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**(2018) 04 BOM CK 0147**  
**In the Bombay High Court**  
**Case No : WRIT PETITION NO.1996 OF 2017**

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|--------------------------|----|------------|
| A2Z INFRASERVICES LTD.   | Vs | APPELLANT  |
| UNION OF INDIA AND 3 ORS |    | RESPONDENT |

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**Date of Decision :** 25-04-2018

**Acts Referred:**

Constitution of India, — Article 12, 14, 226  
Minimum Wages Act, 1948 — Section 5

**Citation :** (2018) 04 BOM CK 0147

**Hon'ble Judges :** B. R. GAVAI, J, BHARATI H. DANGRE, J

**Bench :** Division Bench

**Advocate :** Navroz Seervai, Vinamra Kopariha, Shiraz Dhru, Mitesh Naik,  
Rajni Iyer, T.J.Pandian

**Final Decision :** Allowed

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## Judgement

Bharati H. Dangre, J.

1.The petitioner, a Company registered under the Companies Act and engaged in the business of providing facility of Management services including the mechanized house keeping and technical services, has invoked the writ jurisdiction of this Court being aggrieved by the inaction on the part of the respondent authorities to revise the reimbursement to the petitioner in light of the increase in the rates of minimum wages and to neutralize the petitioner for the increase in cost of labour in terms of the agreement executed between the petitioner and respondent railway. The grievance of the petitioner revolves around the nature of his contract, which is labour intensive and the cause of action of the petitioner is the refusal to neutralize the petitioner for the significant increase in the minimum wages by the respondent no.3 Ministry of Labour and Employment, Government of India by

issuing a notification under the Minimum Wages Act. It is the specific case of the petitioner that in the absence of such an action on the part of the

respondents, the petitioner is required to make payment of increased wages which incurs him a huge financial liability, almost causing closure of his

business, and he fears a worse situation where the trade union would refuse to continue with the work, thereby affecting the working of the railways.

2. In order to deal with the relief sought by the petitioner, it would be necessary to refer to a brief sequence of facts and events.Â

The petitioner is a Private Limited Company and is engaged in the business of providing cleaning and housekeeping services.Â In the past, the

petitioner has been providing different services to the railways including (a) mechanized cleaning of empty railway passenger coaches and various

yards/depots (b) mechanized cleaning of coaches at railway station and (c) mechanized cleaning of coaches in moving trains (On Board

Housekeeping Services).Â The respondent no.1 floated a tender for work of mechanized cleaning of coaches, watering of rakes, including cleaning

of depot premises and provision of On Board Housekeeping Services (OBHS) in the trains of Chatrapati Shivaji Maharaj Terminus (CSMT), Mazgaon

(MZN) and Dadar Terminus (DR)Â coaching depots of Mumbai Division.Â The tender was allotted in favour of the petitioner for a contract amount

of Rs.19,76,69,647/Â¬ (Rupees Nineteen crore Seventy Six lakhs Sixty nine thousand six hundred and forty seven) for a period of three years

commencing from 11th February 2016.Â On completion of the competitive bidding process, three contracts were executed between the petitioner and

the railways on 11/2/2016, 22/3/2016 and 6/6/2016 for offering cleaning services at three separate locations, all in Mumbai.

It is the case of the petitioner that based on the said contract agreement signed by the petitioner, he was diligently carrying out the work allotted to him

since 2016, and there are no complaints about the quality of work executed by the petitioner.Â As per the petitioner, it has employed a total of 1350

employees, who, together service over 2500 coaches everyday.Â As per the petitioner, the petitioner received consideration for increase in cost of

the services in terms of the Price Variation Clause contained in the contract. The Price Variation Clause (for short 'PVC') ensures that in the case of

increase of Consumer Price Index (for short 'CPI'), the reimbursement payable to the petitioner is suitably increased so that the petitioner is not

put under financial distress from inflation etc. If the CPI decreases, the reimbursement due to the petitioner is accordingly reduced to ensure that the Railways do not pay excess amount to the petitioner. The controversy involved in the present petition revolves around the PVC as contained in the agreement and as to the construction/interpretation of the said clause, and whether it would insulate the petitioner on account of increase in the minimum wages, since the minimum wage fixation orders are based on the very same CPI. It is the case of the petitioner that on 19th January 2017, the Minimum Wages applicable to the employees employed in the schedule employment of sweeping and cleaning have been increased by 40% and resultantly, he is required to pay an amount of Rs.523/- per day as against the amount of Rs.374/- per day, which he was paying till 18/1/2017.

As per the estimation of the petitioner in view of the said increase, he is required to incur additional expenditure of Rs.9,79,57,254/- (Rupees Nine

Crore Seventy Nine Lakhs Fifty Seven thousand Two hundred and Fifty Four only) for a period commencing from January 2017 till May 2017.

The petitioner has given the details of the difference in the amount which he is required to bear to adjust the increase in labour costs and his

grievance is that if this amount is not remitted, the contracts would be rendered unworkable.

3.The petitioner Company raised the grievance with the railways by making repeated representations and the respondent no.2 Railway constituted a

Four Member Committee to recommend a suitable alternative for compensating the increase in the minimum wages with a realization that the

mechanized cleaning contracts being labour intensive, are essential one to maintain the train services. The Committee constituting of the High

Ranking officers of the Railways arrived at an option by which it recommended that the labour component of existing price variation be frozen till

19/1/2017 and be kept at a base price, and the subsequent increase to be adopted by using minimum wages paid on actual basis as per notification 19th

January 2017. The grievance of the petitioner is that inspite of the said recommendations made by the Committee, the respondent no.4 i.e. the Chief

Rolling Stock Engineer, CST Mumbai has indicated to the petitioner that the proposal was rejected, meaning thereby that the petitioner will have to

perform the contract as per the existing PVC, and continue to bear 40% hike in the minimum wage, in terms of notification dated 19th January

2017.Â The petitioner, has therefore, invoked the writ jurisdiction of this Court on the ground that it is the only efficacious remedy available to him,

and he has sought a direction to the respondent authorities to implement recommendations of the Committee and to revise the petitioner's

reimbursement under the contract so as to compensate him for the increase in the cost of labour owing to the revised notification dated 19th January

2017.Â The petitioner was also apprehensive that the respondents would encash the bank guarantee and forfeit the security deposit of the petitioner,

and therefore, sought an interim relief.

The petition was filed on 7th July 2017 and came to be amended in view of the subsequent development i.e. the floating of two fresh tenders by the

railways inviting bids for providing mechanized cleaning and On Board Housekeeping Services in the passenger coaches.

4.In response to the petition, the respondent Railways have filed their affidavits and have categorically denied the claim of the petitioner.Â As regards

the contention of the petitioner about the recommendations of the Committee are concerned, it is stated in the affidavit that the recommendations of

the committee were put up before the General Manager and subsequently referred to the HQ Finance, which has turned down the

recommendations.Â Â Â The specific stand of the respondent is that no doubt, the Railway Board (Ministry of Railways) has clarified that payment

of revised minimum rates of wages to be paid by contractors to the contract labourers is statutory obligation, however, the contract conditions of the

subject contract were duly agreed and signed by the petitioner, and therefore, they are binding on him and he is duty bound to honour and comply the

same. It is, however, the specific case of the respondent that the petitioner is not entitled to demand the said amount from the respondents.Â Along

with the affidavit, the decision of the railways has also been placed on record, resolving to notify fresh tenders based on the preÂ-final revised

standard bid document received from the Railway Board covering the new price escalation clause based on the latest board guidelines. A decision is

also taken that till the contracts as per new priceÂ-escalation clause are awarded, necessary arrangements may be made by keeping adequate

imprest.Â In a nutshell, the response of the respondents to the claim of the petitioner is that owing to the provisions of the contract and in the backdrop of the legal provisions, there is no basis for the claim that the railways should reimburse/neutralize full compensation for the increased minimum wages as claimed by the petitioner.

5.We have heard Advocate Navroj Seervai, learned senior counsel for the petitioner and the learned senior counselÂ Advocate Ms.Rajani Iyer representing the respondent nos.1, 2 and 4.

The learned senior counsel Mr.Seervai would take us through the relevant clauses of the contract and would submit that the contract contained a

PVC which permitted the amount payable on account of the price variation to be settled every quarter by a prescribed formula.Â He would submit

that the clause ensured that in case of increase in the Consumer Price Index, the petitioner would be entitled for reimbursement so as to save the

petitioner from the financial distress from inflation.Â He would submit that the petitioner is a contractor, whereas the Central Railway is the principal

employer, and the petitioner's business being labour intensive, the PVC itself sets out that the total compensation payable to the petitioner under the

contracts include the 55% component towards the labour costs.Â The learned counsel would submit that at the time when he entered into the

aforesaid contract, the prevalent rates of minimum wages payable to the employees engaged in the scheduled employment (employed in sweeping and

cleaning) were governed by the notification dated 7/8/2008 in existence issued by the Ministry of Labour and the said notification was binding on

him.Â Learned counsel Mr.Seervai, however, would submit that there was no issue as regards the payment of wages when they came to be revised

by subsequent notification issued by the respondent no.3 on 30th September 2016 where the rates of wages were calculated by including the Variable

Dearness Allowance (for short 'VDA') on the basis of rise in the average CPI number reaching 271.16 from 266.83 (Base 2001Â–100)Â. The rates

of wages applicable to the employment with which the petitioner is concerned, was hiked to Rs.374 â?"Â Rs.180 (Basic wages) and Rs.194 (VDA).

The learned counsel would, however, submit that the difficulty arose when on 19.1.2017, the respondent no.3 in exercise of powers conferred under

the provisions of Minimum Wages Act, superceded the earlier notification and

revised the minimum rate of wages payable to the employees engaged in the 'Employment of sweeping and cleaning'. The said notification came into effect from 19/1/2017 and revised the minimum rate of wage in Area to Rs.523/-. The said revised wage, according to the learned counsel, would comprise of basic rate of wages as well as special allowance (VDA) which was directed to be adjusted by Chief Labour Commissioner at an interval of six months commencing on 1st October and 1st April every year on the basis of average CPI for industrial workers (Base 2001=100).

6. Learned senior counsel Mr.Seervai would submit that the petitioner had no difficulty in paying the minimum wages prior to 19/1/2017, even if there was a hike in the rates of wages, since that was taken care of by the PVC. However, he would submit that his entire calculations would go astray if he is required to pay the revised rate of Rs.523/- per worker. The learned counsel would also submit that the Respondent railway having realization that they are duty bound to deal with the hike in the minimum wages, have, therefore, undertaken an extensive exercise of constituting a committee of its High Ranking Officials who has agreed that Price Variation formula in the contract is based on CPI for wage escalation for which content/weightage for labour has been taken as 55%. However, in light of steep increase of minimum wages as compared to October 2016 (Rs.374) for 'A' category to Rs.523/- for January 2017, whereas the WPI (Wholesale Price Index) in October 2016 was Rs.278/- and WPI in January 2017 is Rs.274/-. The Committee, has, therefore, scrutinized the grievance of the petitioner by considering 5 options and agreed as to the option of the labour component of the existing price variation being frozen till 19/1/2016 and kept as the base price and the subsequent increase to be adopted by using minimum wages paid on the actual basis of the Chief Labour Commissioner's notification. A Learned senior counsel would submit that once the Committee has arrived at a decision by majority of 3 : 1, it was not open for the respondent no.4 to communicate that the proposal cannot be accepted. A He would also submit that there is no reasoning given by the Railway authorities while rejecting the said recommendations. A Learned counsel would submit that what is to be looked into is the decision making process adopted by the

respondents in declining the claim of the petitioner, which according to him, smacks of arbitrariness. He would place reliance on the judgment of the

Hon'ble Apex Court in case of Nabha Power Limited (NPL) Vs. Punjab State Power Corporation Limited (PSPCL) & Anr<sup>1</sup>, to advance his

submission that while construing the terms of commercial contract, the principles of business efficacy to the transaction, must be intended at all

events by both the parties. He would place reliance on the said judgment which recognizes MOORCOCK test of giving business efficacy as a part

of 'five condition test' for an implied condition to be read into the contract. According to the learned senior counsel, the said judgment of the Hon'ble

Apex Court squarely applies to the position of the present contract in question and though, according to him, the said judgment does not disturb the

settled 1 2017 SCC Online 1239 proposition of law that Court does not make contract for the parties or improve the contract between them, he would

submit that the Courts are duty bound to look into the terms of contract to give efficacy to it.

7 The learned Senior Counsel Ms.Iyer would raise a preliminary objection about the maintainability of the writ petition and she would submit that the

writ petition is not an efficacious remedy, and since the petition arises out of a contract, whose terms are clear, and has no scope for interpretation, the

petitioner should be relegated to the remedy of approaching the civil court. She would submit that the contractual obligation amongst the parties will

have to be determined on the basis of law of contract and not on the basis of administrative law. Learned counsel Ms.Iyer would also submit that it

is not permissible for the Court to rewrite a contract and she would submit that the commercial contracts require commercial interpretation and this

Court would not indulge into undertaking the said exercise when an another equally efficacious forum is available to the petitioner. Learned senior

counsel Ms.Iyer would also invite the attention of this Court to the decision making process involved in negating the claim of the petitioner. She

would submit that the respondent railway is duty bound to comply with the statutory obligations and she would invite attention of this Court to clause

(14) of the Specification of Work of Provision of Onboard Housekeeping Services, which mandates the contractor to adhere to the Labour

Rules, Workmen Compensation Act, and Payment of Minimum Wages Act and other Labour Legislation. She would submit that the petitioner

contractor is, therefore, duty bound to abide by the statutory obligations and when he has entered the contract with open eyes, he is bound by the said terms and conditions. She would vehemently submit that the recommendation of the Committee were considered threadbare by the HQ Finance and it arrived at a conclusion that such recommendation cannot be accepted, and in fact, it is the duty of the contractor to be responsible for payment of wages to each worker, and if the contractor fails to make the payment of wages, or makes short payment, Railway would be liable to make payment of wages in full or unpaid balance to the workforce employed by the contractor and to recover the said amount so paid, either by deducting from any amount payable to the contractor under any contract or as a debt payable to the contractor as per clause 21(1) of the Contract Labour (Regulation and Abolition) Act, 1970. She would submit that the contract awarded by Railways was a long term contract, and the subject contract in unambiguous terms, casts a responsibility on the contractor to comply with the Provisions of Contract Labour (Regulation and Abolition Act, 1970 and the Contract Labour (Regulation and Abolition) Central Rules 1971, as modified from time to time. She would also submit that the Indian Railways has been indemnified against any claim under the aforesaid Act/Rules. Learned Senior Counsel Ms. Iyer would rely upon the judgment of the Hon'ble Apex Court in case of Kerala State Electricity Board & Anr Vs. Kurien E. Kalathil & Ors to buttress her submission that it is not within the ambit of Hon'ble High Court exercising powers under Article 226 of the Constitution to interpret the provisions of the Contract, which is necessarily a job of the Civil Court or an arbitrator.

8. Learned senior counsel would submit that the PVC is clearly defined in terms of amount payable on account of price variation by clearly referring to the CPI number for industrial workers "All India" published in RBI Bulletin. She would submit that the petitioner themselves have followed PVC as per CPI changes from April 2016 to December 2016. However, with the increase in the minimum wage rate, the same PVC is being attempted to be interpreted differently.

9. We have carefully considered the rival claim of the parties and have also considered the extensive and elaborate arguments advanced by the learned senior counsels, in support of the parties. It is not in dispute that the

contract agreements were entered between the petitioner and respondent for the work of mechanized cleaning of coaches etc, including the cleaning of depot premises and provision of Onboard Housekeeping Services in trains.Â Perusal of the agreement would reveal that it exhaustively deals with the general terms and conditions and also the additional specialconditions of contract which supplement the general conditions.Â The contract is awarded on a turnkey basis and covers various items like fixed installations, mechanized systems, hand implements, tools & tackles, operators, labour and supervisors, maintenance of machines employed etc.Â The Special conditions of the contract include a condition for provision of payment of Wages Act and also makes it imperative for a contractor to comply with the provisions of Contract Labour (Regulation and Abolition Act, 1970) and the Contract Labour (Regulation and Abolition) Central Rules 1971 as modified from time to time and the contractor is duty bound to indemnify the railways from and against any claim under the aforesaid Act and Rules.Â Under the terms of contract, the contractor is also bound to adhere to the Payment of wages Act, 1936, Workmen Compensation Act, 1923, and other labour legislations.

The contract executed between the parties is no doubt in the nature of public utility.Â Since the number of employees employed by the petitioner in giving effect to the contract is approximately 1350 employees which justifies the whole gamut and scale of operations carried by the contractor, while executing the contract. It was, therefore, made imperative for the contractor to abide by the existing labour laws and various beneficial legislations, including the Payment of Wages Act, Payment of Minimum Wages Act and other labour legislations, the object being to ensure that the workers engaged by the Contractor for executing the contract avail the benefits flowing from the various statutory provisions, benefiting the workers.Â At the same time, the contract intended that the contractor should not be put to a disadvantageous position and, therefore, a PVC is inserted in the contract agreementÂ which reads thus :

Price Variation Clause :

The amount payable on account of Price variation shall be settled every quarter as per the following method :Â–

(i) The amount paid during a quarter shall be divided as under :

i. Labour 55%

ii. Material 30%

iii. Fixed Component 15%

(fixed cost implied the cost of machines and fixed installations.

(ii) For calculation of PV following formula shall be adopted  
$$P = (P_0 \cdot 100) \times [15 + \{55 \times (L_1 - L_0)\} + \{30 \times (M_1 - M_0)\}]$$
 Where :

$P$  : Actual amount of bill payable

$P_0$  : Amount of Bill as per rates awarded at the start of the contract.

$L_0$  : Consumer Price Index Number for Industrial Workers " appellant no.1 India " Published in RBI

$L_1$  : Consumer Price Index Number for Industrial Workers " All India " Published in RBI Bulletin to

be taken as the average price index of 3 months of the quarter under

consideration.

$M_0$  : Index numbers of wholesale prices of Group "Chemicals and chemical products" as published in

the RBI Bulletin for base period.

$M_1$  : Index numbers of wholesale price of Group "chemicals and chemical products" as published in the

RBI Bulletin to be taken as the average price index of 3 months of

the quarter under consideration.

10. The object of the said PVC on one hand is to benefit the contractor in light of the price variation that would take place against the various

components involved, namely, labour or material and also to protect the Railways in case of fall in the CPI so that Railway is not required to pay

excess amount to the petitioner. At the time when contracts were entered into, a notification prescribing the minimum rates of wages published by

the respondent no.3, on 7th August 2008 under Section 5 of the Minimum Wages Act was in force and the minimum rates of wages comprised of (A)

Basic rate of wages, and (B) a Special allowance referred to as Variable Dearness Allowance (VDA). The basic rates of minimum wages

which were made applicable to the employment of sweeping and cleaning activities as far as category "A" in which the petitioner falls would be

Rs.180/- with a variation on Dearness Allowance 1.35 paise. The said notification came to be revised by another notification dated 30th

September 2016 published by the respondent no.3, revising the rates of Variable Dearness Allowance for the employees engaged in 'Employment of

sweeping and cleaning activities' with effect from 30/6/2016 on the basis of rise in the average CPI number reaching 217.16 from 266.83 (Base

2001=100), and thereby resulting in increase of 4.33 points calculated on the basis of average for a period of six months ending on 30/6/2016. As

per the said notification, the rates of VDA for the employment of sweeping and cleaning was fixed at Rs.194/- Thus, the minimum rates of

wages showing the basic rates and VDA payable from 1/10/2016 for Area A was fixed at Rs.374/-. This notification came to be

superseded by another notification issued by respondent no.3 on 19/1/2017 and the rates of minimum wages came to be revised from 19/1/2017

which was to comprise of (a) basic rate of wages (b) Special allowance referred as VDA to be adjusted by the Chief Labour Commissioner at an

interval of every six months commencing on 1st October and 1st April of every year on the basis of average CPI for Industrial Workers (Base

2001=100) for preceding period of six months ending on 30th June and 31st December every year respectively. For area A, the basic rate of

minimum wages applicable to the employment of nature in question was fixed at Rs.523/- whereas the rate of VDA was fixed at Rs.1.93.

It is to be noted that the calculation of price increase as per the PVC contained in the agreement is based on Consumer Price Index for

industrial workers notified by RBI on monthly basis. The notification dated 19/1/2017, however, suddenly changed the scenario, as a result of

which the minimum wages have been increased by the whopping 40% which was an unprecedented increase and also unanticipated. This hike is

not definitely covered by Consumer Price Index for Industrial Workers and issuance of the notification itself reveals that it is issued as

extraordinary notification. It is to be noted that the latest CPI for the industrial workers as issued by Reserve Bank of India on 10th January

2017 reflects that the CPI for January 2017 is reduced by one basis 275 to 274 as compared to 2016. In view of the reduction of the same

Consumer Price Index, resultantly, situation that arose was, that there was increase in the minimum wages, but the Labour Index was reduced in

comparison to the one existing as in December 2016. At that time, the Minimum Wages payable per day was Rs.374/-. However, in view of

the notification dated 19th January 2017, there was a reduction in the Price Variation receivable on account of the increase in minimum wages.

11. In this backdrop, the petitioner made an earnest request to the railways to share the burden of the revised minimum wages and requested a one time suitable increase to be incorporated to cater to the 40% increase in the minimum wages or to insert a clause in the contract insulating the contractor against the wage rise.

The Railway, being sensitive towards the issue, immediately constituted a Committee of four members to deliberate upon revision of minimum wages

applicable to the contract workers, in the backdrop of the representation made by the petitioners. The Committee deliberated on the PVC in the

Mechanized cleaning and the OBHS Contract. On due consideration of the various clauses in the contract, the Committee analyzed the factual

scenario and noted that the price variation element worked out based on CPI for industrial labour is on a lower side i.e. Rs.89,597/- whereas the

price variation element worked out on the basis of minimum wages is Rs.16,55,570/-. It was noted that there is a considerable difference in the

escalation in labour cost based on CPI and based on minimum wages based on CLC. In this backdrop, the committee considered the possible option

on due deliberations.

1. Whether the claim of the contractor for compensation for increase in wages is acceptable in the existing framework of contract.

2. Whether the contracts can be short closed if the contractors are not willing to execute the work till contract period and contractors give one month

notice for short closure of contract. In such a case whether Railway administration can short close the contract and invite fresh tenders by taking a

decision to modify the existing price variation clause and if this takes some time, say 4 to 6 months, whether quotations can be called for shorter period

till finalization of major tender.

3. Whether the price variation clause in the existing contracts can be modified by increasing the weightage of labour component from the existing 55%

to 75% as proposed by Northern Railway and under process in N.Rly HQ as on date (page 26 to 30)

4. Whether the price variation clause in the existing contracts can be modified by substituting the CPI for industrial labour' with Minimum wages,

notified by Central Labour Commissioner.

5. Whether the labour component of existing price variation be frozen till 19.01.2017 and kept as base price and subsequent increase to be adopted by

using minimum wages paid on actual basis as per CLC's notification.

On due deliberation, the Committee nullified the possibility of option nos.1 to 4 after considering the repercussions of the abrupt stoppage of the work

of the present contract. The Committee was of the clear view that in the event of abrupt shortage of work by the contractor, the essential services

like the mechanized cleaning, OBHC will be affected, which would have direct impact on the train operation and it rejected the said solution. As far

as option of inviting fresh tenders was concerned, it was also ruled out. However, the Committee accepted the option no.5 as a viable option to be

adopted for making future payments for the work done from 19/1/2017 by freezing the existing price variation till 19/1/2017.

In order to proceed and implement Option no.5, the Committee recommended that it will act as a modification to the existing contract executed

between the petitioner and the Railway. However, it was noted that any such modification would involve financial implications on the commercial

conditions like PVC and it will vitiate the ethics of tendering procedure which is not recommended in normal course. However, in the peculiar

backdrop of the matter, it was recommended that the proposed modification in PVC should be adopted as a temporary measure, since the activity

involved in the contract will directly affect the train operations i.e. the Railways main business. It was, however, agreed that the same should be

done only on obtaining concurrence of the FA & CAO and sanction from the General Manager. It is to be noted that the Sr.DFM/DB was unable

to agree with the other three members and recorded his reasons for not doing so.

12. In pursuance of the said recommendations of the Committee, the CRSE Respondent no.4 forwarded a communication to the Chief Mechanical

Engineer, CST on 28/4/2017 intimating him that the competent authority has accepted the option no.5 as suggested by the Committee and a request

was made to initiate the proposal as per option no.5 on top priority. The

proposal was also forwarded to the FA&CAO who gave an opinion on 27/6/2017 with the following observations :

Moreover, Finance is of the opinion that the contract is governed by the conditions mentioned in the Contract Agreement and no provisions are available for modifying the existing PVC Formulae or the base year. Accepting such post-contractual modifications are against cannons of public tendering and set a wrong precedence. Moreover, any decision taken pertaining to these three contracts will have a wider ramification for all types of contracts of CR.

In view of the above, the proposal is not agreed to.

Based on the said communication, the respondent no.4 addressed a letter on the same day to the petitioner, informing that the request for altering/modifying the rates made by the petitioner, cannot be accepted in light of the PVC already provided in the contract agreement, and that it covered the aspect of payment of difference in minimum wages.

13. It is pertinent to note that when the petitioner approached this Court on 7th July 2017, he was aggrieved by the communication dated 21st June

2017 issued to him by respondent no.4. An affidavit in reply was filed by respondent no.4 in response to the petition, opposing the petition on the

ground that it was premature since the issue was pending before the General Manager of the Central Railway as well as before the authority in the

office of Regional Labour Commissioner (Central) During the pendency of the said Writ Petition, the respondent no.4 prepared a proposal with

reference to the communication from the FA & CAO dated 21st June 2017. The said proposal was prepared on the basis of a communication

addressed by the ADRM BB, requesting the respondent no.4 to have a re-look at the issue in view of the restlessness of the work force and threat

to immediate resort of stoppage of work and also a letter from the Labour Enforcement Officer addressed to the General Manager/CR from the

Central Railway Contract Labour Sanghatana and Maharashtra Navnirman Kamgar Sangh for payment of revised minimum wages. The note

prepared by CRCE " respondent no.4 dated 10th July 2017 proposed the following :

(a) Proposal for payment of difference in minimum wages (being principal employer) from 19/01/17 to 31/12/17, as per option no.5 of committee report

wherein it was suggested to freeze the existing PVC as it is till 18/01/17 & proposed payment of difference of minimum wage for a limited time on single tender basis with concurrence of FA&CAO and sanction of GM, is turned down by HQ Finance. It is therefore proposed to apprise GM to consider the above proposal.

(b) A pre final revised standard bid document has been received by Railway Board for standardising tender documents all over IR in which new price

escalation clause is suggested. Once the final SBD is released, new proposals for mechanised cleaning to be prepared considering SBD and all

latest Board guidelines. Meanwhile, Divisions/coaching depots will be advised to process and create adequate one time imprests for each coaching

depots for carrying out basic coach cleaning activities. Activities like OBHS, etc. will remain suspended till the new/regular contract gets finalised/is

in place. This one time imprest will be used in the eventuality of sudden stoppage/termination of existing contract.

The said matter was put up before the CME and he agreed with proposal 'A'.

14. The matter was placed before the General Manager who made endorsement to the following effect on 14/7/2017.

1. Based on pre-final revised Standard Bid Document received from Rly. Board, tender documents covering new price escalation clause and all

latest Board guidelines be prepared and processed. Division/HQ to ensure that tenders are notified for opening at the earliest and finalization

expedited.

2. Till the contracts as per new price-escalation clause are awarded necessary arrangements may be made by keeping adequate imprest etc.

In the mean time, the Government of India communicated to the General Manager of the Railway in reference to its letter dated 21/7/2017 on the

subject of Minimum Rates of Wages for Contract Labours. The Government of India made following observations :

4. In view of the above, SEC Railway's proposal is not tenable and have no ground for seeking reference to Ministry of Labour for exemptions for

the on-going contracts from the provisions of Ministry of Labour & Employment vide notification Nos. (i) 1/13(7)2017-LS.II

(ii) 1/13(6)2017-LS II, (iii) 1/13(5)2017-LS.II, (iv) No. 1/13(4)/2017-LS.II and (v) 1/13(3)2017-LS.II, and (vi) 1/13(1)2017-LS.II, dated

20.4.2017 revising the minimum wages and rates of Variable Dearness

Allowance for the labours, circulated vide Board's letter No.2016/E(LL)/ATM/MW/1 dated 5.6.2017

5.Attention is drawn to provisions contained in 'General Conditions of Contract' wherein the contractors are required to comply with the

provisions of Contract Labour (R & A) Act, 1970 and Contract Labour (R&A) Rules, 1971, as modifies from time to time, wherever applicable & are

required to indemnify the Railway from and against any claim under aforesaid Act/Rules.

6.It is reiterated that Railways being Principal Employer are required to ensure that contractors should comply with the relevant provisions of labour

laws pertaining to Contract Labour & Minimum Wages.

7.Thus, SEC Railway are advised to direct the contractors to pay the revised minimum wages along with arrears to the contract labour at the earliest

under intimation to Board's office.

15.It is further pertinent to note that a joint procedure order came to be issued on 20/12/2017 by the respondents to deal with the contracts for coach

cleaning or similar coaching services maintenance. On due deliberation of the intervening events and specifically in light of the letter from the

Railway Board prescribing the Standard Bid document for housekeeping of stations and trains, the JPO recommended that owing to the existing

PVC clause in the ongoing contracts which links labour component with CPI and not with minimum wages and the crucial need of these contracts to

ensure trains upkeep/operations, there is a genuine case to consider and deliberate. The JPO recommended the following course of action :

'The existing contracts for coach cleaning or similar coaching services maintenance contracts (eg.Watering/CTS/ AMOC(Bio Toilets)/OBHC or

others) or station cleaning contracts in the Divisions, wherein request for foreclosure of contract have been received from the contractor,

owing to inability expressed by the contractor to pay the increased minimum wages to labour, shall be reviewed by the concerned Branch officers

keeping in view the pending currency of the contract, the respective contractual issued involved and the merits in the contractor's request for

foreclosure.

Wherever, it is assessed that the existing/ongoing contract is not executable and

a new contract is, essentially needed to replace the existing contract, by foreclosing the ongoing contract, the concerned BO should put up a detailed reasoned note, duly explaining the reasons that lead to the above conclusion. It should be clearly certified by the BO, that the fore-closure of the contract has been concluded owing to the inability of the contractor to absorb and pay the revised minimum wages to contract labour and no undue benefit (apart from reducing the contract's financial impact owing to short-closing of the contract), is intended to the contractor, due to the proposed foreclosure on the ongoing contract.??

The respondent no.4 addressed a letter to the petitioner on 21/12/2017, informing about the JPO and seeking the petitioner's assessment regarding the ability or inability to continue with the contracts, duly fulfilling the statutory provision of payment of minimum wages to the employed contract labour. The petitioner was also advised to approach the Sr.DME/COG BB division, CR who was authorized to take necessary action of foreclosure of the ongoing contracts, in case of a request being made by the petitioner.

16.It is, however, pertinent to note that no action was taken by the respondents to put an end to the contract of the petitioners, and the petitioner

continued to offer the services to the Railway, though the respondents have floated two tenders inviting fresh bids for taking up the work allotted to

the petitioner. The petitioner sought amendment to the petition and has brought the said development to the notice of this Court.

17. It is no doubt true that the scope of the writ court to exercise its power of judicial review of administrative decision arising out of contract is limited

and the Hon'ble Apex Court in case of Tata Cellular Vs. Union of India, has laid down the parameters determining the scope of judicial

review. The Hon'ble Apex Court has held that it cannot be denied that the principles of judicial review would apply to the exercise of contractual

powers by government bodies in order to prevent arbitrariness or favoritism. Their Lordships have further observed that the judicial quest in

administrative matters has been to find a right balance between the exercise of administrative decision to decide matters of contractual nature since

they are not essentially justiciable and the need to remedy any unfairness which is set right by judicial review. The Hon'ble Apex Court dealing with

the case of a Government trading with public and involving public element expected the State to act with fairness and equality and to adopt a fair procedure. Their Lordships have laid down the following principles to be followed in exercise of power of judicial review in contractual matters.Â

(1)The modern trend points to judicial restraint in administrative action.

(2)The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

(3)The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be

substituting its own decision, without the necessary expertise which itself may be fallible.

(4)The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally

speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not,

such decisions are made qualitatively by experts.

(5)The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body

functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of

Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or

actuated by mala fides.

(6)Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

While exercising the power of judicial review in respect of the contract entered into on behalf of the State, the Court is primarily concerned as to

whether there has been any infirmity in the decision making process though it may not delve upon the decision itself.Â By way of judicial review, the

Court is not expected to examine the details of the terms of contract which have been entered into by the public bodies or the State, and the Court

would have limitations on the scope of such an inquiry, unless and until the decision is found to be arbitrary, discriminatory or malafide.Â The

Constitutional Court would exercise the power of judicial review in furtherance of public interest and not only because it has arrived at a conclusion

that some other decision would have been possible.Â Overwhelming public interest, would justify the Court's intervention in such circumstances.Â

18. The respondent railway is a State within meaning of Article 12 of the Constitution andÂ the Court is examining the issue in hand in respect of a

contract entered by a public body and, therefore, the public interest would be a predominant factor guiding this Court while examining the issue.Â The

respondent being a State, its conduct in all fields, including a contract, is expected to be fair and reasonable and it cannot act arbitrarily, capriciously or

whimsically.Â Further, being a State, it is also duty bound to abide and respect the statutory obligations and nonetheless, it must ensure that such

statutory obligations are enforced.Â

The attempt on the part of the railways to submit before this Court that the Court may notÂ exercise its writ jurisdiction in contractual matters, will

not deter us from examining the issue.Â Though the learned senior counsel had vehemently raised a preliminary objection about entertaining such a

petition, in light of the alternate remedy being available, by this time, it is settled position of law that though a writ petition for enforcement of

contractual obligations where one of a party to such contract is State, or falls within the definition of 'State' is not ordinarily maintainable to

enforce the terms of contract or claim of damages arising out of the concluded contract alleging its breach, writ jurisdiction of the Court can always be

invoked and the power of judicial review can be exercised in extra-ordinary cases to decide the validity of actions of state in contractual matters.

19. A statute may confer a power on the statutory functionary to enter into contracts in exercise of its duties and functions.Â The dispute may

arise out of the terms of such contracts or its alleged breaches, and in all such cases, they will have to be settled by applying the ordinary principles of

law of contract.Â Merely because one of the parties to the agreement is a statutory functionary, will not restrict invocation of a remedy of this Court,

since every dispute involving a statutory body or its functionary may not be in exercise of its statutory power.Â In ABL International Ltd Vs. Export

Credit Guarantee Corporation of India Ltd (supra), the Hon'ble Apex Court has extensively dealt with the issue 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.Â The following

observations of the Hon'ble Apex Court would be apt to be referred to :

10. It is clear from the above observations of this Court in the said case, though a writ was not issued on the facts of that case, this Court has held that

on a given set of facts if a State acts in an arbitrary manner even in a matter of contract, an aggrieved party can approach the court by way of writ

under Article 226 of the Constitution and the court depending on facts of the said case is empowered to grant the relief. This judgment in

K.N.Guruswamy V. State of Mysore was followed subsequently by this Court in the case of D.F.O. Vs. Ram Sanahi Singh wherein this Court held:

By that order he has deprived the respondent of a valuable right. We are unable to hold that merely because the source of the right which the

respondent claims was initially in a contract, for obtaining relief against any arbitrary and unlawful action on the part of a public authority he must

resort to a suit and not to a petition by way of a writ. In view of the judgment of this Court in K.N. Guruswamy case<sup>1</sup> there can be no doubt that the

petition was maintainable, even if the right to relief arose out of an alleged breach of contract, where the action challenged was of a public authority

invested with statutory power.

11. In the case of Gujarat State Financial Corpn. Vs. Lotus Hotels (P) Ltd. This Court following an earlier judgment in Ramana Dayaram Shetty v.

International Airport Authority of India held:

The instrumentality of the State which would be 'other authority' under Article 12 cannot commit breach of a solemn undertaking to the prejudice of

the other party which acted on that undertaking or promise and put itself in a disadvantageous position. The appellant Corporation, created under the

State Financial Corporations Act, falls within the expression of 'other authority' in Article 12 and if it backs out from such a promise, it cannot be

said that the only remedy for the aggrieved party would be suing for damages for breach and that it could not compel the Corporation for specific

performance of the contract under Article 226.

The Hon'ble Apex Court in case of Zonal Manager Central Bank vs. M/s. Devi Ispat Limite again revisited the said issue and held that merely

because one of the parties to the litigation raises a dispute in regards to the facts of the case, the Court entertaining such a petition under Article 226

of the Constitution is not always bound to relegate the parties to a remedy of a

suit.Â The Hon'ble Apex Court has further held that when an instrumentality of the State acts contrary to public good and public interest, unfairly, unjustly, and unreasonably, in its contractual, constitutional or statutory obligation, it really acts contrary to the constitutional guarantee enshrined in Article 14 of the Constitution.Â In this backdrop, it was held that writ petition is maintainable even in contractual matters, and there is no complete embargo against invoking the extra ordinary jurisdiction of this Court in Article 226 of the Constitution.Â It is thus the discretion of the High Court to interfere or not to interfere in a contractual matter though the Courts are expected to bear in mind the self imposed restrictions consistently followed by the High Courts not to ordinarily entertain writ petition for enforcing purely contractual rights and obligations particularly when such determination would necessitate recording of oral evidence.Â

In this backdrop, we have examined the facts of the present case.

20. In the backdrop of the said settled proposition of law, when we are dealing with Railway which is a State functionary, we are unable to accede to the argument of the learned counsel for the respondent that merely because the right which the petitioner claims is borne out of a contract, the petitioner should be relegated to resort to the remedy of Civil Court and the Court should decline to exercise its extraordinary jurisdiction.Â Â The instrumentality of a State cannot put its counterÂ contracting party to a disadvantageous position.Â The agreement entered into by the railway with the petitioner mandates the contractor to follow the provisions of the welfare legislation operating in the labour field and the petitioner never intended to walk out of such statutory obligations.Â However, the petitioner is aggrieved by 40% hike in the rates of minimum wages which was not anticipated. On one hand, Respondent railway expects the petitioner contractor to discharge the statutory obligation by paying the minimum wages to its employees, which according to the railway, he is duty bound to comply.Â However, the railway do not want to rope out the petitioner who has been left in a financial lurch on account of the sudden hike in the rate of minimum wages which the contractor is duty bound to abide by in the light of the statutory obligations cast on him.Â This court would therefore, not be a mute spectator when it is dealing with the Railway, who has accepted that the contract is of essential services and if the said contract is intervened, the

functioning of railway would come to a stand still. It will not be appropriate for us to turn down the petitioner on the specious ground that he has another remedy available, by knocking the doors of a civil court. In order to prevent the said authority from exercising its power arbitrarily, though in a field of contract, the Court would not be slow in interfering only on the ground that the matter pertains to realm of contracts, and in fact, while exercising contractual powers, the Government bodies may be subjected to judicial review in order to prevent arbitrariness or favourism on its part. The rule against arbitrariness or fair play, being recognized as a part of rule of law, applicable in a situation or action by the instrumentality of State, in dealing with the parties like the petitioner though in the realm of contract, the manner, the method, the motive and repercussions of the decision making can be subjected to judicial review on the touch stone of fair play and reasonableness. Each case thus will be required to be decided on its own facts. Public interest as noticed, may be one of the factors to exercise the power of judicial review. In case where a public law issue is involved, judicial review cannot be excluded and the Court would be justified in going into the decision making process than the merit of decision itself. Thus, we are of the considered view that the principle of judicial review cannot be excluded completely as far as exercise of contractual matters are concerned, if it is intended to prevent arbitrariness and if this exercise is in the larger public interest or if it is brought to the notice of the Court that the contracts have been awarded for some collateral purpose. This view is fortified by the decision of the Hon'ble Apex Court in case of Noble Resources Limited Vs. State of Orissa & Anr, wherein the Hon'ble Apex Court dealt with an issue as to whether remedies available in a suit per se would refuse relief under Article 226 of the Constitution of India.

It is trite that if an action on the part of the State is violative the equality clause contained in Article 14 of the Constitution of India, a writ petition would be maintainable even in the contractual field. A distinction indisputably must be made between a matter which is at the threshold of a contract and a breach of contract; whereas in the former the court's scrutiny would be more intrusive, in the latter the court may not ordinarily exercise its discretionary jurisdiction of judicial review, unless it is found to be violative of

Article 14 of the Constitution. While exercising contractual powers also, the government bodies may be subjected to judicial review in order to prevent arbitrariness or favouritism on its part. Indisputably, inherent limitations exist, but it would not be correct to opine that under no circumstances a writ will lie only because it involves a contractual matter.â??

21. In the backdrop of the aforesaid legal position, we have given our thoughtful consideration to the facts placed before us.Â It can be seen that the

railway being conscious of the clause contained in the contract, which made it imperative for the contractor to abide by the beneficial labour

legislations was also conscious of the fact that the existing PVC would be insufficient to tackle the situation of 40% hike in the minimum wages

brought into by notification dated 19/1/2017.Â The respondent, therefore, took a decision to constitute a committee of four members, which included

the high ranking officials of the railways.Â The Committee examined the entire issue and by majority, accepted the option no.5 as the most suited

option to deal with the situation.Â The matter was thereafter forwarded to the Finance, and it is interesting to note that the Dy.F.A and CAO(F)

opined that the conditions contained in the contract agreement must prevail and there is no provision for It also observed that accepting such post

contractual modification would be against the cannon of public tendering and set a wrong precedent and will have wider ramification for all such types

of contracts.Â On the said observations by the Finance, the recommendation of the Committee came to be turned down.Â It is also worthy to note

that the railway is conscious of the fact that the Railway Board (Ministry of Railways) in their letter No.2016/E(LL)/AT/MW/1 dated 8th August

2017, has advised that Railways being principal employer are required to ensure that the contractors should comply with the relevant provisions of

labour laws and the SEC Railway was advised to direct the contractor to pay the revised minimum wages along with the arrears.Â In the backdrop

of the aforesaid directions issued by the Ministry of Finance (Railway Board), the respondent nos.2 and 4 are bound by the same and cannot run away

from the responsibility of ensuring that the minimum wages are paid to the workersÂ engaged by the contractor.Â Â It is thus the duty of the

railway to ensure that the contractor complies with the relevant provisions of labour law pertaining to minimum wages.

On one hand, the Railway is expecting a contractor to abide by the labour legislations including payment of minimum wages and has also inserted a specific clause to tackle with variations in the CPI. However, the situation has arose and what has been noted by us above, when the PVC would not be sufficient to neutralize or compensate the contractor for the increase cost of labour, in light of the notification dated 19/1/2017. The respondent railway has also taken a decision to float new tenders and invite new bids by including the new price escalation clause in the tender document to tackle the escalation in the rates of minimum wages. The said decision is taken by the General Manager on 14/7/2017 itself and it appears that the respondents have floated fresh tenders inviting fresh bids at Wadi Bunder, Mumbai and Lokmanya Tilak Terminus for a period of two years. It is, however, pertinent to note that the petitioner has not been communicated of any decision on termination of his contract and rather the railway is availing the services rendered by the petitioner. The respondent railway itself has admitted in its affidavit and it can be seen from its office notings that the service of cleaning and housekeeping being the essential services cannot be discontinued at once, unless a new contractor is placed in order. On the one hand, petitioner is rendering the services and is required to abide by the notification of 19th January 2017 and to continue to pay the workers at the new rate, and on the other hand, he is made to work under the old rate of contracts containing a PVC which do not meet the abrupt rise in the minimum wages in terms of notification dated 19/1/2017. The petitioner company which engages the work force who do not possess equal bargaining power as against its principal employer and are pitched in a situation where they would be made to work by the petitioner without payment of minimum wages or as they have threatened to stop rendering services, the Railway would be the sufferer. Such situation, in any contingency, needs to be avoided.

22. The officials of the railway have itself taken a decision by majority of four member committee and have accepted the option no.5. However, we are conscious of the fact that it will not be appropriate for us to issue a writ in the nature of mandamus directing the railways to enforce its decision taken by the Committee. However, we would only observe that the Finance Wing of Railways has not given any cogent reasons or has not dealt

with the situation which the Committee has dealt with, but has rejected the recommendations only on a specious ground that the decision of the

Committee, if followed would lead to a bad precedence.Â

The General Manager who took a final decision on 14/7/2017 provided guidelines for the fresh tender documents to cover the new price escalation

clause and all the Division/HQ were directed to notify the fresh tenders with insertion of new clause.Â The General Manager also arrived at a

decision that till the contracts as per the new price escalation clause are awarded, necessary arrangements may be made by keeping adequate

imprest.Â However, even the General Manager did not offer any solution to the petitioner as regards his claim for compensation for the increase in

cost of labour owing to the notification dated 19/1/2017.Â The General Manager also did not take into consideration the Option no.5 suggested by the

Four Member Committee constituted by the Railway which had considered the issue in the backdrop of viability of five options.Â Â The entire

decision making process adopted by the respondents is devoid of any rationality and suffers from non application of mind and do not offer any

justification for arriving at such a conclusion.

23. It is to be further noted that all these developments have taken place after filing of the petition and on the date when the petitioner approached the

Court, i.e. in July 2017, no decision was even taken to float new tenders. However, the subsequent stand of the railways make it clear that they have

accepted theÂ position that the future tender will have to include the price escalation clause in terms of the minimum wages and if the railway is

conscious of this fact and the legal position, it is not justified in denying the said benefit to the petitioner contractor.Â The services of the petitioner

have not been terminated by the respondent railway because of its own peculiar difficulties, but it is choosing to deny the petitioner the difference in

the wages, which he is duty bound to pay to the workers in light of the revised rates of minimum wages applicable to the industry of cleaning.

Such an arbitrary action of the Railways thus cannot be sustained.

24. The Hon'ble Apex Court in the case of Nabha Power (supra) had an opportunity to deal with the principle of business efficacy and applied the

said principle to the facts in hand.Â The Punjab State Electricity Board (PSEB) had selected a developer through the tariff based bidding process for

procurement of power on long term basis from a power station to be set up at a village in District Patiala, Punjab. The said project was based on Part

7 of the Electricity Act 2003 which contain provisions for tariff.Â In order to facilitate the implementation of the project, the PSEB incorporated the

appellant Nabha Power Ltd (supra) as a special purpose vehicle (SPV) for implementation of the project and the successful bidder was to acquire

100% of share holding of NPL and to enter into a 25 year Power Purchase Agreement with PSEB.Â On the bidding process being completed, L & T

was declared as a successful bidderÂ and the share purchase agreement was executed between PSEB and L & T, transferring the 100% shares of

Nabha Power Ltd to L & T. Certain issues arose in the course of contractual obligation which cover an issue of the component of the costs of

purchasing of coal, comprising washing related costs, including washery charges and denial of road transportation costs at the plant end and at the

mine end.

It was the case of the appellant that project was located at a distance of more than 1000 kms from the mine and the coal arranged by the respondent

contained more than 34% cash.Â The question was whether the coal supplied for the project was a washed coal or unwashed coal.Â According to

the appellant, in terms of the power project agreement, it could be only washed coal and thus the actual cost of purchasing transport referred in

Schedule 7 of the PPA, must refer to the actual cost of washed coal.Â The respondents, however took a stand that the term 'washing' is not a

part of energy charges formula.Â The other ancillary issue was in relation to the transportation of unwashed coal at the mine end rather than the

GCV of washed coal on 'as received basis' at the project end as a part of PCV in energy charges formula.

25. The Hon'ble Apex Court, on consideration of the rival contentions invoked and applied the principle of business efficacy of the transactions.Â It

placed reliance on the judgment of the Court of Appeal in the Moorcock where BOWEN, L.J dealt with an implied warranty and observed thus :

'Bowen, L.J. : 'Now, an implied warranty, or, as it is called, a covenant in law, as distinguished from an express contract or an express

warranty, really is in all cases founded on the presumed intention of the parties, and upon reason. The implication which the law draws from what

must obviously have been the intention of the parties, the law draws with the object of giving efficacy to the transaction and preventing such a failure

of consideration as cannot have been within the contemplation of either side; and I believe that if one were to take all the cases, and they are many, of

implied warranties or covenants in law, it will be found that in all of them the law is raising an implication from the presumed intention of the parties

with the object of giving to the transaction such efficacy as both parties must have intended that at all events it should have. In business transactions

such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all

events by both parties who are business men; not impose on one side all the perils of the transaction, or to emancipate one side from the all chances of

failure, but to make each party promise in law as much, at all events, as it must have been in the contemplation of both parties that he should be

responsible for in respect of those perils or chances.

The significant issue was the principle of “business efficacy to the transactions” which are intended at all events by parties who are

businessmen. Emphasis supplied Their Lordships also referred to the judgment in a case of Reigate Vs. Union Manufacturing Co. (Ramsbottom)

Ltd, and observed thus :

These principles, however, have been clearly established: The first thing is to see what the parties have expressed in the contract; and then an implied

term is not to be added because the Court thinks it would have been reasonable to have inserted it in the contract. A term can only be implied if it is

necessary in the business sense to give efficacy to the contract; that is, if it is such a term that it can confidently be said that if at the time the contract

was being negotiated some one had said to the parties, “What will happen in such a case,” they would both have replied, “Of course, so and so

will happen; we did not trouble to say that; it is too clear.” Unless the Court comes to some such conclusion as that, it ought not to imply a term

which the parties themselves have not expressed.

Their Lordships noted the development of the law evolving into “five condition test” for an implied condition to be read into the contract including

the business efficacy test. The Apex Court observed thus :

The development of law saw the “five condition test” for an implied

condition to be read into the contract including the 'business efficacy' test.

It also sought to incorporate 'The Officious Bystander Test' [Shirlaw vs. Southern Foundries (supra)]. This test has been set out in B.P.

Refinery (Westernport) Proprietary Limited vs. The President Councillors and Ratepayers of the Shire of Hastings (supra) requiring the requisite

conditions to be satisfied: (1) reasonable and equitable; (2) necessary to give business efficacy to the contract; (3) it goes without saying, i.e., The

Officious Bystander Test; (4) capable of clear expression; and (5) must not contradict any express term of the contract. The same principles

find reference also in Investors Compensation Scheme Ltd. vs. West Bromwich Building Society (supra) and Attorney General of Belize and Ors. vs.

Belize Telecom Ltd. and Anr. (supra). Needless to say that the application of these principles would not be to substitute this Court's own view of

the presumed understanding of commercial terms by the parties if the terms are explicit in their expression. The explicit terms of a contract are

always the final word with regards to the intention of the parties. The multi-clause contract inter se the parties has, thus, to be understood and

interpreted in a manner that any view, on a particular clause of the contract, should not do violence to another part of the contract.

By applying the principle laid as above, the Hon'ble Apex Court held that reading of the energy formula leads to a conclusion that all costs of coal up

to the point of the project site have to be included and the Calorific Value of the coal has to be taken as at the project-site.

The learned counsel for the respondent Ms. Iyer has vehemently referred to the observations made by Their Lordships in para 74 where a word of

caution has been extended and it is clarified that it should not be an endeavour of commercial courts to look into implied terms of contract and

specifically in the current day where making of a contract is a matter of high technical expertise with legal brains on all sides involved in the process

of drafting a contract. Thus, normally a contract should be read, as it reads, as per its express terms. The 'implied term' is a concept which is

necessitated only when the Penta test as set out in B.P. Refinery (Westernport) Proprietary Limited Vs. The President Councillors and Ratepayers of

the Shire of Hastings comes into play and there has to be a strict necessity for it.

26. We are conscious of the observations made by the Hon'ble Apex Court in para 74. The business efficacy test, therefore, should be applied only in cases where the term that is sought to be read as 'implied' is such which should have been clearly intended by the parties at the time of making of the agreement. However, it is not to be applied as a routine test to read something into the contract on a disguise that the parties intended it to be so. However, perusal of the contract agreement in the present case, it is amply clear that the railway itself intended to benefit the contractor by including the PVC, with the avowed object to provide a buffer, to deal with the hike in price variation in labour and material charges. The Railway abided by this clause till 18/1/2017 and the contractor continued to receive the benefits of the PVC in terms of the difference in the wages. However, the petitioner contractor felt the heat only when the minimum wages was escalated by 40%, and then the railway authorities concluded that the PVC clause related itself to CPI and would not cover enhancement in the minimum wages. By applying the principle of "business efficacy" as laid down by the Hon'ble Apex Court, the irresistible conclusion that can be drawn is that the PVC cannot be restricted only to the formula prescribed in clause (12) of the agreement, but it also must cover within its ambit the escalated minimum rate of wages. Clause 14 of the agreement mandates the contractor to abide by the statute like the Minimum Wages Act, Workmen Compensation Act etc which are instances of beneficial legislation in the larger interest of the labour class and it is rather a bounden duty of the Railway in ensuring that such statutory mandates are strictly adhered to. In such circumstances, we are of the considered view that the respondent railways though are at liberty to put an end of the existing contract of the petitioner by following the prescribed mode, but as long as the said contract continues, the petitioner company cannot be deprived of the neutralization for the increase in the cost of labour owing to the extraordinary notification dated 19/1/2017, revising the minimum wages applicable to the industry of mechanized sweeping and cleaning with effect from the date of coming into its force. We are of the considered view that the railway is duty bound to neutralize the said cost of labour to the petitioner under clause (12) of the PVC contract by applying the principles of 'business efficacy', and by including the stipulation of payment of wages as per the

Minimum Wages Act as an implied stipulation in the PVC. The respondent Railway is also liable to continue to compensate the petitioner for the increase in cost of labour in terms of notification dated 19/1/2017 as long as the contract subsists. However, we are not restraining the respondents from proceeding with the finalization of the bids which they might have received in pursuance of the floating of the two new tenders for the mechanized cleaning and Onboard Housekeeping services in the passenger coaches. Needless to say that the petitioner would be at liberty to participate in the said process, if he so desires.

27. Writ Petition is allowed.

It is held that if respondent nos.1 and 2 desire to terminate the contracts of the petitioner, they are at liberty to do so.

However, we hold and declare that for a period between 19/01/2017 till contracts dated 11/02/2016, 22/03/2016 and 06/06/2016 are in existence.

Petitioner would be entitled to payment of difference between Rs.374/- which was required to be paid by the Petitioner in pursuance to the

Notification issued under the Minimum Wages Act dated 07/08/2008 read with the Notification dated 30/09/2016 and Rs.523/- which is required to

be paid under Notification dated 19/01/2017 from the Respondents.

Rule is made absolute in the aforesaid terms.