
(2007) 02 GAU CK 0045
In the Gauhati High Court

Abdul Kasem Ali Ahmed

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 07-02-2007

Acts Referred:

Constitution of India, 1950 — Article 12, 14, 21, 226, 227

Citation : (2007) 1 CTLJ 323 : (2007) 2 GLR 232 : (2007) 1 GLT 784

Hon'ble Judges : I.A. Ansari, J

Bench : Single Bench

Judgement

I.A. Ansari, J.—The moot question, which needs to be addressed in the present set of writ petitions, is whether the remedy available, under Article 226 of the Constitution of India, can be legitimately used for 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 ?

2. In the present set of writ petitions, the facts are similar and may, in brief, be set out, thus : The petitioners have entered, into agreements with the State Government for either executing different contract works for the Government or for supplying various articles to the Government. The petitioners have completed their part of the contracts and have raised their demands for payment. There has been total inaction, on the part of the Government, in making payment of the dues of the petitioners, although the amounts, claimed as dues by the petitioners, are admitted by the Government as due and payable to the petitioners by the Government. In some of the transactions, non-availability of financial resources is cited as a reason for delay in making the payment and assurance is offered that payment would be made as and when funds are made available. It is in these circumstances that the petitioners have sought for issuance of writ/writs commanding the respondents to make payment of the unpaid dues of the petitioners.

3. While considering the present set of writ petitions, it is also important to note

that the factual scenario, in the present set of writ petitions, is, in fact, common to many other writ petitions, which were filed, in this High Court, in the past. This High Court, in similar situations, disposed of earlier, several writ petitions, directing the Department concerned to verify and if any amount is found, on such verification, due and payable, then, such outstanding dues of the petitioners be paid within the time-frame specified by the court. These directions led to a very unhappy situation, for, some of the contractors or suppliers, who had been able to approach this court seeking issuance of appropriate writ(s) or order(s), could obtain their payments by edging out the claims of those, who had not approached the court or who may have come to the court later. Another fall-out of the directions for payment, which had been issued in these types of writ petitions, was that many of such orders of the High Court, having remained unimplemented, contempt proceedings were initiated, wherein defence taken by the concerned officer(s) was also almost common, the defence being that the orders of the court had remained unimplemented not on account of any deliberate omission on the part of the officers concerned, but because of the fact that no money was available for payment in accordance with the directions issued in the writ petitions. In fact, in a contempt proceeding, registered as COP(C) No. 5/2004, the departmental Commissioner and Special Secretary filed an affidavit pursuant to a specific order passed by the court stating, inter alia, that there were, in all, 1062 contractors under the Public Works Department (in short, "the PWD"), Government of Assam, whose dues were payable under the orders of the court and the total amount of money payable was Rs. 4,718.22 lakhs. Having realized that there may be a large number of other contractors to whom money was due, but who may not have moved the court for payment of their admitted outstanding dues, a Single Bench, in Jatin Pathak v. State of Assam and Ors. WP(C) No. 3354/2004, (which was decided on 31.5.2005), observed and directed as follows:

...In a contempt proceeding registered as Contempt Case No. 5/2000, the departmental Commissioner and Special Secretary has filed an affidavit pursuant to the specific order passed by the court in the said case stating that presently, there are a total number of 1062 contractors under the Department in respect of whom money is payable under orders of the court and the total amount of money involved is Rs. 4718.22 lakhs. This Court may reasonably assume that there will be a large number of other contractors to whom money is due but who may not have moved the court for payment of their admitted outstanding dues. In the aforesaid situation, I am of the considered view that the present writ application ought to be disposed of with a little modification of the orders passed earlier in similar matters so as to secure the interests of all concerned and to ensure an equitable distribution of Government fund in discharge of the admitted outstanding dues of the citizens. As ordinarily it is ordered that the following directions shall govern this particular case as well as the course of action that the Department shall now adopt in deciding all similar claims that may be pending before it.

(1) The Public Works Department of the State of Assam shall prepare a list of contractors, in each of its Division, to whom money is admitted to be due on account of the contract works performed whether under orders of the court or otherwise.

(2) Such lists will be prepared Division-wise in strict chronological order on the basis of the date on which payment is due.

(3) In drawing of the aforesaid list, the names of the contractors may be arranged under the separate heads of accounts that may be involved.

(4) That funds received by the Public Works Department under the particular heads of accounts and against the Division will be applied for discharge of the admitted dues in the order in which the list is prepared and maintained.

(5) All the contractors, who claim money to be due, will be at liberty to have their names registered in the concerned Division, which registration will be effected by the concerned authority after due verification of their entitlement to the payment claimed.

This writ petition shall stand disposed of in terms of the above direction.

4. The directions given by the High Court, in *Jatin Pathak (supra)*, were, thus, to the effect that a register of pending admitted bills, in chronological order, shall be maintained by the Department concerned (i.e., Public Works Department) and as and when funds are made available, payment shall be made strictly in accordance with the said register. Acting upon the directions, which had been given in *Jatin Pathak (supra)*, this High Court, in many of the writ petitions, issued directions to the Public Works Department of the State Government to the effect that the writ petitioners name be entered in the said register.

5. It is submitted at the Bar, at the time of hearing of the present writ petitions, that this system has been working, by and large, satisfactorily and may, therefore, be directed to be followed, generally, by all the departments functioning under the Government of Assam. While the present set of writ petitions was pending seeking either directions for payment or to get the names of the writ petitioners included in the register aforementioned, as maintained by the PWD, a Division Bench of this court, in *State of Manipur v. Moirangthem Chaoba Singh and Ors.* reported in (2006) 1 GLT 1 has held that a writ of mandamus cannot be issued for enforcement of private rights, for, the rights of the parties, who have entered into a contract, fall under the domain of private law irrespective of the fact whether the contract has been entered into by two private individuals or by an individual, on the one hand, and the State, on the other, and that when a contract agreement provides for arbitration, the remedy of the aggrieved party lies in obtaining necessary relief by taking resort to arbitration proceeding and not by public law remedy, such as, a writ of mandamus under Article 226. Having so held, the Division Bench, in *Moirangthem Chaoba Singh (supra)*, overruled the decisions, in *Swadesh Lal Roy*

v. State of Assam and Ors. reported in (2000) 1 GLT 332 and Tayum Yalli and Ors. v. Union of India and Ors. reported in (2002) 3 GLT 416. The Division Bench, in Moirangthem Chaoba Singh (supra), further pointed out that in Green Valley Industries v. State of Assam and Ors. reported in (1990) 1 GLT 604 the court had not decided any question as to the maintainability of the writ petitions in matters of enforcement of the State's contractual obligations and that there is no declaration of law touching upon, or having bearing on, the distinction between private law and public law and that the decision, in Green Valley Industries (supra), is confined to the facts of that case.

6. In the backdrop of what have been indicated above, two questions, which fall for determination, in the present writ petitions, are as follows:

(i) Whether this batch of writ petitions is liable to be dismissed on the strength of the decision rendered by the Division Bench of this court in Moirangthem Chaoba Singh (supra) ?

(ii) Whether, in the light of the observations made, and the conclusions reached, in Moirangthem Chaoba Singh (supra), the guidelines, issued by the learned Single Judge, in Jatin Pathak (supra), can still govern the field in so far as, at least, the PWD is concerned ?

7. Appearing on behalf of the writ petitioners, Mr. G.N. Sahewalla, learned senior counsel, Mr. A.K. Goswami, learned senior counsel, Mr. S. Dutta, learned Counsel, Mr. S.C. Biswas, learned Counsel, and Mr. K. Bhattacharjee, learned Counsel, have addressed this court, at great length, to show that the remedy under Article 226 is available to enforce contractual obligations of the State and it is unreasonable and unfair, on the part of the State, to drive its citizens to Civil Court for realization of its dues, particularly, when the dues are not disputed. It is also submitted, on behalf of the writ petitioners, that the system of payment, resorted to in terms of the directions given in Jatin Pathak (supra), has been working well and satisfactorily, these directions are in the field of public law domain, these directions have remained unaffected and cannot be said to have been impliedly overruled by the Division Bench decision in Moirangthem Chaoba Singh (supra). In fact, it has also been submitted, by and large, on behalf of all the writ petitioners, that the directions, which have been given by the learned Single Judge, in Jatin Pathak (supra), may be extended to other departments of the State Government. The other learned Counsel, appearing on behalf of the writ petitions, broadly adopted the submissions noted hereinbefore.

8. Appearing on behalf of the PWD, Mr. I. Choudhury, learned Standing Counsel, has made two-fold submissions. Though, on the one hand, Mr. I. Choudhury concedes that contractual obligations of the State are not completely outside the reach of Article 226, yet, on the other, Mr. Choudhury contends that the Division Bench decision, in Moirangthem Chaoba Singh (supra), makes it clear that no direction, under Article 226, can be given by the High Court to the Government to make payment of a contractor's or supplier's bills. The doctrine of fairness,

according to Mr. Choudhury, is not attracted in the domain of private law and, hence, for the difficulty that may be faced by a contractor or supplier, for non-payment of his dues, the remedy lies in instituting an appropriate suit in the civil court and not in taking resort to a writ application under Article 226. It is, however, the submission of Mr. Choudhury that the guidelines issued, in Jatin Pathak (supra), are not meant for payment of dues of any individual contractor and that the same having been issued in the greater interest of all concerned and to ensure equitable distribution of the Government's fund in the discharge of its admitted outstanding dues, these guidelines fall within the domain of public law remedy and the same, therefore, remain unaffected by the decision of the Division Bench in Moirangthem Chaoba Singh (supra). Further clarifying his position, Mr. Choudhury has submitted that the guidelines issued, in Jatin Pathak (supra), have worked satisfactorily.

9. So far as Mr. K.N. Choudhury, learned Additional Advocate General, Assam, is concerned, his submission is that the public law remedy cannot, ordinarily, be made available to enforce obligations arising out of contract even if one of the parties to such a contract is the State. In a given case, however, contends Mr. K.N. Choudhury, the directions for payment of dues of a citizen may be required to be given under Article 226 if the writ petitioner can show that non-payment of his dues affects his fundamental rights, such as, a case, where the payment of dues of a writ petitioner is arbitrarily refused by the State, or where, while making payment of its dues, the State makes discrimination or when non-payment of dues threatens the very survival and existence of a citizen of the State. The learned Additional Advocate General has also submitted that though a period of limitation prescribed under the Limitation Act, 1963, will not, ordinarily, bar exercise of jurisdiction under Article 226, the fact remains that period of limitation is prescribed by the Legislature as a measure of public policy and the High Court shall not, ordinarily, entertain a writ petition if the unpaid dues are barred by the period of limitation. In support this submission, Mr. K.N. Choudhury has placed reliance on State of Madhya Pradesh Vs. Bhailal Bhai and Others,

10. Appearing as amicus curiae, Mr. N. Dutta, learned senior counsel, has submitted that the decision, in Moirangthem Chaoba Singh (supra), has to be understood in the context of the facts and the issues raised therein. Points out Mr. N. Dutta that none of the writ petitions, in Moirangthem Chaoba Singh (supra), involved (as the decision in Moirangthem Chaoba Singh (supra), reflects) any constitutional issue, such as, enforcement of any of the fundamental rights except the fact that the payments of the writ petitioners' dues had not been cleared, though the amounts were, not being disputed, and it is in these circumstances that the Division Bench has held that the writ petitioners were essentially asking for a writ of mandamus to enforce their private rights and since the dispute between the parties concerned had arisen out of a contract agreement and the contract agreement had provided for arbitration, the remedy of the petitioners lied in taking recourse to the arbitration

proceeding and not in seeking issuance of mandamus by the High Court under Article 226. Mr. Dutta adds that if a State does not make payment of its admitted dues to the contractors or suppliers, the aggrieved party may, ordinarily, be required to go to Civil Court, but there may be a case, wherein payment is arbitrarily refused by the State or a contractor or supplier is discriminated in the making of payment of his dues inasmuch as his payments are denied, while others may have been paid. In such circumstances, even in the light of the decision in *Moirangthem Chaoba Singh* (supra), the recourse to Article 226, according to Mr. Dutta, cannot be said to be totally barred. Mr. Dutta, however, hastens to add that for seeking enforcement of fundamental rights guaranteed under Article 14 or 21, a writ petitioner must plead with clarity all material facts so as to satisfy the writ court that the petitioner is entitled to invoke the powers exercisable by the High Court under Article 226. It is the submission of Mr. Dutta that if the facts, pleaded in a writ petition, show that the writ petitioner has been subjected to unequal treatment in making payment of his dues or he has been arbitrarily dealt with or his payment of dues has not been made on extraneous reasons, the writ court cannot refuse to exercise its constitutional obligation under Article 226. To this extent, contends Mr. Dutta, a writ petition would be maintainable in matters pertaining to payment of admitted amount by the State even in non-statutory commercial contracts. It is also the submission of Mr. Dutta that the remedy, available under Article 226, is an extraordinary remedy and is not intended for the purpose of declaring the private rights of the parties. In the case of enforcement of contractual rights and liabilities, reiterates Mr. Dutta, the normal remedy of filing a civil suit is available to the party and the High Court will not exercise its prerogative writ jurisdiction to enforce such contractual obligations and, hence, a writ or direction, in the nature of mandamus, would not lie to enforce private rights or contractual rights or obligations or even to avoid such obligations or rights. Contracts, which are non-statutory, and rights, which are purely contractual and governed only by the terms of the contract, however, according to Mr. Dutta, are not enforceable by any writ or order under Article 226 of the Constitution of India so as to remedy the breach of contract, "pure and simple". Reference, in this regard, is made by Mr. Dutta to *Lekhraj Satramdas, Lalvani Vs. Deputy Custodian-cum-managing Officer and Others*, *Radhakrishna Agarwal and Others Vs. State of Bihar and Others*, ; *Divisional Forest Officer Vs. Bishwanath Tea Co. Ltd.*, ; *State Bank of Haryana v. Jage Ram* AIR 1980 SC 2018 ; *The Bihar Eastern Gangetic Fishermen Co-operative Society Ltd. Vs. Sipahi Singh and Others*, ; *Bareilly Development Authority and Another Vs. Ajay Pal Singh and Others*, *Life Insurance Corporation of India Vs. Escorts Ltd. and Others*, and *Kulchinder Singh and Others Vs. Hardayal Singh Brar and Others*,

11. In the present set of writ petitions, points out Mr. Dutta, many of the writ petitions are barred by limitation and, in such cases, remedy of Article 226 cannot be, ordinarily, made available unless the petitioner convincingly explains the reasons for the delay in approaching the writ court.

12. Dealing with the question as to whether a writ court can ignore the period of

limitation, while enforcing a claim for payment of the dues, Mr. Dutta has further pointed out that when a claim for payment of dues is barred by limitation, it is the duty of the person aggrieved to satisfy the court that his delay in approaching the writ court did not suffer from any laches or negligence. If a writ petitioner can offer no reasonable explanation for the delay, remedy under Article 226, contends Mr. Dutta, cannot be made available to him.

13. As regards the guidelines issued in Jatin Pathak (supra), Mr. Dutta submits that these guidelines really fall in the domain of public law inasmuch as these guidelines are not confined to any individual's case, but are general in nature aimed at equitable distribution of the Government's funds in the discharge of its admitted outstanding dues and these guidelines cannot be said to have been, directly or impliedly, overruled by the decision of the Division Bench in Moirangthem Chaoba Singh (supra).

14. Let me, now, ascertain the correctness of the submissions noted hereinabove. While considering the present writ petitions, what needs to be noted, at the very outset, is that a governmental 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 authority concerned is 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, govern the parties. These terms and conditions will 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 the contract 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.

15. 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 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 Limited Vs. I.V.R. Construction Ltd. and Others*, 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.

16. To put it differently, while settling the terms to be incorporated in the invitation to tender, the authorities concerned must have complete freedom, for, the terms of the tender are in the realm of the freedom to contract and it is for the authorities concerned to decide as to what would be the terms of the contract. But when the authorities concerned award the contract, the decision making process, leading to the decision to allot the contract, gets open to judicial review provided that there is an element of public interest involved in the case. The question, however, which, now, arises for consideration is this: If any of the terms and conditions embodied in an NIT is arbitrary, discriminatory, mala fide, irrational, whimsical, capricious or actuated by bias, whether the hands of the High Court would be tied and the High Court would, in exercise of its power of judicial review, refuse to interfere with the terms and conditions of the NIT howsoever arbitrary, discriminatory, mala fide, whimsical, capricious or biased the terms and conditions may be ?

17. While considering the above aspect of the case, it may be pointed out that in *TATA Cellular (supra)*, the Apex Court observed that the terms of the invitation to tender are not open to judicial review, for, the invitation to tender is in the realm of the freedom to contract. However, what needs to be pointed out is that in *TATA Cellular (supra)*, no issue was raised, directly or indirectly, as to whether the power of judicial review would be attracted if the terms of an invitation to

tender are in themselves arbitrary, irrational, whimsical, mala fide, capricious or actuated by bias. In its subsequent decision in Directorate of Education and Others Vs. Educomp Datamatics Ltd. and Others, the Apex Court, while taking note of the observations made, in TATA Cellular (supra), that "the terms of the invitation to tender can not be open to judicial review", has, however, clarified that the terms, incorporated in a tender, can, indeed, be interfered with by the court if the terms are in themselves arbitrary, discriminatory, mala fide or actuated by bias. (See also Sumeet Enterprises v. Union of India and Ors. (2005) 4 GLT 227). 18. In short, the merits of a particular term or condition, incorporated in a notice inviting tender, is not open to judicial review, but constitutionality or very legality of such a term is not entirely beyond the scope of judicial review. Similarly, the decision to award a contract to a person is not subject to judicial review, though the decision-making process is subject to judicial review.

19. 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. The mere fact that one of the parties to such a contract is the State or its instrumentality will not make a contract amenable to writ jurisdiction. (See Radhakrishna Agarwal and Others Vs. State of Bihar and Others,

20. 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, no writ would be issued, under Article 226, 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.

21. In the fourth stage of a contract, which arises on completion of the contract, a demand for payment of bills or dues, 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. 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 making application, under Article 226, seeking enforcement of the State's obligation to pay its dues.

22. What may, now, be noted is that a breach of obligation by the State or its agents falls, as indicated in Radha Krishna Agarwal's case (supra), into three categories:

(i) where a petitioner makes a grievance of breach of promise, on the part of the State, on the ground that on the 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;

(ii) where the contract, entered into between the person aggrieved and the State, is in exercise of a statutory power under some Act or Rules framed thereunder and the petitioner, in the case of such a statutory contract, alleges a breach of obligation on the part of the State; and

(iii) where the contract, entered into between the State and the person aggrieved, is not statutory, but 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 a contract by the State.

23. So far as the first category of cases is concerned, these cases, according to Radha Krishna Agarwal (supra), would attract Article 226 in order to enforce the doctrine of estoppel, for, the State or the public bodies are as much bound, as private individuals, to carry out the obligations incurred by them, because the 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 those authorities. (See *Union of India v. M/s Anglo Afgan Agencies* AIR 1968 SC 718 ; *Century Spinning and Manufacturing Company Ltd. and Another Vs. The Ulhasnagar Municipal Council and Another*, *Robutson v. Minister of Pensions* (1949) 1 KB 227 . See also *Motilal Padampat Sugar Mills Co. Ltd. Vs. State of Uttar Pradesh and Others*, ; *State of Punjab v. Nestle India Ltd.* (2004) 136 STC 35; *Shri Guru Ashish Wire Industries v. State of Gujarat* (1994) 92 STC 286 *State of Bihar and Others Vs. M/s. Suprabhat Steel Limited and Others*, and *Union of India (UOI) and Others Vs. Godfrey Philips India Ltd.*,

24. As far as the second category of cases are concerned, there can be no doubt,

observes the Apex Court, in *Radha Krishna Agarwal (supra)*, that since such cases involve statutory contracts, creating rights and obligations of a statutory nature, such obligations can be enforced by taking resort to writ jurisdiction. (See *The D.F.O., South Kheri and Others Vs. Ram Sanehi Singh, and Ajantha Transports (P) Ltd., Coimbatore Vs. T.V.K. Transports, Pulampatti, Coimbatore District*,

25. However, the third category of cases relate to breach of contract "pure and simple". In such cases, holds the Apex Court in *Radha Krishna Agarwal (supra)*, remedy under Article 226 is not appropriate, for, a writ of mandamus, under Article 226, is issued for enforcing public duty and not a private duty. A mere breach of contract or a mere demand for non-payment of dues, in the absence of any other ground, is nothing, but a demand for recovery of money. In such cases, the remedy under Article 226 would not, ordinarily, be available.

26. 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 ? The answer to this crucial question 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, 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 would be available. The mere fact, therefore, that in the present set of cases, the bills raised by the contractors 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 the contractors, who are petitioners in the present case.

27. Before proceeding further, what may be noted is 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 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.

28. What, now, needs to be noted is that howsoever thin and subtle may be, there is, indeed, a real and definite line of demarcation not only between a public wrong and a private wrong, but also between a public law remedy and private law remedy. Article 226 is pre-eminently a public law remedy and is not, generally, available as a remedy against private wrongs. Resort to Article 226 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 functions, within the bounds of law. The remedy under Article 226 can, no doubt, be availed of even against a private body or person; but the scope of the right of mandamus is limited to enforcement of public duty. In minimum possible words, but with extreme exactitude, clarified the Supreme Court, in *Binny Ltd. and Another Vs. V. Sadasivan and Others*, the position of law, in this regard, in these 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." (See also *Kamala Kanta Kalita (DR.) and Ors. v. Assam Cricket Association and Ors.* (2006) 1 GLT 528.

29. Thus, in the face of succinctly laid down position of law with regard to the issuance of a writ of mandamus under Article 226, what one has to bear in mind is that in a case of private wrong, in order to invoke the writ jurisdiction under Article 226, two conditions 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. 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 is possible.

30. What also needs to be cautiously noted is that a constitutional or statutory duty is a public duty and enforceable by a writ of mandamus. To put in differently, the rights and duties go hand-in-hand. When a right is given to a person by a State, the State cast 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. 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, to enforce the constitutional and statutory duties of the State and its instrumentalities.

31. The present set of writ petitions essentially raise a demand for payment of dues and seek a writ, in the nature of mandamus, forcing the State to pay its dues. Though the fact that petitioners were entitled to receive the dues claimed by them is not in dispute, the question raised is as to whether such a demand can be raised at all in a writ petition and be enforced by a writ to be issued in the nature of mandamus. Is it possible to recover from the Government unpaid dues arising out of a contract by invoking writ jurisdiction merely because of the fact that one of the parties to the contract is a State. That a writ petition, under Article 226, will not lie for mere recovery of an amount due and payable, under a contract, by the Government is clear from the decision, in *Improvement Trust, Ropar through its Chairman vs. S. Tejinder Singh and Ors.*, (1995) Suppl. (4) SCC 577 wherein the Supreme Court has held, in no uncertain words, thus, "No writ petition can lie for recovery of an amount under a contract. The High Court was clearly wrong in allowing and entertaining the writ petition."

32. 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 : This brings us to a more important question and the question is : Will the constitutional remedy of Article 226 never be available against a State even if the State refuses to carry out its contractual obligations with ulterior motives, mala fide, irrationally, arbitrarily, unreasonably, unfairly, whimsically 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, mala fide or with ulterior motives, while refusing or omitting to make payment of its dues arising out of contracts? Can a breach of contract ever give rise to any constitutional obligation of the State to make payment of its dues ? Made it clear a three-Judge Bench, in Radha Krishna Agarwal (supra), that every breach of contract by the State or by its officers is not a breach of public duty, for, such a proposition would make every breach of contract by the State or its agents subject of interference by the High Court in its extraordinary jurisdiction under Article 226 and, hence, remedy of a writ of mandamus cannot be had for every breach of contract. The relevant observations made, in this regard, in Radha Krishna Agarwal (supra), run, thus, "Learned Counsel contends that in the cases before us breaches of public duty are involved. The submission made before us is that, whenever a State or its agents or officers deal with the citizen, either when making a transaction or, after making it, acting in exercise of powers under the terms of contract between the parties, there is a dealing between the State and the citizen which involves performance of "certain legal and public duties". If we were to accept this very wide proposition, every case of a breach of contract by the State or its agents or its officers would call for interference under Article 226 of the Constitution. We do not consider this to be a sound proposition at all".

33. What is, now, of immense importance to note is that the case of Radha Krishna Agarwal (supra) was a case of pure and simple breach of contract. In such cases of breach, remedy of payment of damages is available to the person, who suffers alleged breach of contract. It is in such fact situation that the law with regard to invoking of the High Court's extraordinary jurisdiction, under Article 226, was discussed in Radha Krishna Agarwal (supra). The law, laid down in Radha Krishna Agarwal (supra), cannot, therefore, be extended to cases, which are not cases of mere breach of contract, but much more than that. This is clear from the fact that in paragraph 2 of Radha Krishna Agarwal (supra), the Supreme Court observed:

...Primarily, the case of the petitioners is that of a breach of contract for which the State would be liable, ordinarily, to pay damages if it had broken it.

34. What emerges from the above discussion is that the remedy, available under Article 226, is an extraordinary remedy and is not intended for the purpose of declaring private rights of the parties. For the purpose of enforcing contractual rights and obligations, the remedy of filing of a civil suit is available to the aggrieved party and, hence, a High Court will not exercise its prerogative writ jurisdiction to enforce such contractual rights or obligations. A writ or direction in the nature of mandamus would not, therefore, lie to enforce private rights or contractual rights or obligations or even to avoid such obligations or rights. Contracts, which are non-statutory, and the rights, which are purely contractual and governed only by the terms of the contract, cannot be enforced by any writ or order under Article 226 of the Constitution of India. There is formidable array

of authorities, which may be referred to in this regard. (See *Lekhraj Satramdas, Lalvani Vs. Deputy Custodian-cum-managing Officer and Others*, ; *Divisional Forest Officer Vs. Bishwanath Tea Co. Ltd.*, ; *State Bank of Haryana v. Jage Ram* AIR 1980 SC 2018 ; *The Bihar Eastern Gangetic Fishermen Co-operative Society Ltd. Vs. Sipahi Singh and Others*, ; *Bareilly Development Authority and Another Vs. Ajay Pal Singh and Others*, ; *Life Insurance Corporation of India Vs. Escorts Ltd. and Others*, and *Kulchhinder Singh and Others Vs. Hardayal Singh Brar and Others*,

35. However, the principle that in an appropriate case, writ jurisdiction can be invoked even to enforce a contractual obligation of the State or its instrumentality was made clear by the Apex Court, in *K.N. Guruswamy Vs. The State of Mysore and Others*, wherein the Apex Court held that when a party, interested in a contract, claims that he has not received the same treatment and has not been given a chance as someone else, he is entitled to maintain a petition under Article 226.

36. Close on the heels of the decision of the Apex Court in *K.N. Guruswamy* (supra) is the decision, in *The D.F.O., South Kheri and Others Vs. Ram Sanahi Singh*, This was a case in which it was contended, on behalf of the appellant, before the Supreme Court that since the dispute arose out of the terms of the contract and the DFO, under the terms of the contract, had the authority to modify any action taken by the subordinate forest authority, remedy of the respondent lied in instituting an action in the civil court and that the writ petition was not maintainable. Turning down this plea, the Supreme Court held that the impugned order had been passed by a public authority modifying the order of the subordinate forest officer without giving the respondent any opportunity of having his say in the matter and since, by the order so passed, respondent had been deprived of a valuable right, it cannot be said that a petition under Article 226 would not be maintainable merely because of the fact that the source of right of the respondent is traceable to a contract, which is not statutory in nature. The relevant observations of the Supreme Court, in *Ram Sanahi Singh* (supra), run, thus:

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's* case (1995) 1 SCR 305 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.

37. From the decision in *Ram Sanahi Singh* (supra), what clearly surfaces is that even when there is a breach of contract, a writ petition under Article 226 is maintainable if the administrative order passed by a public authority, in breach of the terms of the contract, is against the principles of natural justice. Clearly,

therefore, when a State decides not to pay the dues of a contractor mala fide, with ulterior motives or arbitrarily or when the State avoids payment of the dues of a contractor mala fide, with ulterior motives, arbitrarily or when the State discriminates, while making payment of the dues of the contractors, such a decision of the State not to pay or such an act of the State of not paying its dues cannot be said to be wholly beyond the reach of Article 226, for, what the contractor, in such a case, would be asking the writ court to do is to force the State to act in accordance with its constitutional obligation by adhering to the letter and spirit of Articles 14 and 21.

38. In fact, it was made clear by the Apex Court, speaking through Krishna Iyer, J, in *Kulchinder Singh and Others Vs. Hardayal Singh Brar and Others*, that writ jurisdiction cannot be invoked to enforce the terms of a contract merely because the contract involves a State, a statutory body or a public body, but statutory duty or sovereign and public function of a State can, indeed, be enforced by a writ court. The relevant observations made, in *Kulchinder Singh* (supra), run thus, "....The writ petition, stripped of embroidery and legalistics, stands naked as a simple contract between the staff and the society....At its best, the writ petition seeks enforcement of a binding contract but the neat and necessary repellent is that the remedy of Article 226 is unavailable to enforce a contract qua contract....What is immediately relevant is not whether the respondent is State or public authority but whether what is enforced is a statutory duty or sovereign or public function of a public authority. Private law may involve a State, a statutory body, or a public body in contractual or tortious actions. But they cannot be siphoned off into the writ jurisdiction."

39. I may, now, refer to the case of *Life Insurance Corporation of India Vs. Escorts Ltd. and Others*, 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 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, 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. 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 *1 Congress del Partido* 19812 All ER 1064 *R. v. East Berkshire Health Authority* (1984) 3 All ER 425 , and *Radhakrishna Agarwal and Others Vs. State of Bihar and Others*, 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.

40. 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. 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.

41. Closely following the decision of the Constitution Bench, in *Escorts Ltd.* (supra), is the case of *Dwarkadas Marfatia and Sons Vs. Board of Trustees of the Port of Bombay*, In this case, the appellant, M/s. Dwarka Das & 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 favoritism 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.

42. In its decision, in *Dwarka Das Marfatia & Sons* (supra), a three-Judge Bench of the Supreme Court, having taken note of *Rampratap Jaidayal Vs. Dominion of India, 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/governmental character, legislative assumption or expectation, as noted in the observations of Chagla, CJ 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 *Dwarka Das Marfatia & Sons* (supra), that it is not correct to suggest that in the light of the decision in *Radha Krishna Agarwal* (supra), a State's contractual dealings do not ever fall under public law domain and is not subject to judicial review. The court, in *M/s. Dwarka Das Marfatia & Sons* (supra), also clarified that even the Constitution Bench decision, in *Escort Ltd.* (supra), does not wholly exclude State's all actions, in contractual matters, from the court's power of judicial review.

43. The Apex Court further made it clear, in *Dwarka Das 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 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 *Dwarka Das Marfatia* (supra), that whatever be the activity of the public authority, it should meet the test of Article 14 and that the decision in *Escort Ltd.* (supra), if read properly, does not detract from the aforesaid principles.

44. The observations made, in this regard, by the Apex Court, in *Dwarka Das Marfatia & Sons* (supra), read as under:.

22. Our attention was drawn to the observations of this court in *Radhakrishna Agarwal and Others Vs. State of Bihar and Others*, Reliance was also placed on the observations of this court in *Life Insurance Corpn. of India v. Escorts Ltd. and Ors.* (1985) 3 Supp 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 or 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 (supra) 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 on the observations of this court in *M.C. Mehta and another Vs. Union of India and others*, 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 mean 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 Vs. State of Tamil Nadu and Another*, ; *Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another*, ; *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, ; *Kasturi Lal Lakshmi Reddy, Represented by its Partner Shri Kasturi Lal, Jammu and Others Vs. State of Jammu and Kashmir and Another*, and *Ajay Hasia and Others Vs. Khalid Mujib Sehravardi and Others*, 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

(supra) 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 *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*,

(Emphasis is supplied)

45. What is also necessary to note, in the case of *Dwarka Das Marfatia* (supra), is that this was a case, where the relationship between the parties to the dispute, being that of landlord and tenant, was essentially contractual in nature, yet the Apex Court held that such a dispute is not wholly outside the purview of Article 226, for, a State's action, even under contractual relationship, has to withstand the tests of Article 14. Though to evict or not to evict a tenant is a decision governed by contractual relationship of landlord and tenant, the fact remains that while taking the decision to evict a tenant, State or public body, as the landlord, must take the decision in the public interest and while taking such a decision, State or public body cannot act arbitrarily, unreasonably, whimsically, capriciously or with ulterior motives nor can a State or public body, while taking such a decision, discriminate between one tenant and another and must, therefore, act according to "constitutional conscience".

46. If the decision, in *Dwarka Das Marfatia* (supra), is carefully read, it becomes more than abundantly clear that though at the first blush, the decision, in *Radha Krishna Agarwal* (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 *Dwarka Das Marfatia* (supra), clearly shows that having considered the decision in *Radha Krishna Agarwal* (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 *Dwarka Das 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 *Dwarka Das Marfatia* (supra), that even in contractual matters, the

State's action must be reasonable, lawful and "on relevant ground of public interest".

47. 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* (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 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 provide 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 Court have declined to entertain petitions filed under Article 226 of the Constitution for enforcement of contractual

rights and obligation; 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 obligation 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; Mohammed Hanif Vs. The State of Assam, ; Banchhanidhi Rath Vs. The State of Orissa and Others, ; Smt. Rukmanibai Gupta Vs. Collector Jabalpur and Others, ; Food Corporation of India and others Vs. Jagannath Dutta and others, and State of Himachal Pradesh Vs. Raja Mahendra Pal and Others,

11. 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.

48. Moreover, when a writ court finds that the refusal to extend constitutional remedy of Article 226 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 (supra), 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". From the law, so 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. For instance, a contractor, whose dues are admitted but not paid by the State, approaches a writ court with the plea that his son is a terminal case of cancer and the State's breach of its contractual obligation of not paying its dues is not only unfair and unreasonable, but may even threaten his son's survival and existence, the High Court may, in the absence of any plausible explanation offered by the State for non-payment of the admitted dues, invoke its extraordinary jurisdiction under Article 226 to remedy the wrong, though such a wrong may have arisen out of the State's omission to discharge its contractual obligation, for, the High Court, in such a case, would not be merely enforcing the contractual obligation of the State, but also the State's constitutional obligation to act with reasonableness and fairness as envisaged by Article 14 and not to act in breach of the mandates thereof, which may have the effect of extinguishing the life of one of its citizens, though Article 21 guarantees that the State would act with greatest of promptitude in protecting the lives of its citizens against its own unreasonable and unfair actions.

49. From the decision in *Asha Goel* (supra), what emerges is that ordinarily, a High Court should not entertain a writ petition, under Article 226, 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, 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 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, 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.

50. Let me, now, turn to the case of Kumari Shrilekha Vidyarthi and Others Vs. State of U.P. and Others, which is heavily relied upon by the present writ petitioners. 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 28.2.1990 and directed preparation of fresh penal 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. In answer to this momentous question, 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. Drawing the distinction between the contracts to which the State is a party, and the contracts to which the private parties and the contracts 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. 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.

51. 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. Drawing strength for the conclusion so reached from the decision in *Dwarka Das 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.

52. 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 "Directives 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 along is sufficient to import at least the minimal requirements of public law obligations and impress with this character the contracts made by the State of 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 Vs. International Airport Authority of India and Others*, : and *Kasturi Lal Lakshmi Reddy, Represented by its Partner Shri Kasturi Lal, Jammu and Others Vs. State of Jammu and Kashmir and Another*, In *Niranjan Singh and Another Vs. Prabhakar Rajaram Kharote and Others*, 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 emphasised 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 *Dwarkadas Marfatia and Sons Vs. Board of Trustees of the Port of Bombay*, 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 *Dwarkanadas Marfatia and Sons Vs. Board of Trustees of the Port of Bombay*, 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 of Civil Service Unions v. Minister for the 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.

53. 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.

54. Yet another decision, which has been heavily relied upon by the writ petitioners, is the case of *ABL International Ltd. and Another Vs. Export Credit Guarantee Corporation of India Ltd. and Others*, In this case, the fourth respondent entered into a contract with a State owned corporation of Kazakhstan on 26.8.1993. As per the original agreement, payment, for the product (tea) exported, was to be made by the Kazak Corporation by barter of goods mentioned in the schedule to the said agreement within 120 days from the date

of delivery by the exporter. The agreement also provided that payment to be made by Kazak Corporation shall be guaranteed by the Government of Kazakhstan. By a modified agreement, it was agreed between the parties that if the contract for barter of goods could not be finalized for any reason, then, Kazak Corporation would pay the exporter for the goods received by it, in US dollars, within 120 days from the date of the delivery. After having entered into the contract, the respondent concerned assigned a part of the said contract to ABL Corporation. Ltd. on the same terms on which it had received the contract from Kazak Corporation. On a direction issued by the Reserve Bank of India that the risk, arising out of the export of the tea made by the appellant, shall be guaranteed, the appellant approached Export Credit Guarantee Corporation Ltd. to insure risk of payment of consideration involved in the said contract of export. Pursuant to the request so made, the Export Credit Guarantee Corporation Ltd. issued a comprehensive policy covering the risk. On the failure of the Government of Kazakhstan to fulfill its guarantee, the appellants made a claim on the first respondent, i.e., Export Credit Ltd. This respondent, however, refuted its claim on the ground that the appellants had changed the terms of the contract of payment without first consulting it and it had, therefore, no obligation to compensate the appellants for the loss suffered by it. Having failed to make the first respondent adhere to the contract of insurance, the respondent concerned filed a writ petition. Though the learned Single Judge of Calcutta High Court issued a writ, the Division Bench reversed the order on the ground that the case involved disputed questions of fact, which was not adjudicable in a writ proceeding under Article 226. It was in these factual scenario that the case came up before the Supreme Court, wherein the first respondent's submission, in effect, was, thus:

7. Ms. Indira Jaising, learned senior counsel appearing for the first respondent submitted that on facts and circumstances of this case, a writ petition was not maintainable nor can it be construed as an appropriate remedy. She pointed out that the subject matter is a dispute arising out of a contract and is not a matter falling under the purview of Administrative Law. According to her, 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 her argument 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 the duty of the first respondent under the contract had any public law element involved in it. According to the learned Counsel, this contract was a negotiated contract and not a standard form contract. She also supported the finding of the Appellate Bench of the High Court that the facts involved in the case are all disputed facts requiring evidence to be led, therefore, the appropriate remedy could only be a suit. Hence, the impugned judgment did not call for any interference.

55. Having noted the above submissions made on behalf of the respondents, the Apex Court held that one of the questions that falls for consideration is 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.

56. Responding to the question poised above, the Apex Court has held, in *ABL International Ltd. (supra)*, that the question as to whether a writ petition under Article 226 is maintainable to enforce a contractual obligation of the State is no more *res integra*. Points out the court, in *ABL International Ltd. (supra)*, that as early as, in *K.N. Guruswamy (supra)*, the Supreme Court had already held that a person interested in a contract has a right to receive the same treatment and is entitled to be given the same chances as anybody else. Referring to the observations made in *K.N. Guruswamy (supra)*, the court, in *ABL International Ltd. (supra)*, has also pointed out that in *K.N. Guruswamy (supra)*, the court has held that on a given set of facts, if the action of a State is found to be arbitrary even in a matter of contract, a writ court is, depending upon the facts of the case, empowered to grant relief under Article 226.

57. Having taken note of the case of *Ram Sanehi Singh (supra)*, which followed *Gujarat State Financial Corporation Vs. Lotus Hotels Pvt. Ltd.*, which followed *R.D. Shetty (supra)*, 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 Benches' 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.

58. Having taken note of the various judicial pronouncements with regard to maintainability of writ petitions aimed at enforcing contractual obligations of the State or its instrumentality and having discussed the law on the subject, the Apex Court, in para 27 of *ABL International Ltd. (supra)*, culled out the legal principles governing maintainability of such a writ petition in the following words:

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

(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 facts 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 supplied).

59. From what has been culled out above, there remains no manner of doubt that in an appropriate case, the remedy under Article 226 would be available to enforce contractual obligations of the State, its instrumentality and all public bodies.

60. Having discussed the law on the subject and taking into account the facts in ABL International Ltd. (supra), the court finally observed, at para 53, thus:

53. From the above, it is clear 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 obligations, it really acts contrary to the constitutional guarantee found in Article 14 of the Constitution. Thus, if we apply the above principle of applicability of Article 14 to the facts of this case, then we notice that the first respondent being an instrumentality of State and a monopoly body had to be approached by the appellants by compulsion to cover its export risk. The policy of insurance covering the risk of the appellants was issued by the first respondent after seeking all required information and after receiving huge sums of money as premium exceeding Rs. 16 lacs. On facts we have found that the terms of the policy does not give room to any ambiguity as to the risk covered by the first respondent. We are also of the considered opinion that the liability of the first respondent under the policy arose when the default of the exporter occurred and thereafter when Kazakhstan Government failed to fulfil its guarantee. There is no allegation that the contracts in question were obtained either by fraud or by misrepresentation. In such factual situation, we are of the opinion, the facts of this case do not and should not inhibit the High Court or this court from granting the relief sought for by the petitioner.

(emphasis is supplied)

61. From the above observations made in para 53, what emerges is that when the State or its instrumentality acts contrary to public good, public interest, unfairly, unjustly and unreasonably in the realm of its contractual obligations, arising out of even non-statutory contract, it really acts contrary to the constitutional guarantee given under Article 14 and, in an appropriate case, when this guarantee is found to have been denied, remedy under Article 226 would be available to undo the wrong done by the State and to command the State to pay its unpaid dues, which it is, under its contractual obligation, bound to pay, but has unfairly, unjustly and unreasonably refused to pay.

62. It is worth pointing out that a reference had also been made, in ABL International Ltd. (supra), to the case of State of U.P. and others Vs. Bridge and Roof Co. (India) Ltd., to sustain the argument that the extraordinary jurisdiction of the High Court under Article 226 cannot be invoked for enforcing contractual obligations of a State or of a public body.

63. Pointing out that the decision, in Bridge & Roof Co. (India) Ltd. (supra), is

not attracted to the facts of the case in ABL International Ltd. (supra), the Apex Court observed:

14. This judgment again, in our opinion, does not help the first respondent in the argument advanced on its behalf that in contractual matters remedy under Article 226 of the Constitution does not lie. It is seen from the above extract that in that case because of an arbitration clause in the contract, the court refused to invoke the remedy under Article 226 of the Constitution. We have specifically inquired from the parties to the present appeal before us and we have been told that there is no such arbitration clause in the contract in question. It is well known that if the parties to a dispute had agreed to settle their dispute by arbitration and if there is an agreement in that regard, the courts will not permit recourse to any other remedy without invoking the remedy by way of arbitration unless of course both the parties to the dispute agree on another mode of dispute resolution. Since that is not the case in the instant appeal, the observations of this court in the said case of Bridge & Roof Co. (supra) is of no assistance to the first respondent in its contention that in contractual matters, writ petition is not maintainable.

64. From what has been observed, in para 14, in ABL International Ltd. (supra), it becomes abundantly clear that Bridge & Roof Co. (India) Ltd. (supra) is an authority for the proposition that where the parties to a contract have agreed to a mode of settlement of disputes, if any, which may arise out of their contract or where there is an arbitration clause for settlement of dispute, extraordinary jurisdiction under Article 226 should not be invoked for resolution of such disputes. The decision, in Bridge & Roof Co. (India) Ltd. (supra), cannot be held to have laid down the law that a contractual obligation of the State cannot be enforced, under any circumstances, by invoking extraordinary jurisdiction of the High Court under Article 226.

65. What emerges from the above discussion is that Bridge & Roof Co. (India) Ltd. (supra) is an authority for the proposition that where there is an arbitration clause for settlement of a dispute, extraordinary jurisdiction under Article 226 should not be invoked for resolution of such a dispute. In ABL International Ltd. (supra), no arbitration clause was involved and it was on this ground that the Division Bench, in Moirangthem Chaoba Singh (supra), found that the decision, in ABL International Ltd. (supra), was not attracted. Yet another reason why the Division Bench concluded, in Moirangthem Chaoba Singh (supra), that the doctrine of fairness or the duty to act fairly or reasonably is not attracted to a case of breach of contract, wherein no public law element is involved and when there is an arbitration clause, is that invoking of extraordinary jurisdiction by the High Court, in such a case, would amount to amending, altering, adding or varying the express terms of the contract, for, under the contract agreement, the parties had agreed to resolve their disputes by arbitration and thereby impliedly agreed not to resolve their disputes in any manner other than arbitration. For the conclusion, so reached, the Division Bench relies on the decision in Assistant

66. In the present case, heavy reliance has been placed by the respondents on the decision, in *Issac Peter and Ors.* (supra), to show that the doctrine of reasonableness or fairness does not apply to the contractual obligations of the State, notwithstanding the fact that the State had not carried out, in a given case, its contractual obligation. In order to appreciate the decision in *Issac Peter* (supra), it is necessary that the material facts giving rise to the case in *Issac Peter* (supra) should be borne in mind.

67. In *Issac Peter* (supra), the question raised was whether there was a failure, on the part of the State, in supplying arrack undertaken by the State to be supplied to the licensees and whether the licensees were entitled to any rebate/remission in the amounts, payable by them under the contracts, on account of such failure, if any. Whereas it was contended, in *Issac Peter* (supra), by the licensees that the supply of not only monthly quota, but even the supply of additional quantity/ quota by the Government was obligatory, the State Government's contention was that while supply of monthly quota was obligatory upon the Government, supply of additional quota was discretionary. The Apex Court concluded, in *Issac Peter* (supra), that the supply of the said additional quantity/quota was not obligatory, but discretionary and what the licensees were, in effect, asking the High Court to do was to invoke its extraordinary jurisdiction, under Article 226, in the name of the doctrine of fairness and reasonableness, only because of the fact that the other party to the contract was a State and that by so asking the High Court to treat the supply of additional quota as obligatory instead of discretionary, the writ petitioners were basically asking the High Court to invoke its extraordinary jurisdiction in such a manner, which would amount to altering, amending, adding or varying the express terms of the contract. It is in the backdrop of these facts and conclusions so arrived at that the decision, in *Issac Peter* (supra), needs to be considered.

68. Since the observations made, in para 26 of *Issac Peter* (supra), form the foundation of the submissions, made on behalf of the respondents, in the present case, that the doctrine of fairness and the duty to act fairly or reasonably does not apply to contractual obligations of the State, it is apposite that the observations, made in para 26 of *Issac Peter* (supra), be taken note of, as a whole, and with this end in view, para 26 is reproduced hereinbelow:

26. Learned Counsel for respondents then submitted that doctrine of fairness and reasonableness must be read into contracts to which State is a party. It is submitted that the State cannot act unreasonably or unfairly even while acting under a contract involving State power. Now, let us see, what is the purpose for which this argument is addressed and what is the implication? The purpose, as we can see, is that though the contract says that supply of additional quota is discretionary, it must be read as obligatory at least to the extent of previous year's supplies by applying the said doctrine. It is submitted that if this is not done, the licensees would suffer monetarily. The other purpose is to say that if

the State is not able to so supply, it would be unreasonable on its part to demand the full amount due to it under the contract. In short, the duty to act fairly is sought to be imported into the contract to modify and alter its terms and to create an obligation upon the State which is not there in the contract. We must confess, we are not aware of any such doctrine of fairness or reasonableness. Nor could the learned Counsel bring to our notice any decision laying down such a proposition. Doctrine of fairness or the duty to act fairly and reasonably is a doctrine developed in the administrative law field to ensure the rule of law and to prevent failure of justice where the action is administrative in nature. Just as principles of natural justice ensure fair decision where the function is quasi-judicial, the doctrine of fairness is evolved to ensure fair action where the function is administrative. But it can certainly not be invoked to amend, alter or vary the express terms of the contract between the parties. This is so, even if the contract is governed by statutory provisions, i.e., where it is a statutory contract or rather more so. It is on thing to say that a contract every contract must be construed reasonably having regard to its language. But this is not what the licensees say. They seek to create an obligation on the other party to the contract, just because it happens to be the State. They are not prepared to apply the very same rule in converse case, i.e., where the State has abundant supplies and wants the licensees to lift all the stocks. The licensees will undertake no obligation to lift all those stocks even if the State suffers loss. This one sided obligation, in modification of express terms of the contract, in the name of duty to act fairly, is what we are unable to appreciate. The decision cited by the learned Counsel for the licensees do not support their proposition.

(emphasis is supplied)

69. Thus, a microscopic reading of the above observations, made in Issac Peter (supra), shows that though the contract agreement stipulated that the supply of additional quota was discretionary, the writ petitioner sought that this condition shall be read as obligatory. Since such an approach would have modified or altered the terms of the contract and created an obligation upon the State, which the State was not liable under the contract, the question, which, naturally, arose was as to whether, in the name of doctrine of fairness or duty to act fairly and reasonably, the High Court shall pass, in exercise of its powers under Article 226, such an order, which would amount to altering, amending, varying or modifying the express terms and conditions of a contract merely because of the fact that the State happens to be a party to the contract. To put it a little differently, what the above observations, made in Issac Peter (supra), reflect is that the doctrine of fairness or the duty to act fairly and reasonably cannot be invoked to amend, alter, modify or vary the express terms of the contract between the parties even if the contract is a statutory one or if the State is a party to such a contract, for, the doctrine of fairness or the duty to act fairly or reasonably does not permit creation of one-sided obligation in modification of express terms of the contract.

70. What surfaces from the above discussion is that Issac Peter (supra) is an

authority for the proposition that recourse to Article 14 cannot be taken to modify, alter, amend, add or vary the terms and conditions of a contract. I may, however, hasten to add that if the terms of the contract are in themselves under challenge, the situation may, perhaps, be different. The learned Counsel for the respondents is, therefore, not correct, when he sought to rely, on Issac Peter (supra), in support of his submission that Issac Peter (supra) is an authority for the proposition that Article 14 cannot be invoked for enforcing contractual obligations of the State. What Issac Peter (supra) lays down, if I may reiterate, is that the doctrine of fairness or the duty to act fairly and reasonably cannot be resorted to for the purpose of amending, altering, modifying, adding or varying the terms of the contract. The decision, in Issac Peter (supra), therefore, does not take the view that in an appropriate case, the High Court cannot invoke its extraordinary jurisdiction, under Article 226, to force the State to abide by the terms of the contract.

71. I may, now, point out that Mr. I. Choudhury, learned Standing Counsel for the PWD, has referred to *Suganmal Vs. State of Madhya Pradesh and Others*, to show that since the present writ applications essentially raise demand for payment of unpaid dues of the petitioners, such a writ petition is not maintainable.

72. While considering the case of *Suganmal* (supra), what needs to be carefully noted is that it was a case in which a writ of mandamus was sought solely for refund of money alleged to have been illegally collected by the State. The question, therefore, was as to whether a writ petition solely aimed at obtaining a writ of mandamus commanding the State to refund money collected by the State would be maintainable. Responding to the question, which so arose, the Apex Court held as under:

We, therefore, hold that normally petitions solely praying for the refund of money against the State by a writ of mandamus are not to be entertained. The aggrieved party has the right of going to the civil court for claiming the amount and it is open to the State to raise all possible defences to the claim, defences, which cannot, in most cases, be appropriately raised and considered in the exercise of writ jurisdiction.

73. From what has been held in *Suganmal* (supra), it becomes transparent that "ordinarily", a writ petition solely praying for direction to the State to refund money is not maintainable, for, the aggrieved party has the right to approach civil court for relief and it would, then, be open to the State to raise all possible defences, which it may have. In a case, therefore, where the State admits the claims and has no defence to offer, issue of writ of mandamus has not been barred by the Constitution Bench in *Suganmal* (supra), particularly, when a writ petitioner challenges the withholding of his dues by the State as an act of unfairness, unreasonableness, arbitrariness and contrary to the principles governing Article 14. It is for this reason that the Constitution Bench, in *Suganmal* (supra), has used the word "normally," while laying down that

"petitions solely praying for refund of money against the State by way of writ petition are not to be entertained".

74. Moreover, I may also point out that in *ABL International Ltd. (supra)* too, it was raised, on behalf of the first respondent, that since the writ petition was one for recovery of money, it was not permissible to allow such a writ petition. While turning down this submission, the Apex Court, in *ABL International Ltd. (supra)*, observed as follows:

26. In support of the submission that a writ petition seeking mandamus for mere refund of money was not maintainable, the decision in *Suganmal v. State of M.P.* was cited. In AIR para 6 of the said judgment, it is stated that-

We are of the opinion that though the High Courts have power to pass any appropriate order in the exercise of the powers conferred under Article 226 of the Constitution, such a petition solely praying for the issue of a writ of mandamus directing the State to refund the money is not ordinarily maintainable for the simple reason that a claim for such a refund can always be made in a suit against the authority which had illegally collected the money as a tax.

Again in AIR para 9, the court held:

We, therefore, hold that normally petitions solely praying for the refund of money against the State by a writ of mandamus are not to be entertained. The aggrieved party has the right of going to the civil court for claiming the amount and it is open to the State to raise all possible defences to the claim, defences which cannot, in most cases, be appropriately raised and considered in the exercise of writ jurisdiction.

The judgment cannot be read as laying down the law that no writ petition at all can be entertained where claim is made for only refund of money consequent upon declaration of law that levy and collection of tax/cess as unconstitutional or without the authority of law. It is one thing to say that the High Court has no power under Article 226 of the Constitution to issue a writ of mandamus for making refund of the money illegally collected. It is yet another thing to say that such power can be exercised sparingly depending on facts and circumstances of each case. For instance, in the cases on hand where facts are not in dispute, collection of money as cess was itself without the authority of law; no case of undue enrichment was made out and the amount of cess was paid under protest; the writ petitions were filed within a reasonable time from the date of the declaration that the law under which tax/cess was collected was unconstitutional. There is no good reason to deny a relief of refund to the citizens in such cases on the principles of public interest and equity in the light of the cases cited above.

However, it must not be understood that in all cases where collection of cess, levy or tax is held to be unconstitutional or invalid, the refund should necessarily follow. We wish to add that even in cases where collection of cess, levy or tax is held to be unconstitutional or invalid, refund is not an automatic consequence

but may be refused on several grounds depending on facts and circumstances of a given case.

Therefore, this objection must also fail because in a given case it is open to the writ court to give such monetary relief also.

(emphasis is supplied)

75. From the above observations made in ABL International Ltd. (supra), it becomes abundantly clear that there is no absolute bar in entertaining a writ application, under Article 226, if the writ petitioner aims at enforcing contractual obligation of the State to make payment of its unpaid dues to the writ petitioner, though it will depend, I must hasten to point out, on the cumulative effect of all the facts of a given case as to whether the High Court will or will not entertain such a writ petition and pass directions for payment of dues.

76. Has the Division Bench decision, in State of Manipur (supra), laid down a proposition of law different from what ABL International Ltd. (supra), holds and if the Division Bench decision, in Moirangthem Chaoba Singh (supra), is different from what the ABL International Ltd. (supra) lays down, then, how the two decisions differ? Can this difference be of such an extent that it can be held that the Division Bench decision goes contrary to what ABL International Ltd. (supra) has laid down?

77. Can the Division Bench, in Moirangthem Chaoba Singh (supra), be said to have laid down that Article 14 is never attracted to enforce contractual obligations of the State arising out of non-statutory contracts, though ABL International Ltd. (supra) clearly takes the view that contractual obligations of a State is not wholly outside the purview -of Article 226 if the act of the State of not carrying out its contractual obligations is found to be contrary to, or in violation of, the constitutional obligation of the State to act fairly, justly, reasonably, in public interest and for public good.

78. Let me, now, address the questions, which have so arisen in the present set of writ petitions.

79. Now, in view of the fact that the Division Bench decision, in Moirangthem Chaoba Singh (supra), is contended to have completely ousted the jurisdiction of a writ court to direct payment of dues of a contractor even if the bills are undisputed, let me, now, determine as to what the decision, in Moirangthem Chaoba Singh (supra), lays down, But before I do so, what needs to be borne in mind is that a decision is an authority for what it actually decides and not what can be deduced from it. Reference may be made to the case of Haryana Financial Corporation and Another Vs. Jagdamba Oil Mills and Another, wherein the Apex Court has observed Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of Courts are not to be read as Euclid's theorems or as provisions of the statute. These observations must be

read in the context in which they appear." To the same effect are the observations of the Apex Court in *Padmasundara Rao and Others Vs. State of Tamil Nadu and Others*, The Apex Court has explained the doctrine of judicial precedent, in *Krishena Kumar and Others Vs. Union of India and others*, thus, "The doctrine of judicial precedent, that is being bound by a previous decision, is limited to the decision itself and as to what is necessarily involved in it." Though even obiter dictum of the Supreme Court is binding on all the courts, the fact remains that to be a binding authority on any specific issue, the issue must be, at least, raised and answered directly or by implication. In this regard, clarifying the doctrine of stare decisis, the Apex Court, in *Commissioner of Income Tax Vs. M/s. Sun Engineering Works (P.) Ltd.*, held, "...it is neither desirable nor permissible to pick out a word or a sentence from the judgment of this court, divorced from the context of the question under consideration and treat it to be the complete "Law" declared by this court. The judgment must be read as a whole and the observations from the judgment have to be considered in the light of the questions, which were before this court. A decision of this court takes its colour from the questions involved in the case in which it is rendered and while applying the decision to a later case, "the courts must carefully try to ascertain the true principle laid down by the decision of this court and not to pick out words or sentences from the judgment, divorced from the context of the questions under consideration by this court, to support their reasonings". In *Madhav Rao Scindia Bahadur v. Union of India* (this court cautioned:

It is not proper to regard a word, a clause or d sentence occurring in a judgment of the Supreme Court, divorced from its context, as containing a full exposition of the law on a question when the question did not even fall to be answered in that judgment.

(emphasis is supplied)

80. Bearing in mind the principles, which govern, as indicated above, interpretation of the doctrine of judicial precedents, when I revert to the case of *Moirangthem Chaoba Singh* (supra), what I notice is that the moot question, raised in the writ petitions, was as to whether a dispute of non-payment of admitted bills of a contractor is amenable to writ jurisdiction under Article 226 of the Constitution of India, even when the contract itself provides for the forum to resolve such a dispute. That this was the moot issue, raised in *Moirangthem Chaoba Singh* (supra), becomes amply clear from the observations made by the Division Bench, for, the Division Bench, while framing the core question, observed, thus, "The core question that falls for our consideration is as to whether a writ petition under Article 226 of the Constitution of India is maintainable to resolve the dispute arising out of concluded commercial contractual obligations between a citizen and the State or its instrumentalities even in cases where the contract itself provides for the forum to resolve the dispute."

81. What may, now, be noted is that all the writ petitions, which were considered

in Moirangthem Chaoba Singh (supra), had arbitration clauses. A reading of the decision, rendered in Moirangthem Chaoba Singh (supra), reflects that the question of even non-payment of bills of the contractors stood covered, in each of these writ petitions, by an arbitration clause. It is in this fact situation that the Division Bench held, in Moirangthem Chaoba Singh (supra), that writ jurisdiction would not be exercised in such cases. That such were the facts of the cases in Moirangthem Chaoba Singh (supra) is clear from the observations made, in para 2 of the decision in Moirangthem Chaoba Singh (supra), which read, thus:

2. Shorn of all the details, all the respondent-writ petitioners have entered into agreements for execution of different contract works for the Government of Manipur, it is not necessary to note the details as regards the nature of the contractual work undertaken by them with various departments of Government of Manipur. Suffices to note that the parties have voluntarily entered into the contracts and the terms and conditions have been reduced into writing by duly incorporating the same into agreements.

82. The reasons for the conclusion reached by the Division Bench that writ jurisdiction, in the fact situation of the cases, in Moirangthem Chaoba Singh (supra), cannot be invoked to enforce non-payment of contractors' bills were three, namely, that (i) no writ of mandamus - be it directing payment of bills or otherwise - can be issued except for the purpose of enforcing a public duty; (ii) when the contract agreement itself provides for a forum to resolve a dispute, the dispute between the parties to such a contract shall be resolved by taking recourse to the forum, which the parties, at the time of entering into the contract, had chosen to resort to, should such a dispute arise between them; and (iii) that the doctrine of unfairness and the duty to act fairly and reasonably cannot be invoked in contractual matters for the purpose of altering, amending or varying the terms of contract merely because one of the parties to the contract is the State and thereby the provision for arbitration, which the parties had voluntarily entered into, be allowed to be avoided.

83. In support of the three reasons assigned by it, the Division Bench, in Moirangthem Chaoba Singh (supra), divides, its decision, broadly speaking, into two parts. In the first part, the Division Bench, while drawing distinction between public law and private law remedies, takes the view that a writ of mandamus lies for enforcing a public duty and not a private duty. That such was the conclusion drawn by the Division Bench, in Moirangthem Chaoba Singh (supra), becomes clear if one reads the observations made in Moirangthem Chaoba Singh (supra), which run, thus:

12. ...A writ of mandamus lies, in the normal means of enforcing the public duties by public authorities...It is trite that this court will not exercise its jurisdiction under Article 226 of the Constitution of India to entertain a writ petition wherein public law element is not involved.

84. Coupled with the above, it is worth noticing that in the second part of its

decision in *Moirangthem Chaoba Singh* (supra), the Division Bench discusses the doctrine of fairness, embodied under Article 14, for the purpose of determining if a private duty can be enforced on the basis of doctrine of fairness and concludes that by taking recourse to this doctrine, a writ of mandamus cannot be issued for the purpose of enforcing contractual liabilities, particularly, when the mode of settlement for determining the rights and obligations of the parties to a non-statutory contract is already agreed to by the parties concerned and that allowing writ jurisdiction to be exercised, in such a case, will amount to altering, amending, adding or varying the express terms of the contract by the parties concerned. The Division Bench, thus, holds : (i) a writ of mandamus cannot be issued to enforce a private duty arising out of a non-statutory contract; and (ii) that even Article 14 cannot be made use of to overcome an arbitration clause, which the contract agreement in the case before the Division Bench had, for, allowing Article 14 to be invoked, in such a case, would amount to, in the view of the Division Bench, amending, adding, altering or varying the terms of the contract between the parties concerned.

85. What crystallizes from the above discussion is that having noted the facts of the case and the issues involved, the Division Bench, in paras 12 to 17 in *Moirangthem Chaoba Singh* (supra), drew the distinction between the public law remedy and the private law remedy and points out that a writ of mandamus is a public law remedy and can be issued for the purpose of enforcing public duties by the public authorities and not a private duty, such as, the duty to pay a contractor's bill, for, the duty to make payment to a contractor is not a public duty, but a private duty. Having drawn this distinction, Division Bench concludes, "(f)....This court will not exercise its jurisdiction under Article 226 of the Constitution of India to entertain a writ petition, wherein public law element is not involved." For reaching this conclusion, the Division Bench, in *Moirangthem Chaoba Singh* (supra), extensively quotes from, and relies upon, *Life Insurance Corporation of India Vs. Escorts Ltd. and Others*, *State of Gujarat and Others Vs. Meghji Pethraj Shah Charitable Trust and Others*, *VST Industries Ltd. v. VST Industries Workers' Union and Ors.* (2001) 1 SCC 298 and Professor Wade's *Administrative Law*.

86. It is also worth noticing that dealing with the doctrine of fairness, in paragraphs 18 to 26 of its decision, in *Moirangthem Chaoba Singh* (supra), the Division Bench holds that the doctrine of fairness or the duty to act fairly or reasonably is the doctrine developed in the administrative law field to prevent failure of justice, where action is administrative in nature. Having observed, thus, the Division Bench points out that the Apex Court, in *Issac Peter* (supra), having referred to the decision, in *Kumari Shrilekha Vidyarthi* (supra), pointed out that that the case of *Kumari Shrilekha Vidyarthi* (supra) was a case involving public law element but in a case of a contract, freely entered into by the parties, there is no room for invoking the doctrine of fairness and reasonableness against one party to the contract for the purpose of amending, adding, altering or varying the express terms of the contract. The Division Bench further points out, in

Moirangthem Chaoba Singh (supra), that the rights, liabilities and obligations of the parties to the writ petitions (which the Division Bench was in seisin of), are governed by the terms and conditions of the contract, which has been freely entered into by the parties, and, hence, by taking recourse to the doctrine of fairness and reasonableness, embodied under Article 14, the alternative remedy of referring the dispute to arbitration, as agreed to by the parties, cannot be superceded, for, that would amount to altering, amending, adding or varying the express terms of the contract.

87. What is, however, of utmost importance to note is that the observations made by the Division Bench, in Moirangthem Chaoba Singh (supra), that the doctrine of fairness or reasonableness, as embodied under Article 14, is not applicable to contractual matters are (as a microscopic analysis of this decision shows) meant for such cases, where the exercise of power, under Article 226, is sought to be invoked as a remedy for a breach of contract, "pure and simple", and, secondly, where the contract agreement provides for alternative remedy in the form of resolution of disputes by taking recourse to arbitration, for, in the opinion of the Division Bench, invoking of the extraordinary jurisdiction under Article 226 in the case of a contract agreement, which makes provisions for arbitration, would amount to altering, adding, amending or varying the express terms of the contract.

88. On a careful and cautious reading of the Division Bench decision in Moirangthem Chaoba Singh (supra), what becomes transparent is that the contract agreements, which had given rise to the cases, in Moirangthem Chaoba Singh (supra), had made provisions for settlement of dispute, arising out of the contract, by an arbitrator. Not only this, the decision, in Moirangthem Chaoba Singh (supra), also gives no indication that the disputes, as regard non-payment of admitted bills, were disputes, which were outside the purview of the arbitration agreements; rather, the decision, in Moirangthem Chaoba Singh (supra), proceeds on the premises that even non-payment of admitted bills is a dispute, which is covered by the arbitration proceeding, which the parties had agreed to take recourse to. It is, in the face of these admitted facts, that the decision, in Moirangthem Chaoba Singh (supra), needs to be understood. The decision, in Moirangthem Chaoba Singh (supra), cannot, therefore, be torn out of context and apply to the cases, where the contract agreement does not provide for resolution of disputes of the parties to the contract by way of arbitration. In the present case, it is not the case of the parties that there is any covenant, in the contract agreement, for resolution of dispute of the parties by arbitration. In fact, to a pointed query made by this court, none of the respondents asserted that the contract agreement, which has given rise to the present set of writ petitions, had any provision for arbitration. It is in the backdrop of its own admitted facts that the decision, in Moirangthem Chaoba Singh (supra), needs to be considered.

89. The impression that the decision, in Moirangthem Chaoba Singh (supra), is

meant for such a case, wherein the contract agreement makes provisions for arbitration, gathers strength from the fact that in *Moirangthem Chaoba Singh (supra)*, reliance was placed by the contractors, whose bills had not been paid, on the decision, in *ABL International Ltd. (supra)*, in support of their proposition that a writ lies on a given set of facts if the State acts in an arbitrary manner. However, as, in *ABL International Ltd. (supra)*, there was no covenant providing for arbitration, the Division Bench, in *Moirangthem Chaoba Singh (supra)*, observed that the observations made, in *ABL International Ltd. (supra)*, cannot be torn out of context, for, there was no arbitration agreement in *ABL International Ltd. (supra)*. That the Division Bench, in *Moirangthem Chaoba Singh (supra)*, did not find the law, laid down in *ABL International Ltd. (supra)*, applicable to the facts of the Cases in *Moirangthem Chaoba Singh (supra)* on account of the fact that in *ABL International Ltd. (supra)*, there was no arbitration clause becomes clear if the observations of the Division Bench, made in paragraphs 23, 24 and 25; are carefully read. The relevant observations made in paras 23, 24 and 25 are reproduced hereinbelow:

23. The learned Counsel for the respondent-writ petitioners, however, place heavy reliance upon the decision reported in *ABL International Ltd. v. Export Credit Guarantee Corporation of India and Ors. (supra)* in support of the proposition that a writ lie on a given set of facts if the State acts in an arbitrary manner.

24. In our considered opinion, the observations made by the Apex Court cannot be torn out of context. It may be noted that the Apex Court in the said judgment while referring to the paragraph referred to hereinabove in *State of U.P. v. Bridge & Roof Co. (supra)* observed:

that it is seen from the above extract that in that case because of an arbitration clause in the contract, the court refused to invoke the remedy under Article 226 of the Constitution. We i have specifically inquired from the parties to the present appeal before us and we have been told that there is no such arbitration clause in the contract in question. It is well known that if the parties to a dispute had agreed to settled their dispute by arbitration and if there is an agreement in that regard, the courts will not permit recourse to any other remedy without invoking the remedy by way of arbitration, unless of course both the parties to the dispute agree on another mode of dispute resolution.

(emphasis is added)"

25. It is thus clear that the parties having voluntarily entered into a non-statutory contract and having agreed to settle disputes, if any arising between them by arbitration cannot have recourse to any other remedy without invoking the remedy by way of arbitration. Public law remedy is not available in such a situation even if one of the parties to the contract is State or its instrumentality. In our considered opinion, *ABL International Ltd. v. Export Credit Guarantee Corporation of India and Ors. (supra)* in no manner supports the contention of

the respondent-writ petitioners that in contractual matters remedy under Article 226 of the Constitution of India is always available even if the contract itself provides a mode for settlement of dispute arising from out of the contract.

(emphasis is supplied)

90. What emerges from the above discussion is that the decision in *Moirangthem Chaoba Singh* (supra) applies to those contracts, which have arbitration clause and also to those cases, where there may not be arbitration clause, but the remedy of Article 226 is sought for breach of contract, "pure and simple". In short, when there is arbitration clause, there is, according to the decision in *Moirangthem Chaoba Singh* (supra), no scope for the parties to take recourse to Article 226. Whether this view is correct or not is a question, which this court is neither entitled to examine nor is it required to be examined in the facts of the present case, for, in none of the cases at hand, there was any agreement between the parties to refer their dispute to arbitration. As regards the conclusion, reached in *Moirangthem Chaoba Singh* (supra), that for a mere breach of contract, Article 226 cannot be invoked, there can be, and there is, in fact, no dispute.

91. What also becomes transparent from a patient reading of the decision, in *Moirangthem Chaoba Singh* (supra), is that the Division Bench has not held that the remedy provided under Article 226 is completely barred and that for the purpose of enforcing contractual obligations of the State, no writ petition would lie even if the breach of contractual obligation is found to have violated the guarantee of equality, non-arbitrariness, fairness and reasonableness under Article 14. Logically, therefore, the decision, in *ABL International Ltd.* (supra), still holds the field and there can be no manner of doubt that that when the State acts contrary to public good and public interest or unfairly and unjustly or unreasonably, even in the realm of its contractual obligations, the constitutional guarantee, given in Article 14, would be attracted. Consequently, therefore, even in the case of contractual obligations, if the action of the State does not withstand the tests of Article 14, the constitutional remedy of Article 226 would be available to the aggrieved person.

92. I may, now, pause here to point out that many of the writ petitions, in the present case, are such, where recovery of money has been sought by way of a writ of mandamus after the dues have become long overdue and, in fact, stood time-barred. When a debt is barred by law of limitation, a suit for recovery of such a debt would not be maintainable. By taking resort to writ jurisdiction of the High Court under Article 226, can a person, whose dues are barred by the limitation, recover his dues, which he cannot, otherwise, recover in a civil suit ? This momentous question stands squarely covered by the Constitution Bench decision, in *State of Madhya Pradesh Vs. Bhailal Bhai and Others*,

93. In *Bhai Lal Bhai* (supra), the issue involved, in a nutshell, was, thus : when sales tax, assessed and collected from a dealer, was declared by a competent

court to be invalid in law, the payment of tax already made would be one made under a mistake within the meaning of Section 72 of the Contract Act and, hence, the Government to whom the payment has been made, by mistake, must, in law, repay. The writ petitions were, thus, filed seeking writ of mandamus directing the State to repay the tax collected by it. However, the right to collect the dues had become barred by the law of limitation. One of the questions, therefore, which arose in, *Bhai Lal Bhai (supra)*, was as to whether the Limitation Act shall have any bearing, while invoking the High Court's power under Article 226, for the purpose of obtaining a writ of mandamus directing the State to repay the money, when the dues had become time-barred.

94. Dealing with the question as to whether a time-barred debt can be recovered by taking resort to Article 226, the Constitution Bench, in *Bhai Lal Bhai (supra)*, observed that the remedy, which Article 226 provides, is not aimed at superceding completely the modes of obtaining relief by an action in a civil court or to deny the defences legitimately open in such actions. Pointed out the Constitution Bench, in *Bhai Lal Bhai (supra)*, that the power to give relief under Article 226 is a discretionary power and this is, particularly, true in the case of issue of a writ of mandamus and while deciding as to whether the court shall exercise its discretion to issue the writ, one of the factors, which the court must take into account, is the delay made by the aggrieved party in seeking the remedy under Article 226 and what explanation, if any, has been offered for such a delay. Further points out the Constitution Bench, in *Bhai Lal Bhai (supra)*, that the maximum period fixed by the legislature as the period of limitation for obtaining relief from the civil court is a matter of State's policy and may be, ordinarily, taken to be reasonable standard by which the delay in seeking the remedy under Article 226 can be measured. In fact, the court may consider, in the light of *Bhai Lal Bhai (supra)*, the delay as unreasonable even if the delay is for a period less than the period of limitation prescribed for a civil action; but where the delay is of a period, which is more than the prescribed period of limitation, it would almost always be proper for the court to hold that such delay is unreasonable. The Constitution Bench, in *Bhai Lal Bhai (supra)*, concluded, thus:

It appears to us however that the maximum period fixed by the legislature as the time within which the relief by a suit in a civil court must be brought may ordinarily be taken to be a reasonable standard by which delay in seeking remedy under Article 226 can be measured. The court may consider the delay unreasonable even if it is less than the period of limitation prescribed for a civil action for the remedy but where the delay is more than this period, it will almost always be proper for the court to hold that it is unreasonable. The period of limitation prescribed for recovery of money paid by mistake under the Limitation Act is three years from the date when the mistake is known. If the mistake was known in these cases on or shortly after January 17, 1956 the delay in making these applications should be considered unreasonable. If, on the other hand, as Mr. Andley seems to argue, the mistake was discovered much later, this would be

a controversial fact which cannot conveniently be decided in writ proceedings. In either view of the matter we are of opinion the orders for refund made by the High Court in these seven cases cannot be sustained.

(emphasis is added)

95. In the light of the law laid down in *Bhai Lal Bhai* (supra), I have to consider the present set of writ petitions. There is no dispute that a period of limitation prescribed for recovery of dues is three years from the date, when the payment becomes due. In the case at hand, therefore, the onus lies on the writ petitioners to show, if their dues are, otherwise, time-barred, as to why they had not approached this court seeking a writ in the nature of mandamus before the dues became time-barred. For this purpose, material facts have to be stated by the writ petitioners concerned so as to enable the High Court to decide if the writ petitioner has good reasons for not approaching the court before the limitation period expired. This, however, does not mean, I must hasten to add, that the Government is debarred from making payment of the time-barred debts, for, there is no provision, under the law, prohibiting the State from clearing its dues even after the dues become time-barred.

96. In some of the writ petitions, I notice, reliance has been placed to support the delay on the letters issued by some authorities admitting the dues. What needs to be pointed out, in this regard, is that an acknowledgement of debt for the purpose of extension of time shall be before the debt becomes time-barred. In the cases at hand, letters showing admission of dues have been issued after the dues already stood time-barred. In such circumstances, the letters admitting the dues would not extend the period of limitation. This apart, a letter of admission is not a promise, for, a promise to make payment can be enforced u/s 25(3) of the Contract Act. In the case at hand, there is not even one writ petition, wherein time-barred debt has been promised to be paid by a competent authority. What has been relied upon by such writ petitioners are letters admitting the dues. Suffice it to point out that an admission is not same as a promise to make payment of the dues.

97. While considering the present set of writ petitions, what is of paramount importance to note is that Article 226 is couched in the widest of language and confers on the High Court wide power, as indicated in *Bhai Lal Bhai* (supra), to give relief by way of enforcement of fundamental rights and other rights by issuing directions, orders or writs, including writs in the nature of mandamus.

98. The question as to whether the High Court can issue a writ in the nature of mandamus commanding the State to pay its admitted dues can be examined purely from the angle of jurisprudence. Let us assume a case, wherein following the assumption of power by a political party in a State, the State Cabinet, as a matter of policy, decides, without, however, assigning any reason, not to pay the bills of all those contractors, who had been given orders by the Government, while another political party, was in power and to pay the bills of only those

contractors with whom orders are placed after the present political party has come to power. In such a case, assume that a contractor, whose bills are not disputed, seeks intervention of the High Court, by way of a petition under Article 226, on the ground that the decision of the State is motivated, mala fide, arbitrary and also discriminatory, for, there is no legal foundation for the State's decision not to make payment of his dues and that the persons, who became entitled to receive payment latter, cannot be paid their bills merely on the ground that the orders had been placed with him by the Government, while another political party was in power. Can the High Court, in such a situation, refuse to step in and remedy the wrong ? Article 14 provides answer to this momentous question. Article 14 is not an empty formality or an imbecile guarantee, but a solemn undertaking by the State that it will not act arbitrarily nor will it discriminate between one citizen and the other without a valid law supporting such discrimination. The fundamental rights or even statutory rights are really not meant for the benefit of the individuals alone; rather, the fundamental rights or statutory rights are guaranteed in the interest of the State and have to be regarded as guarantees having been given to a citizen in the public interest. Since Article 14 aims at preserving and protecting the rule of law, let us bear in mind that the rule of law has to be protected not merely in the interest of the individuals, but also in the interest of the State itself. The very existence and survival of the State would be threatened if the rule of law does not prevail. The guarantee, which the Constitution gives under Article 14, is not in the interest of a particular individual, but in the interest of the public at large. When an Indian citizen, therefore, approaches the High Court seeking a writ of mandamus with allegations of unfairness, arbitrariness or discrimination by the State in making payment of its dues to him, it is the solemn duty of the High Court if the High Court is satisfied that the omission or refusal to make payment of dues by the State is unfair, unreasonable, arbitrary or discriminatory to command the State to make payment of the dues of such a writ petitioner and when the High Court would issue such a writ, the writ would not be in the interest of such a writ petitioner alone; rather, the High Court, in such a case, would, in effect and in substance, be enforcing the fundamental right of a citizen, in the interest of the general public, and in the interest of the rule of law. Fundamental rights given to a citizen carton be narrowed down to any personal rights. A fundamental right is a right, which has been embodied in the Constitution essentially to preserve and protect the rule of law. Hence, when the rule of law is threatened by an action or omission of the State, it is not only desirable, but imperative that the High Court steps in and undo the wrong. When Article 226 commands the High Court to issue writ of mandamus in order to enforce fundamental rights of a citizen if the situation so demand, it will be no answer for the High Court that invoking of its extraordinary jurisdiction under Article 226, in such a case, would amount to enforcing contractual obligations of the State. It is, therefore, necessary to bear in mind that when a contractual obligation of a State is sought to be enforced by a citizen by invoking Article 226, the High Court has to ascertain, as observed in Asha Goel (supra), if the writ petitioner is seeking enforcement of a mere

contractual right or he has raised a question of law or a constitutional issue. In the present case, the writ petitioners complain that the omission, on the part of the State, to make payment of their dues is unfair, unreasonable and arbitrary. If the writ petitioners have stated the material facts, in their writ petitions, to support such accusations and have produced materials in support of their accusations, there is no reason for the High Court not to direct the State to make payment of its dues. In fact, not issuing directions, in such a case, to the State would be a lapse of High Court's solemn duty under Article 226. I may also, at this stage, pause here to point out that it is no more *res-integra* that in the writ petition and/or counter affidavit, if the facts are not pleaded or the evidence in support of such facts is not annexed to the pleadings, the court will not entertain the point. The Apex Court has clearly held in *Bharat Singh and Others Vs. State of Haryana and Others*, that there is a distinction between the pleadings under the writ petition/affidavit and plaint and that while in a pleading, i.e., in a plaint or in a written statement, facts and not evidence are required to be pleaded, in a writ petition or a counter affidavit, not only the facts have to be pleaded, but also evidence, in proof of such facts, are to be annexed thereto.

99. It is, therefore, clear, as already indicated above, that if the writ petitioners have not stated the material facts, which can show how the State has acted arbitrarily, unreasonably or unfairly and if the writ petitioner has not annexed materials in support of the facts stated, the writ court cannot, on the basis of mere allegation of arbitrariness and without having reached, in this regard, a clear finding, grant relief to the writ petitioners.

100. In the light of the law discussed above, let me, now, decide each of the writ petitions on its own merit.

101. Before, however, I enter into the merit of the individual writ petitions, it needs to be noted that it is neither disputed, as already indicated above, nor could it have been disputed that the guidelines, issued in *Jatin Pathak (supra)*, are not meant for payment of dues of any particular contractor or supplier and that these guidelines have been issued in the greater interest of all concerned to ensure equitable distribution of Government's fund in the discharge of its admitted outstanding dues. Viewed thus, these guidelines fall clearly within the domain of public law remedy and the same, as sought for by the parties, need to be extended to other Departments of the State Government and its instrumentalities. It is, therefore, directed that the Government and all its instrumentalities including the Government undertakings and corporations, such as, the ASEB, adopt, adhere to and follow the guidelines issued in *Jatin Pathak (supra)*.

102. What is, however, necessary to point out is that the guidelines, issued in *Jatin Pathak (supra)*, are not meant for payment of those dues, which are time-barred and cannot be realized by instituting civil suits, for, unless there is a specific direction by the High Court, in exercise of its powers under Article 226, for payment of the time-barred dues of any particular person, payment of such

dues (which already stood time-barred, when the guidelines, in Jatin Pathak (supra), were issued) would not be covered by the guidelines and these guidelines would not enable anyone to include any contractor or supplier's name in the register to be maintained as has been directed in Jatin Pathak (supra). For the purpose of entering into the register aforementioned the name of a person, whose dues have become time-barred, specific direction has to be obtained from the High Court.

103. I must, however, hasten to add that since there is no legal bar for the State respondents to make payment of its time-barred debts, the respondents shall be at liberty to pay even its time-barred dues. However, even while making payment of its time-barred debts, the State cannot act arbitrarily. It is, therefore, necessary that the State Government evolves a policy for the purpose of deciding as to when a time-barred dues of a contractor or supplier would be paid and in what manner such a time-barred dues would be paid. The policy, to be so evolved, shall apply to all the Departments including the PWD and all instrumentalities of the State Government, such as, the Assam State Electricity Board. In specific cases, however, a person, aggrieved by non-payment of time-barred dues, may approach the High Court. In order to ensure that there is no arbitrariness or discrimination, while making payment of the admitted dues of the State, which are, otherwise, time-barred, the State Government is directed to evolve the policy, as directed hereinbefore, within a period of three months from to-day and furnish to the Registry of this court a copy of these guidelines.

WP(C) Nos. 970/2006, 4935/2000, 2534/2003, 4709/2002, 2615/2003, 10339/2003, 3306/2004, 6625/2003, 1826/1999, 926/2006, 1309/2006, 1183/2006, 6709/2004, 3259/2004, 3944/2004, 1673/2004, 289/ 2006, 1683/2006, 576/2006, 1807/2006, 575/2006, 9730/2003, 1805/ 2006, 934/2006, 3972/2004, 1599/2004, 10416/2003, 2481/2004, 8761/ 2004, 5397/2004, 3942/2004, 3940/2004, 3941/2004, 2784/2004, 5676/ 2004, 3364/2004, 3917/2002, 2417/2003, 46/2006, 1308/2006, 6018/ 2002, 8711/2004, 86/2005, 1810/2006, 6820/2005, 1803/2006, 1701/2006, 1611/2006, 1833/2006, 7382/2005, 258/2006, 1385/2006, 5396/2004, 2062/2005, 6118/2004, 902/2006, 3258/2004, 9081/2003, 8994/2004, 6131/2004, 950/2006, 1184/2006, 970/2006, 3939/2004, 3943/2004, 5681/2004, 5686/2005, 8653/2005, 1804/2006 and 1495/2006

104. All these writ petitions have been filed after a lapse of more than three years of the dues becoming payable to the writ petitioners. As no plausible explanation has been offered by the writ petitioners for such delay nor is there any justifiable reason discernible from the materials on record as regards the delay, these writ petitions deserve to be dismissed outright. However, considering the fact that such dismissal may bar the petitioners from receiving their unpaid but time-barred dues, these writ petitions are disposed of with liberty given to the writ petitioners to approach this court with appropriate application, in future, if there is any explanation for the delay in approaching this court.

Notwithstanding the liberty so given to the writ petitioners, the claims for payment of unpaid dues, made in these writ petitions, shall be examined by the respondents in terms of the policy, which has been directed to be framed by the State Government for payment of its time-barred, but admitted dues. Those unpaid time-barred dues, which are found payable in terms of the policy, which may be framed, as directed hereinabove, shall be entered in the name(s) of the writ petitioner(s) concerned into the register, which has to be maintained in terms of the directions given in Jatin Pathak (supra) and in the light of the observations made hereinabove.

WP(C) Nos. 1581/2006, 303/2004, 6820/2005, 8710/2004, 1866/2006, 2410/2004, 696/2006, 10338/2003, 1221/2006, 9416/2004, 1517/2006, 1625/2006, 1700/2006, 9419/2004, 1705/2006 and 8709/2004

105. In these writ petitions, though the claim for payment of some of the admitted dues are within the period of limitation, the fact remains that in many of these writ petitions, there is clubbing of causes of action, which are not connected with each other; hence, such writ petitions cannot be allowed. This apart, in none of the writ petitions, there is cogent and supporting materials on record to show that any constitutional or legal issue has been raised by the writ petitioners. In the absence of clear pleadings and supporting materials on record to show arbitrariness, discrimination, etc, no specific direction for payment can be made. Though this court, in such circumstances, was tempted to dismiss the writ petitions, what restrains the court from dismissing these writ petitions is that such dismissal may, completely and permanently, disable the writ petitioners from receiving payment of their unpaid admitted dues.

106. Considering, therefore, the matter in its entirety and in the interest of justice, it is hereby directed that the respondents shall examine the claims of the writ petitioners and those claims, which are found within the period of limitation, shall be entered into the register aforementioned. As regard those writ petitions, where part of the claims are barred by limitation, such claims shall be examined and considered by the respondents in terms of the policy, which has been directed to be formulated by the State Government and in terms of such a policy, proper action shall be taken by the respondents concerned.

WP(C) Nos. 43/2004 and 2904/2004

107. In both these writ petitions, the High Court passed orders for payment of dues of the writ petitioners: However, notwithstanding the directions so given, the dues, in terms of the directions, were not paid. The writ petitioners did not seek drawing of proceedings for contempt of the orders of the court. It is in the backdrop of these facts that these two writ petitions need to be considered.

108. In view of the fact that in these two writ petitions, directions for payment had already been given by the High Court, as indicated hereinabove, these two writ petitions are disposed of with direction to the respondents to clear the dues of the writ petitioners within a period of four months from to-day with interest @

6% per annum from the date of institution of the respective writ petitions, wherein these directions are, now, being given.

WP(C) No. 7756/2004

109. In this writ petition, the claim for unpaid dues is admitted by the respondents. However, as the writ petitioner's father, with whom the work orders were placed, had died and the writ petitioner had to obtain succession certificate for enforcement of his claim for payment of the dues, the dues became time-barred. In these circumstances, when the letter, dated 14.9.2004, issued by the respondents (which forms subject-matter of this writ, petition), is considered, it becomes transparent that the respondents had sought for time to make payment. In these circumstances, the respondents are hereby directed to make payment of the said admitted dues within a period of four months from to-day.

WP(C) No. 2673/2000

110. In this case, the admitted unpaid dues of the writ petitioner are of a sum of Rs. 3 lakh. The writ petitioner has clearly averred that his wife is sick and it is for her treatment that he is in need of the dues, which are payable by the respondents. While the respondents admit the liability, they have, without assigning any reasons whatsoever, not made payment of the dues of the writ petitioner. Such an approach to the dues of the writ petitioner by the respondent is a clear case of arbitrariness and such non-payment of dues may prove fatal to the life of the writ petitioner's wife. In these circumstances, it is hereby directed that the dues of the writ petitioner be paid within a period of one month from today.

WP(C) Nos. 952/2006, 4935/2000, 4463/2004, 1576/2006, 6286/2004, 4162/2002, 7332/2002, 7410/2003, 2815/2004, 9239/2004, 5395/2004, 3945/2004, 958/2006, 1169/2006, 1491/2006, 1442/2006, 1441/2006, 7285/2005, 7010/2003, 971/2006 and 5780/2006

111. All these writ petitioners' claim for unpaid dues are within the period of limitation; but none of these writ petitions clearly aver as to how the conduct of the respondents can be said to be violative of Articles 14 and/or 21 nor are there any supporting materials available in this regard. No issue of law has also been raised by these writ petitioners. There can, therefore, be no specific direction for outright payment to the writ petitioners, particularly, when what the writ petitioners' claim is merely enforcement of payment of their admitted dues. In such circumstances, the respondents are hereby directed to enter the names of the writ petitioners in the register to be maintained in terms of the directions given in Jatin Pathak (supra) and in the light of the observations made hereinabove.

WP(C) No. 3178/2006

112. In this writ petition, in terms of the claim for payment of unpaid dues of the writ petitioner, a cheque was issued by the respondent concerned on 19.4.2005.

However, when the cheque was presented to the bank, the same was dishonoured for insufficiency of funds. It is in these circumstances that the writ petitioner has approached this court for appropriate directions. In the peculiar facts and circumstances of the present case, it is hereby directed that the respondents shall make payment of the admitted dues of the writ petitioner within a period of four months from to-day.

WP(C) No. 5986/2002

113. In the present case, the claim for the dues has been disputed by the respondents concerned by filing affidavit. The correctness or otherwise of the claim made by the writ petitioner would, therefore, require making of roving enquiry, which is not legally possible in a writ proceeding. Moreover, the writ petition has not raised any constitutional or legal issue. This writ petition is merely for enforcement of alleged dues of the writ petitioner. In such circumstances, this court has no option, but to hold that the writ petitioner is not entitled to any relief in this writ petition. However, considering the matter in its entirety and in the interest of justice, this writ petition, instead of being dismissed, is disposed of with liberty granted to the writ petitioner to take recourse to appropriate provisions of law.

114. Before I conclude, there is yet another aspect of the case, which I consider of paramount importance. The backdrop in which the guidelines had to be issued by the court, in Jatin Pathak (supra), as well as the present set of writ petitions eloquently speak that the various departments of the State government and its instrumentalities have been placing orders with contractors and suppliers without having any budget allocation for such purposes. This has resulted into unpaid dues of the contractors and suppliers running into thousands of crores. This state of affairs shows that the constitutional scheme relating to financial management of the State is being flouted every moment. Placing of such orders, which is not only inconsistent with but in clear violation of the constitutional scheme of financial governance, cannot be permitted to continue, for, such unchecked expenditure would lead to complete breakdown of the Government machinery and financially ruin and destroy the persons with whom such orders are placed. Considered thus, it has become absolutely inevitable that proper directions be issued to the Government in this regard.

115. In view of the above and in the interest of justice, it is hereby directed that the State Government shall not, ordinarily, allow any order to be placed by any of its department or its instrumentalities with any contractor or supplier without having budget allocation therefor. Since some expenditure may be required to be made in emergent circumstances, the State Government is directed to formulate a policy, in this regard, with clear direction that flouting of such financial norms shall become a ground for taking disciplinary action against the officer/ authority concerned, who does not adhere to such government instruction/policy. It is also hereby made clear that placing of orders without budget allocation may, in future, force the court to issue directions for recovery of the amount(s) from the

officer/authority concerned so as to clear the unpaid dues of the suppliers or contractors concerned. The policy, as directed hereinbefore, shall be formulated by the Government within a period of three months from to-day and a copy of this policy, which the Government may formulate, shall be furnished to the Registrar General of this court.

116. Before concluding these writ petitions, it is further directed that the Chief Secretary to the State Government shall ensure that the directions given hereinabove are scrupulously followed by all the departments concerned as well as the various State instrumentalities including Corporations, such as, the Assam State Electricity Board.

117. Let a copy of this order be issued to the Chief Secretary to the State Government.

118. With the above observations and directions, all these writ petitions shall stand disposed of.

119. No order as to cost