonable conduct, to the respondent. In such a situation, the court is not powerless from holding the appellant to its promise and it can be enforced by a writ of mandamus directing it to perform its statutory duty. A petition under Article 226 of the Constitution would certainly lie to direct performance of a statutory duty by "other authority" as envisaged by Article 12* **Lotus Hotel** (supra)
- (e) *If challenge is made on the ground of violation of Article 14 by alleging that the impugned act is arbitrary, unfair or unreasonable, the fact that the dispute also falls within the domain of contractual obligations would not relieve the State of its obligation to comply with the basic requirements of Article 14.* **Shrilekha Vidyarthi** (supra)
- (f) *The ultimate impact of all actions of the State or a*

*public body being undoubtedly on public interest, the requisite public element for this purpose is present also in contractual matters and, hence, it is difficult and unrealistic to exclude the State actions in contractual matters, after the contract has been made, from the purview of judicial review to test its validity on the anvil of Article 14. **Shrilekha Vidyarthi** (supra)*

*(g) The State, in its contractual obligations, cannot take an arbitrary decision; rather, the decision must be taken considering only relevant materials devoid of any arbitrariness **Biman Krishna Bose** (supra)*

*(h) In an appropriate case, a writ petition, as against a State or an instrumentality of a State arising out of a contractual obligation, is maintainable. **ABL International** (supra)*

*(i) Merely because some disputed questions of fact arise for consideration, same cannot be a ground to refuse to entertain a writ petition in all cases as a matter of rule. **ABL International** (supra)*

*(j) A writ petition involving a consequential relief of monetary claim is also maintainable. **ABL International** (supra)*

*(k) If in a contract, there is a clause for arbitration, a writ court should not invoke, normally, its jurisdiction; **Devi Ispat** (supra)*

(l) The existence of effective alternative remedy provided

*in the contract itself is a good ground to decline to exercise its extraordinary jurisdiction under Article 226. **Devi Ispat**, (supra)*

*(m) If the instrumentality of the State acts contrary to the public good, public interest, unfairly, unjustly, unreasonably discriminatory and violative of Article 14 of the Constitution of India in its contractual or statutory obligation, writ petition would be maintainable. However, a legal right must exist and corresponding legal duty on the part of the State and if any action on the part of the State is wholly unfair or arbitrary, writ courts can exercise their power. In the light of the legal position, writ petition is maintainable even in contractual matters. **Devi Ispat**, (supra)*

281. Having laid down the general principles, which governs a writ involving contractual matters, it would, now, be necessary to adjudge the appeals in the light of attending facts.

ACTION OF THE RESPONDENTS: WHETHER ARBITRARY?

ROLE OF RESPONDENT CORPORATION

282. It has been alleged by the writ petitioner that action of the respondents, all throughout, have been arbitrary, unfair and prejudicial to the writ petitioner. It, therefore, needs to be examined whether the action of the respondents, in the course of contract with the writ petitioner, has been arbitrary so as to attract a violation of Article 14 of the Constitution.



283. In the case of ***Shrilekha Vidyarthi*** (supra), the Supreme Court, while dealing with the aspects of arbitrariness, held that every State action, in order to survive, must not be susceptible to the vice of arbitrariness, which is the crux of Article 14 of the Constitution and basic to the rule of law, the system, which governs us. Arbitrariness is the very negation of the rule of law. Satisfaction of this basic test, in every State action, is *sine qua non* to its validity and, in this respect, the State cannot claim comparison with a private individual even in the field of contract. This distinction between the State and a private individual, in the field of contract, has to be borne in mind.

284. Adding further, the Supreme Court, in ***Shrilekha Vidyarthi*** (supra), held that the meaning and true import of arbitrariness is more easily visualized than precisely stated or defined. The question, whether an impugned act is arbitrary or not, is ultimately to be answered on the facts and in the circumstances of a given case. An obvious test to apply is to see whether there is any discernible principle emerging from the impugned act and if so, does it satisfy the test of reasonableness. Where a mode is prescribed for doing an act and there is no impediment in following that procedure, performance of the act otherwise and in a manner, which does not disclose any discernible principle, which is reasonable, may



itself attract the vice of arbitrariness. Every State action must be informed by reason and it follows that an act, uninformed by reason, is arbitrary. Rule of law contemplates governance by laws and not by humour, whims or caprices of the men to whom the governance is entrusted for the time being. It is trite that '*be you ever so high, the laws are above you*'. This is what men in power must remember always.

285. It would be proper to reproduce the relevant paragraphs, in ***Shrilekha Vidyarthi*** (supra), which read as follows;

"35. It is now too well settled that every State action, in order to survive, must not be susceptible to the vice of arbitrariness which is the crux of Article 14 of the Constitution and basic to the rule of law, the system which governs us. Arbitrariness is the very negation of the rule of law. Satisfaction of this basic test in every State action is sine qua non to its validity and in this respect, the State cannot claim comparison with a private individual even, in the field of contract. This distinction between the State and a private individual in the field of contract has to be borne in the mind.

36. The meaning and true import of arbitrariness is more easily visualized than precisely stated or defined. The question, whether an impugned act is arbitrary or not, is ultimately to be answered on the facts and in the circumstances of a given case. An obvious test to apply is to see whether there is any discernible principle emerging from the impugned act



*and if so, does it satisfy the test of reasonableness. Where a mode is prescribed for doing an act and there is no impediment in following that procedure, performance of the act otherwise and in a manner which does not disclose any discernible principle which is reasonable, may itself attract the vice of arbitrariness. Every State action must be informed by reason and it follows that an act uninformed by reason, is arbitrary. **Rule of law contemplates governance by laws and not by humour, whims or caprices of the men to whom the governance is entrusted for the time being. It is trite that 'be you ever so high, the laws are above you'. This is what men in power must remember, always."***

(Emphasis supplied)

286. On the mode of proving arbitrariness, the Supreme Court, in ***Shrilekha Vidyarthi (Kumari)*** (supra), held that it is for the person alleging arbitrariness, who has to prove his allegation. This can be done by showing, in the first instance, that the impugned State action is uninformed by reason inasmuch as there is no discernible principle on which it is based or it is contrary to the prescribed mode of exercise of the power or is unreasonable. If this is shown, then, the burden is shifted to the State to repel the attack by disclosing the materials and reasons, which led to the action being taken in order to show that it was an informed decision, which was reasonable. If after a *prima facie* case of arbitrariness is made

out, the State is unable to show that the decision is an informed action, which is reasonable, the State action must perish as arbitrary.

287. In the light of the law, laid down on arbitrariness, let us traverse the facts, none of which are disputed.

288. The chronology of events, which led to the filing of the present writ petition, have already been set forth hereinbefore and, hence, those facts are not being repeated except the basic facts, which have a bearing on the discussion in question.

289. It is clearly discernible, from the admitted facts of the present case, that when the writ petitioner raised concerns about the prohibition on mining in Bihar, which would have had material financial impact on the project, the respondent No.4 wrote a letter to the Collector, Sasaram, to consider the request of the writ petitioner as a special case by relaxing the provisions under Rule 36 of the Rules under the Mines & Minerals (Development & Regulation) Act, 1957. This letter, by the respondent No. 4, is, in fact, an acknowledgment of the concerns of the writ petitioner. However, as things rolled out later, the letter (Annexure 32), was never pursued seriously by the respondents as a result of which a situation arose, when the writ petitioner had to, in the interest of project, fetch



aggregates from outside the State of Bihar. The writ petitioner needed an assurance from the respondents that the additional cost of more than Rs 400 crores would be re-imbursed by the respondents. It may be pointed out that quantification of additional cost was not done by the writ petitioner himself; rather, such quantification was done by Independent Engineer, Intercontinental Consultants and Technocrat Pvt. Ltd, appointed by the respondents. It may also be pointed out that at no point of time, the figure of Rs 435 crores, as additional cost, was ever disputed by the respondents.

290. In the review meeting, dated 25.9.2013, held in the Conference room of BSRDC, in the presence of respondent No. 8, the Independent Engineer, and the representative of writ petitioner, the minutes No. 2, in Annexure 2, of the said meeting go to show that consent was given by the respondent No. 8 to the writ petitioner to go ahead with the installation of crusher and procurement of aggregates from the neighboring States being fully aware of the additional cost involved and it was, thereafter, acting on these representations made by the respondent No. 8, the writ petitioner went ahead with the procurement of aggregates from neighbouring States.

291. About a year after the meeting was held on 25.9.2013, another review meeting was held on 05.08.2014 vide Annexure 33. As against Serial No. 3, the discussion/



decision reached, with respect to payment of extra lead of aggregates, was recorded and it would be seen from the minutes that contrary to the commitment, made before, respondent stated that that there was no provision of extra lead aggregate in the Concessional Agreement and the claim for extra lead of aggregate had already been rejected. The respondents, therefore, as is apparent, changed their stance so far as the re-imbusement for additional cost for extra lead of aggregates is concerned. It may be pointed out at this juncture that no specific reason was assigned in the meeting, dated 5.8.2014, to explain the departure from the earlier stand.

292. In view of the stance of the respondents, the writ petitioner invoked the rights conferred by the Concession Agreement, particular1y, Article 37.2.2, bringing to the notice of the respondents to cure the *defaults* and issues within a period of 90 days. Among the various *defaults* and issues raised, by the writ petitioner, the *default* and issue, with respect to serial No. 1, was concern as to non-payment of additional cost incurred for the procurement of aggregates from longer leads amounting to Rs 5.63 crores till date. In the review meeting, dated 4.9.2014, which followed the Notice to cure issued by the writ petitioner, the first item of the meeting was regarding the Notice, under Clause 37.2, served by the writ petitioner upon the respondents. As against this item of the



discussion, the respondents advised the Independent Engineer to examine and submit the proposal for additional cost, for procurement of aggregates involving longer leads, by 8th September, 2014, for further consideration and submission to the State Government for approval. The minutes also reveal that respondents advised the writ petitioner to withdraw the notice, which the writ petitioner agreed subject to the recommendation of the proposal of extra lead by the Authority to the Govt. of Bihar.

293. In the meeting, dated 06.11.2014, vide Annexure 8, the respondents made an explicit promise to the writ petitioner to cure *all the issues* (i.e., defects) raised by the writ petitioner and further requested the writ petitioner not to terminate the contract.

294. However, as the time passed by and no headway was being made on the request of the writ petitioner for payment of additional cost, even though the writ petitioner had been incurring additional cost for procurement of aggregates from neighbouring States, on the promise made by the respondents, the lenders of the writ petitioner held a meeting with the writ petitioner in the presence of the respondent No. 8. In this meeting the respondent No. 8, as Annexure 36 explains, revealed that it is the responsibility of the Company (i.e., the writ petitioner) to arrange the aggregates. This, again, was a

change of stance without any remotely justifiable reasons.

295. Thereafter, the writ petitioner issued the Notice of Intent to Terminate Agreement in view of the provisions contained in Article 37.2.2 of the Concession Agreement. Among several of *defaults* brought out, the principal one was non-payment of cost incurred for the procurement of aggregates and non-granting of permission to procure aggregates from longer leads for the road works as decided in the meeting, dated 25.9.2013, i.e, Annexure 2.

296. The options, available to the respondents, on the receipt of the Notice of Intent to Terminate the Agreement, was either to cure the *defaults* or to dispute the notice. However, rather than curing the *defaults* or disputing the Notice of Intent to Terminate, the respondents, as is apparent from Annexure-12, admitted the *default* and chose to take the following-up action under Article 37.4 of the Concession Agreement. The opening lines of Article 37.4 reads as follows;

"Upon Termination for any reason whatsoever, the Authority shall"

297. It is, thus, clear that the respondents, too, agreed to terminate the agreement instead of choosing to contest the claims made by the writ petitioner and that is precisely the reason that they opted for the follow-up action needed to be taken by the Authority, when the agreement

stands terminated.

298. However, as the events further unfolded, the respondents became the judge of their own cause and declared the Notice of Intent to Terminate, issued by the writ petitioner, as illegal even though, by Annexure 12, the respondents had started taking follow-up action upon termination of the agreement.

299. It appears from the letter, dated 16.2.2015, Annexure 16, that in para 3.1, under the heading Non-payment of additional cost, incurred by the Concessionaire for procurement of aggregates, the respondent referred to Clause 12.1(d) of the Agreement, which provides as follows:

"Prior to commencement of Construction works, the Concessionaire shall make its own arrangement for quarrying the materials needed for the project highway under and in accordance with applicable laws and applicable permits".

300. By referring to clause 12.1(d), the respondents stated that it is the responsibility of the writ petitioner to procure aggregates or any other materials needed for the project highway.

301. It seems that contents of clause 12.1(d) has not been construed in proper perspective. It mentions that the Concessionaire, the writ petitioner herein, shall make its own



arrangement for quarrying the materials needed for the project highway under, and in accordance with, applicable laws and applicable permits. Quarrying is the act of removal of aggregates from the quarry; but despite repeated applications from the writ petitioner, the respondents had done nothing to allow quarrying, in the State of Bihar, by granting mining lease; rather, they directed the writ petitioner to bring aggregates from outside the State of Bihar, which the writ petitioner did. The respondents, thus, as an afterthought, sought to create a confusion over the meaning of quarrying leaving the writ petitioner to burden the issue of procuring aggregates.

302. A further reading of paragraph 3.1 of Annexure 16 would show that respondents contended that by then, the Government of Bihar, had, vide Notification no. 3085/M, Patna, dated 11.08.2014, opened the mining lease for procurement of aggregates, but even then, the writ petitioner had not made any efforts for procurement of aggregates.

303. However, it is not understood as to how removal of prohibition on mining would have automatically led to an inference that the writ petitioner would have been granted mining lease, had he taken up the matter. In fact, it would not be proper to even suggest that writ petitioner had not put up efforts to get a mining lease within the State of Bihar. The letters, vide Annexure 29 and 30, indicate that writ petitioner



had been pressing hard for a mining lease, in the State of Bihar, pursuant to which the letter, vide Annexure 32, was written by respondent No. 4 to the Collector, Rohtas, Sasaram, for considering the request of the writ petitioner in the light of Rule 36 of the Rules under the Mines & Minerals (Development & Regulation) Act, 1957, as a special case.

304. It, thus, emerges that the plea of lifting of prohibition on mining and alleging the writ petitioner of not putting up efforts to get an allotment of mining lease was taken only with a view to subvert the Notice of Intent to Terminate issued by the writ petitioner by misrepresenting the facts. In any view of the matter, such a reply, as contained in Annexure 16, was issued only after the issuance of Notice of Intent to terminate in view of Authority *default*. Having induced the writ petitioner by various representations to procure aggregates from outside the State of Bihar, a representation, as have been noticed, affirmed on several occasions, and also acted upon by the writ petitioner, it was not open to the respondents, on the principles of promissory estoppel, to turn around and say that it is the responsibility of the writ petitioner to procure aggregates. It is apparent that respondents initiated the termination process only to protect itself from the payment of termination amount to the writ petitioner; hence, the representation, dated 16.02.2015, smacks of arbitrariness and actuated with ulterior motive.

305. It may be pointed out here that Article 37.2.1 mentions the circumstances, whereunder the Agreement can be terminated by the writ petitioner for *default* of the Authority. The principal circumstances are as follows;

The Authority commits a material default in complying with any of the provisions of the Agreement and such default has a material adverse effect on the Concessionaire;

(a) The Authority has failed to make any payment to the Concessionaire within the period specified in the Agreement;

(b) The Authority repudiates the Agreement or otherwise taken any action that amounts to or manifests, an irrevocable intention not to be bound by the Agreement;

(c) The State commits a material default in complying with the provisions of the State Support Agreement if such a default has a material adverse effect on the Concessionaire and the breach continues for a period of 90 days from the date of notice given in this behalf by the Concessionaire to the Authority.

306. The facts, noted hereinabove, would reveal that acting on the assurances given by the respondents, the writ petitioner started procuring aggregates from outside the State of Bihar Incurring certain additional cost(s), which was not part of the contract. The entire cost would not have been a small



amount; rather, would have amounted to Rs 435 crores as per the assessment made by the Independent Engineer. The conduct of the respondents show that at no point of time, having promised to bear the additional cost, they actually paid the cost; rather, as the events turned out to be, the respondents, suddenly, termed the claim of the writ petitioner as illegal, which was arbitrary, unreasonable and unfair as a measure of subsequent or after thought. I, therefore, find no infirmity in the findings of learned Single Judge that the termination notice, issued by the respondents on 10.6.2015, is illegal being served only to avoid termination payment to the writ petitioner. In any view of the matter, there could not have been any further termination of the agreement, from the end of respondents, in view of Annexure 12, whereby they accepted the notice of intent to terminate issued by the writ petitioner.

307. Subjecting the aforementioned facts to the test of arbitrariness as laid down in the case of ***Shrilekha Vidyarthi (Kumari)*** (supra), it is found that despite the recommendation of the Independent Engineer to provide mining lease to the writ petitioner or to make additional cost, in the alternative to the writ petitioner, the respondents, having made explicit promise to the writ petitioner to make additional payments, kept dillydallying the issue of additional cost leading the writ petitioner to issue notice of intent to terminate. Thereafter,

accepting the notice and taking follow up action upon termination, the respondents, again, took a somersault and termed the notice of intent to terminate as illegal.

308. Thus, the conduct of the respondents is uninformed by reason inasmuch as there is no discernible principle on which decisions were taken. The initial onus to show arbitrariness and unreasonable on the part of the respondents having been discharged by the writ petitioner, no material and/or sustainable reason have been shown by the respondents, in this appeal, which led to the action being taken in order to show that it was an informed decision, which was reasonable. The State respondents, being unable to show that their decision, to first, assure the writ petitioner to bear the additional cost, inducing the writ petitioner to bring aggregates from outside the State of Bihar, and, eventually, retracting from their assurances and promise, is not found to be an informed action, which is reasonable and, hence, the respondents' action must perish as arbitrary and, consequently, violative of Article 14 of the Constitution of India.

ROLE OF STATE GOVT OF BIHAR

309. It is also necessary to mention at this juncture that the project was not only ventured by the respondents, but the Govt. of Bihar equally had a stake in it. The approval for the project, along with the request of the writ petitioner, to provide



mining leases, was approved by the State Cabinet. It would appear from the letter, dated 21.11.2014, vide Annexure 35, that according to RFP (Request for Proposal), the Bid was not sanctioned within 120 days by the State Cabinet; hence, the writ petitioner was requested to extend its bid validity beyond 02.03.2011. The writ petitioner extended the validity of the Bid for one month. In the meantime, the file for projects State VGF (Viability Gap Funding) share, for theoretical consent was with the Finance Department, and, therefore, BSRDC, the respondents herein, requested the writ petitioner to extend the validity of the Bid for next two months. Based on the request, the writ petitioner extended its validity of the Bid by one more month. The writ petitioner was, again, requested to extend the Bid validity for the third time, which the writ petitioner complied by extending the Bid by one more month. On the fourth occasion, when the writ petitioner extended its Bid, its extension, on 16.06.2011 was subject, admittedly, to the granting of the mining lease. It is further revealed from the Annexure 35 that, as the proceedings for approval of the project were at the final stage before the Govt of Bihar, the respondents further requested the writ petitioner to extend the Bid, which writ petitioner did. Eventually, the conditional bid was approved by the State Cabinet.

310. It is, thus, apparent that at the time, when the



State Cabinet approved the project, the conditions, set out by the writ petitioner, that mining leases shall be granted to the writ petitioner, were already brought to the notice of State Cabinet. The opinion of the Principal Additional Advocate General, in his letter, dated 28.10.2014, also contains a reference to the approval by the State Cabinet. In this regard, Clause (d) to Article 37.2.1 provided that if the State commits a material *default* in complying with the provisions of the State Support Agreement and if such *default* has a Material adverse effect on the Concessionaire and the breach continues for a period of 90 days from the date of notice given, in this behalf, by the Concessionaire to the Authority, the Concessionaire shall be entitled to terminate the agreement.

311. Mining plots were exclusively under the possession of State and mining was essential for the construction of the project. If mining was prohibited, then, the State Government should have either allowed mining within the State of Bihar, in the interest of the project, or could have granted permission for additional cost likely to be incurred by the writ petitioner. However, despite seeking several extensions of bid from the writ petitioner, and, eventually, approving the project with the knowledge of the conditions of mining set out by the writ petitioner, the State Government continued to sit idle over the matter, that too, with respect to a project involving



huge amount of money. In Annexure 19, the Termination Notice, issued by the writ petitioner, it has been categorically mentioned that in view of the delay in the decision as to payment of additional cost, it would be impossible to complete the project and commence toll collection from 15.3.2016, the agreed date, on the basis of which entire financial viability of the project was worked out.

312. Thus, the Govt. of Bihar, by not taking decision on the payment of additional cost, not only materially and adversely affected the project, but also put the writ petitioner to risk of committing a *default* in not completing the project in time. Seen from the perspective of Clause 37.1.1 (e) of the Concession agreement, such a delay could have been a ground for the Authority to terminate the agreement, that too, for no fault of the writ petitioner. It may be pointed out here, as submitted by the learned Senior Counsel for the writ petitioner, that if the writ petitioner would not have agitated the issue of additional cost of aggregates, from the longer leads, the project would have gone in indeterminate state since the financial close of Rs 1200 crores did not include the additional cost of Rs 435 crores for procurement of aggregates from longer leads. Hence, it is evident that, apart from the actions of respondent Corporation, even the action of State Government is undoubtedly unfair, unreasonable, arbitrary and, therefore,

violative of Article 14 of the Constitution of India.

WHETHER THE WRIT PETITION DISCLOSES DISPUTED QUESTIONS OF FACT?

313. One of the prohibitions, which regulates the grant of relief in exercise of the extraordinary writ jurisdiction, under Article 226 of the Constitution of India, is whether the pleadings, when taken in its entirety, raise disputed questions of fact.

314. In the present case, the pleadings and materials on record, when read as a whole, reveal no disputed fact. The contents of the documents, relied upon, by the writ petitioners, are also admitted. The only issue, which may require adjudication, even though not specifically disputed, is the quantum of the money claimed in the writ petition.

315. Clause 37.3.2 of the Concession Agreement deals with Termination Payment on account of *default* by the Authority. It provides that upon termination of agreement on account of Authority *default*, the Authority shall pay to the Concessionaire an amount equal to

- a. Debt due; and
- b. 150% of the Adjusted Equity.

316. Termination payment shall become due and payable to the Concessionaire within 15 days of a demand being made by the Concessionaire to the Authority with the necessary particulars and, in the event of delay, Authority shall pay interest

at the rate equal to 3% above the Bank rate on the amount of termination payment remaining unpaid.

317. In the present case, the quantum of termination payment has been worked out by the Independent Engineer appointed by the respondents themselves. This was done in terms of the review meeting, dated 04.09.2014. In the report of Independent Engineer, dated 09.09.2014, Annexure 34, it has been specifically stated that the amount, on account of termination, works out to Rs 602 crores by applying the standards mentioned in Clause 37.3.2, though it may be pointed that the figure of Rs 602 crores were till the date of report, i.e., 09.09.2014, which, by stipulated calculation method, has gone up, on account of interest, as the writ was filed in the month of May, 2015, which is more or less eight months after the report, Annexure 34, was submitted. The writ petitioner, along with Termination Notice, dated 20.02.2015, Annexure 19, had annexed the calculation for termination payment, supported by the certificate from the Lead Bank of the Consortium of Banks, for debt disbursed till that date, which is not disputed on record.

318. Apart from the report of Independent Engineer, the respondents have themselves got the figures of equity and debt verified through the Concurrent Auditor, appointed by the respondents, as can be seen from the minutes of the meetings, dated 04.09.2014 and 06.11.2014, Annexure 7 and 8,



respectively. It would be seen that vide a letter, dated 16.2.2015, respondent No. 7, addressed a letter to the Department of Economic Affairs, Ministry of Finance, Govt. of India, vide letter no. BSRDCL-1548/2014-39, dated 16.02.2015, wherein they have certified that the Concessionaire, the present writ petitioner, has subscribed Rs 202.00 crores against Equity support.

319. Again, the lenders of the writ petitioner also addressed a letter, vide letter No. ADV:KO:2069/14-15, to the respondent No.8, namely, General Manager of the respondent-Corporation, on the subject of disbursement made to the writ petitioner, wherein they have stated that till 16.02.2015, the lenders have disbursed Rs 3,08,28,389 to the writ petitioner. The amounts of equity and debt are, thus, not disputed at any point. Hence, the claim cannot, but be held to be true and legitimate, which I do.

320. With regard to the findings of the learned single Judge, in paragraph 13 of the judgment, that "*As regards the quantification of the consequent Termination Payment liable to be paid by the respondents with regard to the nature and extent of authority default in terms of Clause 37.2.2 of the of the agreement, the same would necessarily require a detailed investigation into facts and adduction of evidence, into the details of which this Court need not travel*" is found to be not in

consonance with the admitted position of the case. As already pointed out, the calculation method of termination payment and the quantum of payment have never been disputed by the respondents; hence, no detailed investigation of facts is required in the present case.

321. Now, the law as provided in Section 70 of the Contract Act is that even if the contract is illegal, but, in execution of such a contract, a party has derived benefit, the party, who derives and accepts the benefit, has to compensate the person from whom such benefit is derived and accepted. Hence, though a contract is illegal, the fact remains that if, in terms of the contract, the State has derived benefit, or received delivery of property, the State has to compensate the person, who delivers the property, or from whom benefit is derived by the State. Though, in the present case there is no question of illegality of contract as the contract was lawfully entered into but the fact remains that the respondents have received the benefits of the work done by the appellant, i.e. construction of road by procuring aggregates from outside the State of Bihar. In these circumstances, when the appellant was allowed to execute the contract, in question, it will be highly iniquitous not to let the respondents compensate the appellant for the benefits, which the respondents have derived, because of the execution of the contract by the appellant. The compensation, in the present

case, would be one which has been worked out by the Independent Engineers in terms of Clause 37.3.2.

322. It would be proper to refer, in this context, to one of the observations made by the Supreme Court in the case of ***Gunwant Kaur v. Municipal Committee, Bhatinda, (1969) 3 SCC 769***, wherein it has been held that the High Court is not deprived of its jurisdiction to entertain a petition under Article 226 of the Constitution of India merely because in considering the petitioner's right to relief, questions of fact may fall to be determined. In a petition under Article 226 of the Constitution of India, the High Court has jurisdiction to try issues both of fact and law.

323. Even though no disputed questions of fact have been found in this case; yet, it may be proper to quote one of the observations made in the case of ***Century Spg. And Mfg. Co. Ltd. V. Ulhasnagar Municipal Council, (1970) 1 SCC 582***, with respect to a submission made therein that the appellant had raised questions of fact and, hence, remedy under writ jurisdiction is not appropriate. To this submission the Apex Court responded as follows;

"13. Mr. Gokhale appearing on behalf of the Municipality urged that the petition filed by the Company apparently raised questions of fact which in the view of the High Court could not appropriately be tried in the exercise of the extraordinary jurisdiction under Article 226. But the High Court has not said so,

*and on a review of the averments made in the petition this argument cannot be sustained. **Merely because a question of fact is raised, the High Court will not be justified in requiring the party to seek relief by the somewhat lengthy, dilatory and expensive process by a civil suit against a public body. The questions of fact raised by the petition in this case are elementary.***"

(Emphasis is added)

324. In view of the fact that the quantum of compensation has never been disputed by the respondents, the findings of the learned single Judge, in paragraph 13, referring the matter to arbitration and direction to the writ petitioner to co-operate in the arbitration, are not justified in the context of this case and, accordingly, needs to be interfered with.

325. The facts of this case are similar to that of **Lotus Hotels (P) Ltd.** (supra). In the present case, too, same as **Lotus Hotels** (supra), the respondents assured the writ petitioner that they will bear the additional cost of procurement of aggregates from outside the State of Bihar. The writ petitioner had acted on the assurances and promise and invested huge sums of money to procure aggregates from outside the State of Bihar; but, later on, not only the respondents resiled from their promise, but also termed the writ petitioner's claim as illegal.

326. I have had the pleasure of reading the judgment of my learned brother, Justice Chakradhari Sharan Singh, and

even though I appreciate the efforts put in by my learned brother, yet I am unable to persuade myself to agree to the conclusions reached by my learned brother on some of the vital aspects of the case.

327. The learned single Judge, in paragraph 12 of his judgment, has held that **"on merits of the present case, this Court finds no error in the action of the petitioner in issuing the termination notice and the Respondent's contention that the petitioner ought to have first opted for arbitration cannot be accepted"**.

(Emphasis is added)

328. Thus, the learned single Judge has held that not only the termination notice of the petitioner is proper, but the contention of the respondents that petitioner ought to have taken recourse to arbitration, too, did not find favour with the learned single Judge. In this regard, while going through the findings of my learned brother, I notice that this finding of the learned single Judge has not been disturbed in any manner.

329. The learned single Judge, having held that termination of the notice by the appellant is proper, has, however, held that so far as quantification of termination amount is concerned, the same would require adducing of evidence and investigation of facts. Such an observation seems to have been upheld by my learned brother, though the

materials on record make it, to my mind, amply clear that even the amount is not in dispute, or to be more precise, the termination amount has been admitted.

330. Now, it is an admitted position that at the time of entering into agreement, mining operations were prohibited in the State of Bihar and that is why, the bid of the appellant was conditional that mining would be permitted. The **conditional bid was approved on 2.8.2011 by the State Cabinet.** A reference to the Cabinet approval is found in Annexure 35 and Annexure 26, the contents whereof have not been in dispute. The Concession Agreement signed by the parties contains all the correspondences regarding the conditional bid and allotment of mines.

331. I, therefore, find myself in disagreement with the observation made by my learned brother that there was no stipulation in the Concession Agreement that mining lease would be granted to the appellant for execution of work. My learned brother has incorporated the provisions of Article 12 of the Agreement, which specifically provides that prior to the commencement of works, the Concessionaire shall make its own arrangements for *quarrying* the materials needed for the project highway.

332. Article 12.1 (d) provided that the appellant shall quarry the materials needed for the project highway in



accordance with applicable laws and applicable permits. The act of quarrying, as agreed, was the sole responsibility of the appellant; but such an act of quarrying was subject to applicable laws and permits. Since, admittedly, mining operations stood prohibited at the relevant point of time, the question arose as regards procuring materials from outside the State of Bihar requiring additional cost. It is not the case of the Corporation that even for mining operation in Bihar, the appellant was asking for additional cost. In this regard, when the matter was referred to Independent Engineers, appointed by the Corporation, they, too, gave an opinion, vide Annexure 6, that BSRDC, the respondents herein, may take a decision either to impress upon the State Government to allow mining or re-imburse the additional cost of Rs 410.13 crores based on SOR-8th edition of Road Construction Department, Bihar. The mining operations in Bihar was, admittedly, never allowed to the appellant.

333. My learned brother has, while referring to Annexure 2, held that Annexure 2 does not contain any admission on the part of the respondents permitting the appellant to procure aggregates from outside the State of Bihar in view of the mining prohibitions in the State of Bihar and has further held that since Annexure 2 does not contain the signatures of the respondents, it cannot form basis of any assurance. While considering Annexure 2, it needs to be



carefully noted that the contents and contentions embodied in Annexure-2 have never been in dispute between the parties concerned and, therefore, I am unable to fall in agreement with my learned brother that Annexure 2 does not contain an admission. It is apparent from Annexure 6, the notice issued by the appellant to the respondents for curing the defects/defaults, that till 31.7.2014, the appellant had already incurred an expenditure of Rs 5.63 cores for procuring aggregates from outside the State of Bihar. This amount went upto Rs 9,15,20,314/- as can be seen from Annexure 11. In my considered view, therefore, the conduct of the respondents in not prohibiting the appellant from incurring expenditures goes to show that the respondents wanted the appellant to go ahead with the assurance. Hence, Annexure 2 has to be treated as clear admission on the part of the respondents that in view of the requirement to complete the project in time and also in view of the mining prohibitions, they had allowed the appellant to procure aggregates from longer leads. The absence of signatures of respondents in Annexure 2 is of little importance since the respondents have not disputed the document, Annexure 2, and/or the conditions therefor. This apart even Annexure 33, which is also a minute relied upon by the appellant, bears only the signature of respondents.

334. It has been held in ***Nagubai Ammal v. B.***



Shama Rao, (AIR 1956 SC 593) that an admission is not conclusive as to the truth of the matters stated therein. It is only a piece of evidence, the weight to be attached to which must depend on the circumstances under which it is made. It can be shown to be erroneous or untrue, **so long as the person to whom it was made has not acted upon it to his detriment, when it might become conclusive by way of estoppel.**

335. It may be stated here that the case of the respondents is that they are denying the entitlement of the appellant to the money claimed and not the computation. The entitlement has been upheld by the learned Single Judge, while holding that termination of agreement was correct on the facts of this case.

336. It may be pointed out that in para 7 of Annexure 34, the Independent Engineers have mentioned the expression *tentative*, but the method of computation of the amount is, admittedly, in terms of the Concession Agreement, as reflected in Article 37.3.2. Article 37.3.2 of the Concession Agreement deals with Termination Payment on account of *default* by the Authority. It provides that upon termination of agreement on account of Authority *default*, the Authority shall pay to the Concessionaire an amount equal to;

- a. Debt due; and
- b. 150% of the Adjusted Equity.



337. The Independent Engineers had prepared the report on 9.4.2014 and they had taken into account the components as available and admitted on the day of preparation of report. On that day, the principal amount outstanding to Senior lenders of the appellant was Rs 248.49 crores, which, at the time of filing of writ petition, was Rs 3,08,28,18,389/- *vide*, Annexure I.

338. It is also pertinent to point out that the Independent Engineers were directed by the respondents themselves to visit the appellant's headquarter along with the Concurrent Auditor, appointed by the respondents, for the scrutiny of papers related to VGF grants and to submit a scrutinized report by 15.9.2014. The VGF grant is based on equity and debt by the banks. The Independent Engineers and the Concurrent Auditors scrutinized the accounts of the appellant at the appellant's headquarters as can be seen from the minutes, dated 6.11.2014, and after all these compliances, the respondents decided to process the release of grant by the State and the Central government. This would mean that the debt amount and equity amount has been verified and were found to be true as can be seen from the minutes of the meetings, dated 04.09.2014 and 06.11.2014, Annexure 7 and 8, respectively.

339. It would be seen that respondent No. 7, addressed the Department of Economic Affairs, Ministry of



Finance, Govt. of India, letter No. BSRDCL-1548/2014-39, dated 16.02.2015, (Annexure a, page 123), wherein they have certified that the Concessionaire, the present appellant, has subscribed Rs 202.00 crores against Equity support. If the equity amount is Rs 202 crore, then, 150% of 202 crore comes to Rs 303 crore. Thus, the figure of Rs 602 crores is sum total of figures of Rs 303 crores and 248.49 crore along with interest.

340. The case of the appellant is, thus, not based on the report of Independent Engineer alone, but also on the scrutiny of the Independent Engineer and the Concurrent Auditor as per minutes, dated 4.9.2014 and 6.11.2014, and the unequivocal admissions of the respondents about the equity and debt, while recommending release of grant to the Government of India read with confirmation letter of the lenders.

341. Thus, if the finding of the learned single Judge that appellants had rightly terminated the agreement has been upheld, the denial of relief on the grounds that termination payment would require adducing evidence and investigation of facts is not borne out of records. Such quantification is simple arithmetic based on agreed formula. In any view the matter, the respondents have never disputed the computation method as projected by the appellant. No question of any agreement on the binding force of Independent Engineers' report arises for the reason that it is nobody's case. However, what is binding is



Article 37.3.2, which deals with the method of computation of termination payment in the event of Authority default. That there has been an authority default has already been affirmed in the findings of learned Single Judge in para 12 of the judgment, while holding that "**on merits of the present case, this Court finds no error in the action of the petitioner in issuing the termination notice**".

342. Now, so far as quantification of amount, mentioned in the writ petition, is concerned, the computation method as stated in Article 37.3.2 is admitted. The components required for computations are also admitted. The debt due is admitted to be Rs 3,08,28,18,389/- vide Annexure I. The equity amount is also admitted to be Rs 202 Crore. The computation of 150 % of adjusted equity done by the appellant have never been disputed by the respondents – be it in the original hearing or in the appellate hearing. Thus, 150% of 202 crore comes to Rs 303 crore. The sum total of admitted amounts of Rs 3,08,28,18,389/- and Rs 303 crores comes to Rs 6,11,28,18,389. It is seen that appellant has claimed amount lesser than the figures arrived at by applying the formula and this is so, because the debt due figure is required to be computed with reference to Wholesale Price Index. According to the appellant, 150% of 202 Crores with reference to Wholesale Price Index, comes to Rs 3,02,24,54,344 and the total of Rs

3,08,28,18,389 and 3,02,24,54,344 comes to Rs 6,105,272,733. Such a method of computation does not adducing of evidence nor does it call for any investigation of facts. The figure of the amount claimed has also neither been disputed in the pleadings nor in the entire proceedings before the Court.

343. With great respect to the findings of my learned brother, the observation that question of termination payment would arise only if termination agreement for authority default is held to be justified, I am clearly of the view that such an issue does not remain alive for discussions since my learned brother has upheld the findings of learned single Judge and the learned single Judge has categorically held that on merits of the present case, no error has been found in the action of the petitioner in issuing the termination notice.

344. In any view of the matter, these issues do not arise for three specific reasons;

a. Firstly, because the termination of agreement for authority default has been held to be correct by the learned Single Judge in para 12 of the judgment. The respondents have, in the appeal, put limited challenge to the finding of the learned single Judge with respect to maintainability in view of Article 44 and the



setting aside of their notice of termination. The correctness of termination of agreement by the appellant has not been challenged either in the writ petition or in this appeal. Hence, the finding that appellant has correctly terminated the contract remains intact and cannot be gone into.

b. Secondly, the question of respondents approaching the Arbitral Tribunal does not arise, because the respondents themselves have never approached the tribunal. If the respondents' plea of non-maintainability of writ, due to Article 44, has been over-ruled, then, the question of referring the matter to arbitration does not arise, for, if the writ is maintainable, the only ground on which relief may be denied is that the writ petition involves disputed questions of fact, which, in the present case, has, admittedly, none.

c. Thirdly, an issue can become a disputed question of fact only when dispute existed prior to litigation. A mere plea, on facts, in the pleadings cannot conform to the status of a disputed fact if the documents, otherwise,



make it sufficiently clear that facts are not in dispute. The representation, dated 16.2.2015, filed by the respondents, challenging the validity of the termination notice issued by the corporation, cannot be taken on its face value, when on the previous occasion, *vide* Annexure 8, in the review meeting, the respondents promised to cure the issues raised by the appellant in his notice to cure issues. Thus, when the issue, relating to additional cost of aggregates, was promised to be cured, such a promise becomes a binding promise. Hence, by subsequent denial, a dispute cannot be raised on previously admitted position. In any view of the matter, a representation once submitted may or may not be acted upon by the appellant. The respondents had the opportunity to dispute the claims of the appellant, when it had issued notice of intent to terminate the contract, but they did not do so.

d. Fourthly, the respondents have, in para 12 of the counter affidavit, categorically stated as follows;

"That the termination on account of the petitioner's default will absolve the respondent from any termination payment as provided in clause 37.3.1."

e. As against this averment, the learned single Judge rightly held, in para 12 of the judgment, that termination notice by the respondent has been issued after filing of the writ petition possibly for the purpose of avoiding the consequences of having to make the termination payment to the petitioner as a fallout of the termination notice issued by the petitioner for the authority default.

345. After the termination notice was issued by the appellant, the respondents issued the letter dated 7.2.2015, Annexure 12, which specifically mentions Article 37.4(b). The opening lines of Article 37.4 reads *"Upon Termination for any reason whatsoever, the Authority shall"*. This notice was issued by an officer of the rank of Deputy General Manager and he is definitely expected to know the contents of Article 37.4(b) and, hence, he would not have mentioned the Article unless the respondents intended to act upon it.

346. In the above view of the matter, the respondents have, nowhere, submitted that the intent of issuing Annexure

12 was to seek information and details of all materials, etc, so that, if needed, possession of the same can be taken over.

347. That apart, Annexure 12 refers to the termination notice issued by appellant. Hence, the respondents were fully aware of the nature and content of the letter, which by no means carried a meaning other than the follow up action pursuant to the termination of agreement.

348. On the issue of legal opinion, relied upon by the appellant and on which my learned brother has taken serious exception of what is of importance to note, while considering the question of privileges, is that a privilege has to be expressly or impliedly claimed, by the authority, which enjoys the privilege, for an authority may choose to waive its privilege in the greater interest of the general public or for the welfare of the nation unless a legal or constitutional bar exists restraining the authority concerned from waiving or restricting its privilege. For example, Article 74(2) provides that the question, if any, and, if so, what advice was tendered by the Ministers to the President shall not be inquired into in any court. Thus, Article 74(2) contains an express bar restricting Parliament from waiving its privilege. So long as this Constitutional provision remains, Parliament cannot enact a law authorising courts to inquire into as to what advice the Council of Ministers had tendered to the President, for, such a statutory provision



will not be permissible in the face of the embargo imposed by Article 74(2). However, in respect of those privileges, which the Constitution do not specifically bar, the Legislature has the discretion of waiving or not claiming. The Legislature, therefore, may, by enacting law, give up its privilege. This fundamental aspect of the scope of "privilege" has to be kept in mind in deciding the question, which the Court is concerned with.

349. In the present case, too, no privilege has been claimed by the learned Principal Additional Advocate General, who gave the opinion and who himself argued the case. This apart, the legal opinion has been referred to in several other correspondences precisely in para 14 of Annexure 26 and Annexure 35. In these circumstances, the legal opinion, tendered by the learned Principal Additional Advocate General, loses the touch of any confidentiality or privilege.

350. In the words of Justice Bhagawati, in the case of ***Hindustan Sugar Mills vs State of Rajasthan (AIR 1981 SC 1681)***, in a democratic society governed by the rule of law, it is the duty of the State to do what is fair and just to the citizen and the State should not seek to defeat the legitimate claim of its citizen by adopting a legalistic attitude, but should do what fairness and justice demand.

351. The question of imposing cost on the Concessionaire to pay a fine of Rs. 5,00,000/- does not arise and

the cost of Rs. 5,00,000/-, contrary to what my esteemed brother has held, is not and cannot be directed to be paid.

352. In the result and for the reasons discussed above, I uphold the conclusion of the learned single Judge that the termination of the Concession Agreement by the respondent Corporation was invalid, but I set aside the directions given by the learned single Judge that the parties shall take recourse to arbitration. I further direct that the amount, as has been determined above, shall be paid in terms of the directions, within a period of three months from the date of pronouncement of this judgment and order with interest, as provided under Clause 37.3.2, at the rate equal to 3 per cent above the Bank Rate on the amount of termination payment remaining unpaid from the date of termination, i.e., 20.02.2015 till the date of payment.

353. However, there shall be no order as to costs.

(I. A. Ansari, ACJ.)

Pawan/-

AFR/NAFR	AFR
CAV DATE	22.01.2016
Uploading Date	12.05.2016
Transmission Date	N.A.