
(1996) 03 CAL CK 0025
In the Calcutta High Court
Case No : Writ Petition No. 1876 of 1995

D. Wren International Ltd. and another	APPELLANT
Vs	
Engineers India Ltd. and others	RESPONDENT

Date of Decision : 28-03-1996

Acts Referred:

Arbitration Act, 1940 — Section 2
Constitution of India, 1950 — Article 12, 14, 226, 226(2)
Contract Act, 1872 — Section 28, 4, 7

Citation : AIR 1996 Cal 424

Hon'ble Judges : Satyabrata Sinha, J

Bench : Single Bench

Judgement

1. A letter dated 8-10-1995 cancelling acceptance of an offer made by the petitioners as regards supply of loading arms to the respondents Nos. 1 and 2 pursuant to a request for quotation for supply of loading arms as contained in Annexure "L" to the writ application as also issuance of a global tender notice issued by the first respondent in terms of its letter dated 10th October, 1995 in Annexure "M" thereto are the subject matter of the present writ application.

2. The fact of the matter shortly stated is as follows:--

A request for quotation for supply of loading arms was made by the petitioner on or about 14-9-1994 in relation where two bids were required to be submitted in two parts; (i) the unpriced bid complete with technical and commercial details and (ii) price bid complete with all technical details and commercial details as also with full price details.

3. Technical specification were required to be given in terms of the requisition attached thereto and in case of revision the same were required to be spelt out. The petitioners submitted their technical commercial bid and price bid on 24-10-1994. Various letters were exchanged and discussions were held for a period of over nine months. By a fax dated 5-8-1995 the offer of the petitioner was accepted, by the respondent No. 1 as contained in Annexure-I to the writ

application; one of the clauses whereof required joint signature and acceptance of purchase orders by the petitioners as also its American collaborator O.P.W. Engineering System, USA (hereinafter referred to as the "Collaborator"). On the same date the said offer was accepted by the petitioner but by a fax dated 10th August, 1995 the respondent No. 1 requested the petitioners to hold action on fax of acceptance, which the petitioner agreed in terms of its fax message dated 14th August, 1995 without prejudice to its rights and contentions. However, on 8-10-1995 the respondent No. 1 intimated to the petitioner by a fax message that the earlier fax of acceptance of offer dated 5-8-1995 was cancelled and a decision to reissue tender was intimated to it whereafter on 10th October, 1995 a global notice was issued inviting tenders for supply of loading arms.

4. The petitioners contend that they were to supply loading arms to be used in the petroleum industry under technical collaboration with M/s. Engineering System, U.S.A. They submitted bid for 1000 numbers of loading arms to be installed for Indian Oil Corporation at Panipath terminal and after due tender and consideration processes, the respondent No. 1 accepted the same upon holding discussions and evaluation of techno-commercial aspects and were awarded a firm order to supply 840 numbers of loading arms purely on merits which was accepted by them. But the impugned action was taken unilaterally in an arbitrary manner at the instance of one M/s. Emco Wheaton, U.K. as some sort of representation was filed by it before the Hon'ble Minister of Petroleum.

5. The writ petition was moved on 16-10-1995 and B. Ghosh, J. passed an interim order staying process in respect of global tender and also gave directions to the respondents to file affidavit. The respondents Nos. 1 and 2 moved an appeal on 16-11-1995 against the said order wherein an interim order was passed by the Division Bench on 9-11-1995. On 1-11-1995 the revised schedule for sale of bid document and due dates for opening of bids pursuant to global tender were intimated to the petitioner by respondent No. 1. The petitioner protested with regard to the wording of the proposed press notification on or about 14-11-1995 but despite the same on 16-11-1995 a press notification giving revised dates for global notice inviting tender was issued. On 18-11-1995 the petitioner received the communication from Respondent No. 1 enclosing amendment clause to tender document to be issued pursuant to the global notice inviting tender.

6. The contention of the respondents Nos. 1 and 2 appears to be that Indian Oil Corporation is setting up a refinery at Panipath for production of petroleum products; a project of high national importance and for effective marketing and distribution, it became necessary to build terminal near the Panipath refinery to receive and distribute such petroleum products by road and rail tankers. For the loading facilities by rail, the project envisaged an automated system with the help of Loading Arms which are of metallic flexible conducts used for transfer of petroleum products from pressurised pipings to Rail wagons. The petitioners submitted their technical bids and after negotiations, the first respondent sent

the fax message but no such communication was sent to the collaborator of the writ petitioner.

7. It is stated that while processing the said bids, certain relevant issues had not been considered/explored in the decision making process. As it required further study and enquiry, the aforementioned fax dated 10th August, 1995 was sent. An internal assessment was thereafter undertaken by the first respondent wherein a system failure and serious errors were found to have crept in. It was stated that lapses have occurred in the evaluation process, particularly in the course of technical bid analysis which are as follows:--

(a) The technical Parameters were frozen on 21st April, 1995, and the same was communicated to all the tenderers. Annexure I of the Frozen Technical Parameters provided that the Loading Arms to be supplied were to be fully assembled and imported as such without any further work in India. A copy of the Frozen Parameters will appear front the communication dated 21st April, 1995 (together with the Annexures thereto, which are annexed and marked V.

(b) After receiving the Frozen Technical Parameters, all the participants submitted their revised bids.

(c) The writ petitioner had quoted with three options, namely, (i) fully imported; (ii) imported components but assembled in India; and (iii) imported components and indigenous Swivel Joint but assembled in India.

EMCO (foreign) quoted with two options, namely, (i) imported, (ii) imported components but assembled in India.

(d) On this state of affairs, TBA showed that the writ petitioner was acceptable for the first two options, and EMCO was acceptable for its first option. The second option of EMCO was not even considered.

(e) Tested against the Frozen Commercial Parameters EMCO's quotation for its First Option was found to be the lowest. The First Respondent negotiated with EMCO for further reduction and EMCO responded positively by making a reduced price offer on 13th July, 1995.

(f) In the meantime certain adverse reports were received by the First Respondent regarding financial condition of EMCO and based on that it was decided not to proceed further with EMCO.

(g) Hence on 18th July, 1995 the First Respondent requested the other bidders to submit revised price bid. The other tenderers including the writ petitioner responded.

(h) Before the First Respondent could finally consider these revised offers of others, EMCO furnished evidence of solvency, based on which it was decided that EMCO's revised offer made on 13th July, 1995 would be opened and if it was found to be within the revised in house cost estimate, the order would be placed on them, but if they were higher, then the matter would be referred to the

management for decision. This was decided on 26th/27th July, 1995.

(i) The revised EMCO's bid was thereafter opened. The discount offered was found to be low, i.e., the revised in house cost estimate still lower. As such it was decided that the revised prices of the others would be opened and a comparative statement would be made including the price of EMCO, and the order would be finalised strictly on L-I basis. This was decided on 28th July, 1995.

(j) On 29th July, 1995 the other offers were opened and the recommendation was to award in favour of the writ petitioner's quotation for indigenous assembly, i.e., its Second option,

(k) It was evident that the evaluation process did not proceed on a common basis and the comparative statement was in respect of quotations made on different basis. It was particularly noted that EMCO's first option which was in accordance with the Frozen Technical Parameters was considered along with the writ petitioner's and others' quotations which were dehors the condition of Frozen Technical Parameters, i.e., imported components hut assembled in India.

8. It is contended that the matter was studied at some depth and the first respondent also took legal advise in the matter and pursuant thereto it was advised to cancel the offer to the the writ petitioner and go for global tender.

9. The said respondent also contend that the writ application is not maintainable as :--

(a) It involves various disputed questions of fact;

(b) The writ petitioners had no enforceable right as no concluded contract had been arrived at nor any firm commitment against the general principles as well as the terms and conditions of the tender was made;

(c) No purchase order has been issued having regard to the terms of the tender as well as the agreed minutes dated 31st July, 1995.

10. It has been urged that this Court has no territorial jurisdiction to entertain, try and decide writ application inasmuch as the Park Street Office of the First Respondent or the Gariahat Road .Office of the Second Respondent have no connection whatsoever and were never involved with the transactions which are in question, nor did they play and role therein. It is contended that the Head Office of the Second Respondent is situated at Bombay. The refinery and the Terminal are in Panipat. The communications of 10th August, 1995, 7th October, 1995 and 10th October, 1995 could not be the basis of invoking the jurisdiction of this Court nor the same constitute an integral part as cause of action for the enforcement of which the petitioner has filed the writ petition.

11. Mr. Jayanta Mitra, the learned Counsel appearing on behalf of the petitioner, has raised the following contentions in respect of this writ application.

(1) The offer made by the respondent accepting the bid of the petitioner as also

the termination of the said contract having been communicated to the petitioners at Calcutta as a result whereof the petitioner suffered pecuniary losses at Calcutta, his Court has territorial jurisdiction to entertain this writ application. Reliance in this connection has been placed in *Mussummat Chand Kour v. Partab Sing* reported in (1880) 15 IA 156, *Union of India (UOI) and Others Vs. Hindustan Aluminium Corporation Limited and Another*, *Everest Coal Co. Pvt. Ltd. Vs. Coal Controller and Others*, *Oil and Natural Gas Commission Vs. Utpal Kumar Basu and Others*, *State of Rajasthan and Others Vs. Swaika Properties and Another*, *Arthur Butler and Co., Ltd. Vs. District Board of Gaya*, *G. Venkatesha Bhat and Others Vs. Kamalapat Motilal and Others*, and *Serajuddin and Co. Vs. The State of Orissa and Others*. It was urged that only because the Read Offices of the respondents are not within, the jurisdiction of the Court the same by itself would not take away the jurisdiction of this Court as a part the cause of action arose at Calcutta. Reliance in this connection has been placed in *M/s. Patel Roadways Limited, Bombay Vs. M/s. Prasad Trading Company*. It was also submitted as the breach of contract took place at Calcutta in view of the fax message and the letter of communications as contained in Annexure-J and L pages 112 and 116 of the writ application and thus the cause of action arose at Calcutta as f.he same amounts to communication within the meaning of Section 4 of the Indian Contract Act. It was further submitted that in any event even the new global tender has been sent in Calcutta.

(2) The respondents being "State" within the meaning of Article 12 of the Constitution of India, were bound to act fairly and the impugned orders being illegal and arbitrary, this Court should quash the same. The learned Counsel relying on or on the basis of the decisions of *Dwarkadas Marfatia and Sons Vs. Board of Trustees of the Port of Bombay*, *Kumari Shrilekha Vidyarthi v. State of Uttar Pradesh* reported in 1991 SC 537, *Council of Civil Service Unions v. Minister for the Civil Service* reported in 1984 (3) All ER 935: 1985 App Cas 374, *Jones v. Swansea City Council* reported in 1989 (3) All ER 162, *Tata Cellular Vs. Union of India*, *Sterling Computers Limited and Others Vs. M and N Publications Limited and Others*, *New Horizons Limited and Another Vs. Union of India (UOI) and Others*, *LIC of India and Another Vs. Consumer Education and Research center and Others*, as also two decisions of this Court in *Marine Engineer v. Siddeswar Halder* reported in 1991 (1) CLJ 467 and *Jute Corporation of India Ltd. v. Nillimarla Jute Mills Co. Ltd.* reported in 1993 (1) CLT 79 submitted that the illegal termination of contract also comes within the purview of the judicial review of this Court under Article 226 of the Constitution of India.

According to the learned Counsel the contract was terminated without assigning any detailed reason inasmuch as in the impugned fax message the reason stated to be "techno-administrative" one which is a vague term and thus cannot be sustained.

(3) As the matter was reopened at the instance of EMCO Wheaton, the said action is also mala fide. In support of his aforementioned contention the learned

Counsel has relied upon *Punit Rai and Another Vs. Mohammad Majid and Others*, *Badat and Co. Vs. East India Trading Co.*, and *Smt. Asha Handa Vs. Baldev Raj Handa*, In this connection the learned Counsel has also relied upon an unreported decision of mine dated 27th February, 1995 in *India Hotels Co. Ltd. v. Calcutta Municipal Corporation* in Matter No. 3743 of 1994 and an unreported decision of Babulal Jain, J. dated 8th September, 1993 in Matter No. 3106 of 1993 *Niranjan Pipalia v. Hindusthan Steel Works Construction Ltd.* as also as an article on Judicial Review and the Contractual Powers of the Public Authorities by Sue Arrosmith published in 106. *The Law Quarterly Review*, page 277.

Mr. Mitra would urge that as the impugned order does not contain any reason, the respondents cannot be permitted to supplement the same in their affidavits and in this connection reliance has been placed in *Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others*, My attention has further been drawn to the decision of the Apex Court in *Tata Cellular Vs. Union of India*,

(4) The petitioners having submitted the bid and participated in a detailed negotiation on all aspects of the matter, be it technical or the price and such offer having been accepted, they had a legitimate expectation of making supply of loading arms. The learned Counsel urges that the doctrine of legitimate expectation is rooted in fairness and the procedural protections is aimed at protection of substantive interest of the parties. In support of his aforementioned contention reliance has been placed on *R. v. Board of Inland Revenue, ex parte MFK Underwriting Agencies Ltd.* and related applications 1990(1) All ER 91, *Food Corporation of India Vs. M/s. Kamdhenu Cattle Feed Industries*, *R. v. Ministry of Agriculture Fisheries & Food, ex parte Hamble (Offshore) Fisheries Ltd.* reported in 1995 (2) All ER 714 as also an article by P. P. Craig "A Conspectual Analysis" Published in 108 *Law Quarterly Review*, page 79.

12. Mr. S. Pal appearing on behalf of the respondents, however, submitted that the question of territorial jurisdiction would depend upon the determination of jurisdictional fact which this Court being not in a position to adjudicate, should not interfere in the matter. The learned Counsel contends that keeping in view various documents it would be apparent that no concluded contract had been arrived at by and between the parties and thus the question of revocation of such contract and communication thereof to the writ petitioners in terms of Section 4 of the Indian Contract Act does not arise.

13. Mr. Pal would urge that a decision is not required to be communicated and in view of the fact that such a decision not to award work in favour of the petitioner has been taken by the respondents at Delhi, no part of cause of action arose within the jurisdiction of this Court. Reliance in this connection has been placed on *Burn Standard Company Ltd. Vs. M/s. McDermott International Inc. and another*,

14. It was been submitted that there being no concluded contract the question of

revocation thereof will not arise and in the event, it is held by this Court that there exists a concluded contract, this Court may not exercise its jurisdiction in view of existence of an arbitration agreement. Reference in this connection has been made to A.C. Roy Co. and others Vs. Union of India and others,

15. It was submitted that on perusal of Clause 40 of the general conditions of contract it will be evident that the parties consented to submit themselves to the jurisdiction of the Bombay Court and as such a clause is valid in terms of Section 28 of the Indian Contract Act, this Court has no territorial jurisdiction in relation thereto. Reliance in this connection has been placed on Hakam Sing Vs. Gammon (India) Ltd., It was further submitted that no averment in the writ application has been made that by reason of the purported revocation the loss has been suffered by the petitioner at their corporate office at Calcutta. The learned Counsel submits that Hindalco's case (supra) reported in Union of India (UOI) and Others Vs. Hindustan Aluminium Corporation Limited and Another, has been distinguished in Everest Coal Company's case reported in 90 CWN page 438.

16. Assuming a part of cause of action has arisen within the jurisdiction of this Court Mr. Pal submits that doctrine of forum conveniens should be applied, Reliance in this connection has been placed on Bhagat Singh Bugga Vs. Dewan Jagbir Sawhney, Mandal Jalan v. Madanlal reported in 49 CWN 357, M/s. New Horizons Limited and another Vs. Union of India and others, as also the decision of the Supreme Court in Oil and Natural Gas Commission Vs. Utpal Kumar Basu and Others,

17. Mr. Pal would submit that in a contractual matter relating to procurement of materials no writ application is maintainable unless such contract is granted by the State in exercise of its Governmental power, and as the instant case, has a commercial character as contradistinguished from a public character the writ petition is liable to be dismissed. Reliance in this connection has been placed on Lekhraj Satramdas, Lalvani Vs. Deputy Custodian-cum-managing Officer and Others, Radhakrishna Agarwala v. State of Bihar reported in 1977 SC 1496, Pancham Singh Vs. The State of Bihar and Others Sri Konaseema Co-operative Central Bank v. N. Seetharam Raju reported in AIR 1990 AP 171 : 1990 Lab IC NOC 63 (FB), Geetha Timbers, Chalakudy Vs. State of Kerala and Others, ; in R. v. Disciplinary Committee of the Jockey Club ex parte Agakhan reported in 1993 (2) A E R 853 and in A.C. Roy Co. and others Vs. Union of India and others,

18. It was also contended that the petitioner cannot have any legitimate expectation for grant of contract. Reliance in this connection has again been placed on A.C. Roy Co. and others Vs. Union of India and others,

19 The questions which, therefore, arise for consideration in this application are:--

(i) Whether this Court has territorial jurisdiction to entertain the writ application and in any event whether this Court should exercise its jurisdiction in the facts and circumstance of the case.

(ii) Whether the impugned order terminating the alleged contract and issuing the global tender notice suffers from illegality, irrationality or procedural irregularity.

(iii) Whether the petitioner had a legitimate expectation to be awarded the contract in question.

20. Re: Question -- I

A question as to whether the Court has territorial jurisdiction to entertain the writ application would depend upon the findings as to whether cause of action or any part thereof arose within the jurisdiction to this Court. Clause (2) of Article 226 of the Constitution of India reads thus:--

"The power conferred by Clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories."

21. Cause of action, as is well known, although not defined under the Constitution must be held to mean a bundle of facts which are necessary to be proved by the petitioner to obtain reliefs sought for.

22. It is not disputed that the Head Office of the respondent No. 2 is at Bombay. The refinery and terminal of the said respondent are in Panipat. Although the respondent No. 2 has offices at Park Street and Gariahat Road and the same had no connection whatsoever and never involved with the transactions in question. The petitioner in paragraph 17 of the writ application stated thus:--

"Part of the records of the instant case are lying within the jurisdiction of this Hon'ble Court. The communications of August 10, 1995, October 10, 1995 the letter of October 10, 1995 along with Notice Inviting Tender bearing No. PR/95-96/85 were all received by the petitioner No. 1 at its registered office at 25, Swallow Lane, Calcutta-700 001 within the aforesaid jurisdiction and thereby sought to be made effective against the petitioner within the jurisdiction of this Hon'ble Court. The cancellation of the concluded contract between the petitioners and the respondent No. 2 became effective only on receipt of the communication of October 8, 1995 by the petitioner No. 1 at its registered office within the aforesaid jurisdiction. The acts and conduct of the respondents complained or hereinabove have also caused loss and damage to the petitioners at the registered office of the petitioner No. 1 at 25, Swallow Lane, Calcutta-700 001 within the aforesaid jurisdiction. In such circumstances, part of the cause of action has also arisen within the jurisdiction of this Hon'ble Court. In the premises, this Hon'ble Court has the jurisdiction to entertain, try and determine the instant application."

23. The core question which arises for Consideration in this application is as to whether there had been a concluded contract and such contract was concluded in

Calcutta as also the fact as to whether the action on the part of the First Respondent to repudiate contract was communicated to the petitioner at Calcutta.

24. The petitioner has stated that the petitioner's corporate Head Quarters is at Calcutta. Of course it has its office as also carries its manufacturing and operation at 344 GIDC Waghadia in the district of Baroda in the State of Gujarat. By a fax dated 5th August, 1995 the petitioner were allegedly offered the contract. The said fax 61 acceptance being 3412/163 as contained in Annexure-I to the writ application although was despatched at its Calcutta address, admittedly the same was issued from Delhi and had been accepted by the petitioner in its entirety on the same date itself namely 5th August 1995 at Delhi. The petitioners agreed to furnish performance guarantee on the proforma of the respondent No. 1 within 10 days. The contract, if any, was, therefore, concluded at Delhi and not at Calcutta where a copy of the said fax was sent for information.

25. The question as to whether the parties have arrived at a concluded contract or not would depend upon the intention of the parties which has to be found out from the correspondences passed between the parties. A document as is well known must be read in its entirety and upon consideration of the intention of the parties which has to be gathered not only from the wording used therein but also from the attending circumstances. In this connection, therefore, it is necessary to take into consideration the conduct of the parties as also the conditions of fax of acceptance so as to enable this Court to come to the conclusion as to whether the contract can be said to have been concluded only upon joint signature and acceptance of purchase order by the petitioner as also their collaborator.

26. Clauses 9 and 13 of the said fax of acceptance read thus:--

"9. Purchase order will be jointly signed and accepted by OPW collaborator and D. Wren.

13. Our general purchase conditions and other conditions attached with our enquiry documents are totally acceptable to you without any deviation whatsoever."

27. It is, therefore, also necessary to consider the relevant provisions of the general purchase conditions which is contained in Annexure-A to the writ application. In the said general conditions the words "owner, vendor, contractual delivery date and project" have been defined as follows:--

"The "owner" means Indian Oil Corporation Limited, a company incorporated in India having its registered office at G. 9 Ali Yavar Jung Marg, Bandra (East) Bombay acting through Panipath Marketing Terminal and shall include its successors and assignees.

"Vendor" shall mean the Person, Firm or Corporation to whom this purchase order is issued.

"Contractual Delivery Date" is the date on which goods shall be delivered F.O.P. despatching point/destination in accordance with the terms of the Purchase Order. This contractual delivery date/period is inclusive of all the lead time for engineering, procurement of raw materials, manufacturing, inspection, testing, packing and any other activity whatsoever required to be accomplished for effecting the delivery at the agreed delivery point.

Panipath Marketing Terminal of Indian Oil Corporation Limited (Marketing Divn.)"

28. Thus, it may be true that issuance of a purchase order plays an important role as would be evident from clause 27 of the said contract in terms whereof the right of the owner to cancel the purchase order arises only thereunder. Clause 39 of the said agreement contains arbitration clause in respect of all disputes arising out of the purchase order. Clause 40 of the said general agreement states:

"The vendor hereby agree that the court situated at Bombay alone shall have the jurisdiction to hear and determine all actions and proceedings arising out of this contract."

29. However, in my opinion, the said clause has no application to the fact of the present case as the same does not and cannot override a constitutional provision contained in Art. 226(2) of the Constitution of India.

30. It may be true that all material correspondences were made by the petitioner with the respondent No. 1 at its Delhi Office from its Baroda Office and not from Calcutta as on the body of the said document, a rubber stamp of the Baroda Office of the petitioner appears, but does that mean that no part of cause of action arose within the jurisdiction of this Court?

31. It is not in dispute that the petitioner responded to the notice inviting tender issued by the respondent No. 1. In a letter dated 25th April, 1995 issued by the collaborator of the petitioner, it is stated :

"OPW Engineered Systems would like Engineers India Limited to recognize that the D. Wren International Limited quotation for the loading arms at your Panipath Marketing Terminal is a joint consortium offer from both D. Wren International Limited and OPW Engineered Systems. If the order should be placed with the consortium part-ners, there will be no change in the scope of supply, price or (for each company) the delivery schedule staled in the quote. The consortium between the partners covers the following points."

32. Again the said collaborator of the petitioner in its letter dated 26th May, 1995 addressed to the respondent No. 1 issued certain clarification as regards the consortium bid offered by it and the petitioner inter alia stating:--

"Should at any point in time the subcontract between OPW Engineered Systems and D. Wren International Limited be abrogated/fail, OPW Engineered Systems will supply Indian Oil with the loading arms at the agreed upon price and within the agreed upon delivery schedule. This will keep the total liability to Indian Oil

unchanged."

33. The petitioner in its letter dated 22nd June, 1995 addressed to the respondent No. I stated:

"Our collaborators, M/s. OPW Engineered Systems, USA have also offered to furnish an unconditional Bank Guarantee regarding the supplies to be made by our company against the subject tender. Further, M/s. OPW Engineered Systems, USA have also committed to assume full responsibility of the order (including all terms and conditions). In the event of D. Wren being unable to execute the order due to unforeseen circumstances beyond our control, to the satisfaction of EIL.

34. Furthermore from the minutes of meeting held at New Delhi between respondent No. I and the petitioner as contained in Annexure "H" to the writ application it appears that the petitioner agreed that in case their offer is selected for purchase order, they would call M/s. OPW Engineered Systems, USA and purchase order may be accepted by it and the said M/s. OPW Engineered Systems, USA jointly.

35. Apparently it is pursuant to that arrangement, the respondent No. 1 in its fax dated 5-8-95 had imposed one of the conditions being condition No. 9 thereof as quoted hereinbefore that the said purchase order would be jointly signed and accepted by the collaborator as also by the petitioner.

36. It is not in dispute that pursuant to the notice inviting tender, the writ petitioner submitted its tender. A detailed negotiation took place whereafter the fax of acceptance as contained in Annexure "1" to the writ application was issued. It is also not in dispute that during the course of negotiation the collaborator of the writ petitioner agreed to join the contract but as noticed hereinbefore, such negotiation took place through the petitioner. During negotiation several new conditions were attached as regards participation of the collaborator of the petitioner in the execution of the contract which was accepted by the petitioner as also its collaborator. They also agreed to execute a performance guarantee and accept the purchase order jointly. They also made themselves liable jointly and severally for breach of contract.

37. As the offer was made to the writ petitioner alone the fax of acceptance being No. 3412/163 was sent to the writ petitioner alone laying down the conditions therein.

38. The said fax of acceptance refers to the offer of the petitioner dated 24-10-94 and the consortium offer dated 24-7-95 Memorandum dated 31-7-95 and all other correspondences up to and including the writ petitioner's 3 fax dated 3-8-95 from its Delhi office for loading arms (rail wagons) against respondent No. Ps notice inviting tender.

39. In no uncertain terms in the said fax, it was stated "pleased to issue firm-order on M/s. OPW Engineered Systems D. Wren International Limited consortium basis for white oil loading arms 840 numbers." The price was quoted

and the terms and conditions were also quoted therein. The terms and conditions include a firm price offer, time of delivery, supervision charges, liability of the petitioner and its collaborator for timely execution of the contract, the manner in which the work is to be executed etc... In ternu of condition No. 12 D. Wren/OPW was to furnish contract performance bank guarantee. It also contains terms of payment.

40. By reason of the said fax of acceptance the petitioner was asked to acknowledge receipt thereof and the said fax of acceptance, in no uncertain terms states "regular purchase order follows."

41. The said fax of acceptance was accepted by the Managing Contractor of the petitioner in its entirety and it was stated that CPG will be furnished on EIL's pro forma within 10 days.

42. Although Mr. Pal submitted that the said fax of acceptance is really a fax of intent, a bare reading of the aforementioned fax in its entirety together with the conduct of the parties and the attending circumstances, there cannot be any doubt that the same was a fax of acceptance.

43. The conditions Nos. 9 and 12 upon which strong reliance has been placed by Mr. Pal are merely conditions subsequent and the same, in my opinion, do not constitute a conditional acceptance/ counter offer.

44. The subsequent fax dated 10-8-95 whereby the petitioner was asked to hold action on fax of acceptance as also the impugned telegram dated 8th October, 1995 as contained in Annexure"L" to the writ application also terms the said communication dated 5-8-95 as fax of acceptance and not a fax of intent.

45. It is also relevant to notice that the pro forma bank guarantee (performance) which is to be furnished in terms of the general purchase conditions (indigenous) a pro forma of which was annexed along with the request for quotation and upon which strong reliance has been placed by Mr. Pal clearly stated "in consideration of the Indian Oil Corporation Limited having awarded" The words "having awarded" in the pro forma bank guarantee must thus be read along with the aforementioned fax of acceptance dated 5-8-95, and, ihus, there cannot be any doubt whatsoever that the contract performance guarantee and issuance of purchase order were merely the condition subsequent.

46. In Jawahar Lal Burman Vs. Union of India (UOI), the Apex Court clearly held that an acceptance of contract subject to making security deposit constitutes concluded contract. The Apex Court held that although S. 7 of the Contract Act requires the acceptance of offer must be absoiutely unqualified and it cannot be conditional, but reading the letter as a whole, the same amounted to absolutely an unqualified acceptance of the tender or offer made by the appellant. In the said case also tender of security deposit was treated as a subsequent condition. Acceptance of pur-chase!order by the writ petitioner as also its collaborator were also one of the conditions had emerged during the negotiation and such condition

was also accepted by the petitioner.

47. It is now well known that in a given case it is necessary to examine the language of offer and acceptance to determine the existence of an agreement. See Cheshire, Fifoot & Furmston's Law of Contract, 11th Edn., p. 28.

48. In the instant case also the petitioner was asked to "acknowledge the receipt of the) fax and confirm acceptance and thus it was treated as an offer without reference to its collaborator and whose offer having been accepted by the fax of acceptance a concluded contract came into being. It was stated that the fax of acceptance was addressed to the writ petitioner only and at the bottom of the same the writ petitioner has been described as "vendor" and endorsement at the bottom thereof the expression, "vendor's acceptance" has been used. The subsequent conduct of the respondents also show that they had proceeded on the basis that a concluded contract has come into being. Reference to general conditions of contract by the petitioner means that same would be acceptable by both the parties for working out the contract.

49. The communication dated 21-4-1995 required that the delivery be effected from the 9 months from the date of letter of acceptance of offer. The minutes dated 31-7-95 also shows that the contract was to be concluded by issuance of fax of acceptance.

50. Mr. Pal's submission that the collaborator did not accept the offer and thus no concluded contract has come into being is of not much importance in view of clause (4) of the fax of acceptance and particularly in view of the fact that OPW had already agreed to such conditions as would appear from the Memorandum of Understanding dated 24-7-1995 (Anx.-F) which are in the following terms:

(CC) "OPW will offer to. negotiate with EIL, New Delhi, India, a Bank Guarantee for execution of contract, jointly and severally with D. Wren and will offer all technical assistance, including deputing appropriate technical personnel for timely execution of contract, in event of order, if so necessary.

(DD) OPW hereby affirms complete and total technical and financial support to D. Wren for timely execution of the order, if so placed on D. Wren, whilst adhering to the terms and conditions of the order placed by EIL. Further OPW and D. Wren will be jointly and severally responsible to EIL for the order.

(FF) OPW/D. Wren will also offer a guarantee against all manufacturing defects for the operation of the loading arms. 18 months from date of supply or 12 months from date of installation, whichever is later."

51. The other stipulations as contained in Clause "5" of acceptance was also agreed by the petitioner's collaborator as would appear from Clause EE aforementioned as also communication dated 18th July, 1995 from the collaborator to the respondent No. 1 which contains the following clauses:--

"All components for the loading arms will be manufactured by OPW Engineered

Systems in Mason, Ohio, U.S.A.

The loading arms will be welded and assembled by D. Wren International Ltd, under direct supervision of OPW Engineered Systems" personnel.

OPW Engineered Systems will certify the in-country technical support for these loading arms during assembly through installation."

52. Similarly stipulation contained in Clause (7) was also agreed to by the collaborator as would be evident from the letter dated 18th July, 1995. to the following effect :--

"Should at any point in time the subcontract between OPW Engineered Systems I and D. Wren International Limited be abrogated/fail, OPW Engineered Systems will supply Indian Oil with the loading arms at the agreed upon price and within the agreed upon delivery schedule. This will keep the total liability to Indian Oil Unchanged."

53. The stipulation in Clause "8" has also been agreed to by the collaborator. See paragraph 1 of its letter dated 18th July, 1995 which is to the following effect:--

"OPW Engineered Systems ships to D. Wren International Limited on open account, which means that we extend credit terms to them D. Wren International Limited guarantees payment to OPW Engineered Systems."

54. Similarly Clause 12 has also been agreed to by the collaborator in Clause CC of the Memorandum of Understanding between petitioner and its collaborator.

55. Clause (9) imposes an obligation on the writ petitioner to have the purchase order signed and accepted by its collaborator and thus no separate offer was to be made to it as it is evident that the condition imposed on the collaborator have also been agreed to by it.

56. Moreover, admittedly the petitioner represented itself and its collaborator in respect of the consortium offer. All particulars and details relating to its collaborator were also forwarded by the petitioner and all communication relating to the matter were only addressed by the respondent No. 1 to the petitioner only. Meetings were also held between the respondents and the petitioners only as also all the queries and clarifications regarding the consortium offer were required from and provided by the petitioner only to the respondent. Reliance placed by Mr. Pal upon clause "3" of the minutes of the meeting dated 31-7-95 to the effect that without issuance of purchase order there would be no concluded contract appears to be misplaced inasmuch as clause (3) of meeting dated 31-7-95 which appears at page 104 of petition merely records an agreement that if offer of the petitioner No. 1 is selected for purchase order, the same would be accepted by the petitioner No. 1 and its collaborator jointly. Moreover even the performance guarantee. was to be furnished by both the petitioner No. 1 and its collaborator within 10 days from the date of acceptance thereof. In the instant case, it must be held that issuance of purchase order was a mere formality. It

may be noticed that furnishing of the performance guarantee is not mentioned in the purchase order.

57. It is now well known that a distinction has to be drawn between a condition precedent and a condition subsequent. In AIR 1946 97 (Privy Council) it has been held that an oral contract is valid and enforceable whenever court comes to the conclusion that a concluded contract has come into being and thus, non-execution of the formal agreement will be a matter which would not bind the parties.

58. In *Maheswari Metals and Metal Refinery, Bangalore Vs. The Madras State Small Industries Corporation Ltd.*, a similar view has been taken by Venkatraman, J. that requirement to execute an agreement is a mere formality.

59. In *Smallman v. Smallman* reported in 1971 (3) All ELR 717 : 1971 (3) Writ LR 588, an agreement of maintenance between a husband and a wife subject to the approval of the court was held to be a condition subsequent. What is, therefore, necessary for constitution of a contract is "animus contrahendi" between the parties. The terms of contract are ascertained from the invitation of tender, the acceptance and any other relevant documents.

60. It is true that the law relating to offer and acceptance is not simple. In *Hamilton Rau and Weintraub on Contracts, Cases & Materials*, at page 346, it is slated :--

"The rules of offer and acceptance are usually favourites of law students; they are easily stated and tend to be rather mechanical in their operation. They also involve situations that are relatively easy to grasp and in which various policy considerations are close to the surface. However, one should not assume that one has mastered the law of contracts simply because one is conversant with rules of offer and acceptance. Indeed the writing of modern contracts scholars tend to deprecate the importance of the rules of offer and acceptance. See Genevick G. Gilmore, *The Death of Contract* (1974) : L. Friedman, *Contract Law America* (1965)."

61. The decisions rendered by different Courts in unmistakable terms pointed out that the same depends upon the intention of the parties as reflected from correspondences (See *Bigg v. Boyd Gibbons Ltd.* (1971) 1 WLR 913 : 1971 (2) All ER 183 and *Stores v. Manchester City Council* 1974 (3) All ER 824).

62. In *Halsbury's of England*, 4th Edition, Vol. 9, meaning of the offer has been stated in paragraph 227 at page 98 in the following terms:

"227. Meaning of offer. An offer is an expression by one person or group of persons or by agents on his behalf, made to another, of his willingness to be bound to a contract with that other on terms either certain or capable of being rendered certain.

An offer may be made to be individual or to a group of persons or to the world at

large. It may be made expressly by words or it may be implied from the conduct of the offerer."

63. In *Sardar Sucha Singh v. Union of India* reported in 1987 Su SCC 127, a tender was accepted on behalf of the Union of India by the Chief Engineer stating:

"Reference your tender dated March 11, 1958. Your tender for the above service for the lump sum of Rs. 8,34,280.22 (Rupees Eight lakhs, thirty-four thousand two hundred and eighty and twenty-two naya paise only) is, hereby accepted by me on behalf of the President of India.

In accordance with condition 22 of IAFW 2249 you are required to lodge with GE Paragraph a sum of Rs. 700 (Rupees seven hundred only) as additional security within 30 days from the receipt of this letter."

64. In *Global Tenders Inc. v. Amercoat Europa N. V.* reported in (1975) 1 LLR 666, the Queen's Bench held that keeping in view the entirety of the correspondence, it was an unconditional offer. In that case, the offer was made but it was stated by the offeree that payment would be made by the insurer.

65. The Court held :

"I cannot read this as conveying to a businessman that if the insurers should never pay, then the defendants were to be relieved from all liability. Far clearer wording would be required to achieve this effect."

66. In *Dhutipudi Namayya v. The Union of India*, reported in AIR 1958 AP 533, a Division Bench of the Andhra Pradesh High Court held that the mere fact that a new and collateral term is annexed to an absolute acceptance would not affect the formation of the contract on the basis of the original which is unconditionally accepted.

67. In American Jurisprudence, 2nd Sec. 65, it has been stated -

"It must not be inferred from the rule that an acceptance must be unconditional, the mere mention in a letter of acceptance of matters upon which the acceptance of the proposition does not depend prevents the contract from being completed. There is authority to the effect that although an acceptance which introduces a new term as part of the proposed contract is insufficient, the mere addition to the acceptance of a collateral or immaterial requisition not warranted by the terms of the offer does not prevent the contract from being completed. Thus, immaterial or minor differences or variances between the offer and acceptance will not prevent the formation of a contract. Although a request for a change or modification of a proposed contract made before an acceptance thereof amounts to a rejection of it, a mere enquiry as to whether one proposing a contract will alter or modify" Us terms, made before acceptance or rejection, does not amount to a rejection; and if the offer is not withdrawn, it may be accepted within a reasonable time.

Requested or suggested modifications of an offer will not preclude the formation of a contract where it clearly appears that the offer is positively accepted regardless of whether the requests are granted. Where the acceptance of an offer is initially unconditional, the fact that it is accompanied with a direction or request looking to the carrying out of its provisions, but which does not limit or restrict the contract, does not render it ineffectual or give it the character of a counter-offer. This rule has been held to apply to a request for information as to the manner of remitting the price, to a request to a proposed seller of real estate to fix the date for closing the transaction, to a buyer's suggestion for a time and place of closing made in accepting an offer which specified no time for closing, and to a mere suggestion or request that payment of delivery be made at a place other than that specified in the offer."

68. There cannot be any doubt that in the event (here exists an arbitration clause, the Court should not exercise its jurisdiction. However, in this case the arbitration clause is not applicable in as much as the said arbitration agreement would have applied only in the event disputes arise out of purchase order. As the purchase order was yet to be issued question of any disputes arising out of the purchase order would not arise and in that view of the matter the decision of mine in A.C. Roy Co. and others Vs. Union of India and others, and the The Tamil Nadu Water Supply and Drainage Board (TWAD) and others Vs. The Pioneer Engineering Syndicate, Engineers and Contractors, Hyderabad and others, are not applicable. Moreover the reliefs sought for herein cannot be granted by the arbitrator.

69. The jurisdictional clause containing in clause 40 of the general terms and conditions have also no application keeping in view the fact that it is not the case of the parties that any cause of action arose within the territorial jurisdiction of the Bombay High Court. In any event in view of clause (2) of Art. 226 of the Constitution of India, such a clause cannot have any application.

70. Furthermore the petitioner in terms of its letter dated 3-8-95 categorically stated "that the contract performance guarantee will be submitted at the time of signing of Contract/Purchase Order, jointly by D. Wren International Limited & OPW Engineered Systems, it was also stated that D. Wren/OPW eagerly looks forward to the opportunities to be of service to BIL."

71. It is now well settled principles that the documents for the purpose of arriving at a decision as to whether a concluded contract has been arrived at between the parties or not, have to be read as a whole. A conjoint reading of the aforementioned letters leave no manner of doubt that issuance of purchase order by the respondent No. 1 and acceptance thereof by the petitioner and its collaborator jointly as also furnishing of the contract performance guarantee were not sine qua non for arriving at a concluded contract and at best can be said to be conditions subsequent. Furnishing of bank-guarantee and issuance of purchase order were mere formalities.

72. It is also evident that at all relevant times the American collaborator of the petitioner took part in the negotiation only through the petitioner although it was to be a party to the contract. It is a case where the collaborator of the petitioner intervened inter alia for the satisfaction of the respondent No. 1 that it had the backing of the collaborator, and it appears to be a case where collaboration agreement was taken into consideration for the purpose of ascertaining the credibility of the petitioner.

73. The action on the part of the respondent No. 1 to direct the petitioner to hold its action has to be read in the context of the aforementioned background inasmuch as the respondent No. 1 wanted that the petitioner may not take up the matter with its collaborator pursuant to the fax and acceptance as aforementioned.

74. It is, therefore, clear beyond any shadow of doubt that the parties had arrived at a concluded contract. If the parties have arrived at a concluded contract the question of revocation thereof and/ or communication of such revocation to the petitioner had its Calcutta Address would undoubtedly constitute cause of action within the meaning of clause (2) of Art. 226 of the Constitution of India.

75. In *Mussummat Chand Kour v. Par-tap Singh* (15 IA 156), it was held:--

"... the cause of action has no relation whatever to the defence which may be set up by the defendant, nor does it depend upon the character of the relief prayed for by the plaintiff. It refers entirely to the ground set forth in the plaint as the cause of action, or, in other words, to the media upon which the plaintiff asks the court to arrive at a conclusion in his favour."

76. The Supreme Court in *Oil and Natural Gas Commission Vs. Utpal Kumar Basu and Others*, held that the question as to whether the court has a territorial jurisdiction to entertain a writ petition, must be arrived at on the basis of averments made in the petition, the truth or otherwise whereof being immaterial. Mr. Pal's contention that the averments made in the writ petition only can be considered by way of summary and not when the entire materials are placed on records is not required to be considered in view of my aforementioned findings.

77. However, it goes without saying that statements made in the writ application alone would not serve the purpose inasmuch as the documents annexed thereto being a part of the writ petition may also be looked into by the court for the purpose of determining as to whether it can exercise its territorial jurisdiction or not.

78. The Supreme Court in *Oil and Natural Gas Commission Vs. Utpal Kumar Basu and Others*, held that all necessary facts must form an integral part of the cause of action. It observed:

"So also the mere fact that it sent fax messages from Calcutta and received a reply thereto at Calcutta would not constitute an integral part of the cause of

action. Besides the fax message of 15-1-1993, cannot be construed as conveying rejection of the offer as that fact occurred on 27-1-1993."

79. In the instant case, not only concluded contract was arrived at, admittedly the offer of the petitioner accepted by the respondent No. 1 whether on provision basis or otherwise was rejected and the said decision was conveyed to the petitioner at Calcutta.

80. In Union of India (UOI) and Others Vs. Hindustan Aluminium Corporation Limited and Another, it was stated in the writ petition that the aluminium control order which was although issued at Delhi, the same having affected the business of Hindalco at Calcutta; a part of cause of action arose in Calcutta.

81. However, the Union of India (UOI) and Others Vs. Hindustan Aluminium Corporation Limited and Another, has also been distinguished in Everest Coal Co. Pvt. Ltd. Vs. Coal Controller and Others, in the following term :--

"For the purpose of accrual of action for filing a writ petition, it is also necessary to make a distinction between actual or apprehended injury in the writ petitioner and indirect effect or remote consequences on him. Obviously, for giving rise to cause of action for maintaining the writ petition what is material is whether or not within the territorial limits of the said High Court, there has been proximate or direct effect upon the petitioner. Indirect or remote result of the impugned acts of the respondents must be pleaded for establishing that cause of action, either whole or in part has arisen within the territorial limits of a particular High Court."

82. In the instant case, the petitioner has pleaded that there has been a direct effect on his offer by rejection thereof by the respondent No. 1 and the same took place within the territorial jurisdiction of this Court.

83. It must, however, be borne in mind that only because the petitioner-company had its registered office at Calcutta by itself cannot give rise to any part of any cause of action.

84. In State of Rajasthan and Others Vs. Swaika Properties and Another, the Supreme Court held that mere service of a notice would not give rise to any cause of action unless service of notice was integral part of the cause of action. In the instant case, service of notice formed an integral part of cause of action. The said decision has also been noticed in Oil and Natural Gas Commission Vs. Utpal Kumar Basu and Others, The Apex Court held:--

"The answer to the question whether service of notice is an integral part of the cause of action within the meaning of Art. 226(2) of the Constitution must depend upon the nature of the impugned order giving rise to a cause of action."

85. In Serajuddin and Co. Vs. The State of Orissa and Others, a Division Bench of this Court also held that this Court will have territorial jurisdiction as important correspondences were made from Calcutta and communication of revocation of

mining lease was also made at Calcutta and thus this court had jurisdiction to entertain the writ petition.

86. Reference in this connection may be made to a recent decision of this Court *People's Union v. Union of India*, reported in 1996 (1) Cal LJ 184 .

87. There cannot be any doubt whatsoever that a part of cause of action would arise for maintaining a suit for damages on the ground of breach of contract on the part of the defendant where the contract has been entered into or where the same has been revoked as has been held by Patna High Court in *Arthur Butler & Co. Ltd. v. District Board of Gaya* reported in AIR 1947 Patna 13 and *G. Venkatesha Bhat and Others Vs. Kamapat Motilal and Others*, but the said decisions cannot be said to have any application whatsoever to the facts and circumstances of this case.

88. The submission of Mr. Pal as regards "Forum Convenience" is wholly misconceived. The said doctrine has no application in a writ petition ;,nd, thus, it is not necessary to notice the decisions cited by Mr. Pal.

89. The question which now arises for consideration as to whether even if a part of cause of action has arisen within the jurisdiction of this court, this court should exercise its discretion in entertaining the writ application or not.

90. It is also difficult to accept the submission of Mr. Pal that decision to regret the offer of the petitioner was not required to be communicated. The Respondent No. 1 having communicated the order of acceptance of the petitioner's offer, was also bound to communicate its decision of rejection of offer. The decision of the Supreme Court in *Burn Standard Burn Standard Company Ltd. Vs. M/s. McDermott International Inc. and another*, was rendered in a different fact situation and is not applicable to the fact of the. present case.

91. Mr. Pal has, however, relied upon a Division Bench decision of this Court in *Bharat Coking Coal Limited. Vs. Jharia Talkies and Cold Storage Private Ltd.*, wherein a Division Bench of this Court having come to the conclusion that a part of cause of action has arisen within the jurisdiction of this Court refused to exercise its jurisdiction on the ground that earlier the parties had litigated before the Patna High Court. The said decision was, thus, rendered in a different fact situation.

92. In *M/s. New Horizons Limited and another Vs. Union of India and others*, the Delhi High Court clearly held that the said Court has jurisdiction in the matter. The Division Bench held that although Court could refuse to exercise, its jurisdiction but since the argument had been addressed at length; the jurisdiction was not refused to be exercised. This decision, therefore, does not help the respondents as in this case also the parties have addressed me at length o'n merit of the matter.

93. In any event, in this case, the fax of intent was admittedly meant to be communicated to the petitioner at Calcutta. It also also received the fax of

"holding action" on the said fax of acceptance/intent at Calcutta. It agreed to the said request of the Respondent No. 1 from Calcutta. It also received the impugned notices and the global tender at Calcutta.

94. The fax of acceptance of offer/ intent was also communicated to the petitioner and similarly it was communicated with the decision of cancellation of the fax of acceptance/intent. There cannot be any doubt that acceptance of such offer was provisional and subject to fulfilment of some other requirements viz. issuance of purchase order and joint acceptance thereof by the petitioner and its collaborator as also furnishing of performance-guarantees by them, but the fact remains that the offer of the petitioner was found acceptable and the intention of the Respondent No. 1 was made known to the petitioner. In this view of the matter, I have no doubt that in view of the statements made in paragraph 17 of the writ application, this Court has territorial jurisdiction to entertain the writ application.

95. Keeping in view of the fact that the writ petition has been admitted and the learned Counsels addressed me at great length for a number of days, I also do not consider it to be a fit case where I should refuse to exercise any jurisdiction to entertain the writ petition.

96. In *Surjit Singh Atwal Vs. Union of India (UOI)*, a learned single Judge has held that an invalid contract cannot be relied upon as constituting the part of cause of action. In that case jurisdiction of High Court was invoked on the ground that the contract was entered into within the jurisdiction but on fact it was held that there was no such contract. The decision of the Division Bench in *Modern Malleable Casting Works Ltd. v. M/s. Star Iron Works Ltd.*, reported in 1995 (2) Calcutta High Court Notes, page 433 also has no application to the fact of the case. In that case it was held that the cause of action for the writ application questioning arbitrary exercise of power by the respondents therein took place at Delhi and, thus the same would not confer jurisdiction to this Court merely because some communication was received at Calcutta which had nothing to do with formation of contract. The fact of the matter in the present case is absolutely different.

97. In *Ujjal Talukdar Vs. Netai Chand Koley*, this Court held that cause of action does not comprise every piece of evidence which is necessary to prove each case fact, but every fact which is necessary to be proved. No exception can be taken to the aforementioned law but in that case the fact of the matter appears to be absolutely different. The letter in question involved in that case was considered to be an evidence and not a cause of action.

98. It was not disputed that once a concluded contract was arrived at, revocation or cancellation thereof would require communication and communication of such revocation at Calcutta will confer jurisdiction on this court in view of S. 4 of the Indian Contract Act. Communication of the revocation of the contract was a part of the cause of action. As on facts of the present case I have held that a part of

the cause of action has arisen within the jurisdiction of this Court, the submission of Mr. Pal to the effect that intention of the parties being a question of fact cannot be gone into in the writ application is not acceptable. The question as to whether the action on the part of the respondent is arbitrary or not can only be answered if there existed a concluded contract by and between the petitioner and the respondent and for that purpose this Court can construe the admitted documents relied on by both the parties.

99. In *Steel Authority of India Ltd. and Others Vs. Salem Stainless Steel Suppliers and Others*, , the Court had gone into the correspondences entered into between the parties for the purpose of deciphering as to whether a concluded contract was arrived at or not.

100. For the reasons aforementioned it has to be held that this Court has territorial jurisdiction to entertain this writ application.

Re : -- Contention -- 2.

101. The power and/or jurisdiction of this Court to interfere in the matter of contract is no longer *res integra*. The Respondents are State within the meaning of Art. 12 of the Constitution of India. Admittedly the project in question is of national importance. It is also admitted that procurement of the loading arms was essential for public goods and in public interest. The respondents, thus, being public bodies must act in public interest as they occupy public positions. However, this Court can exercise its jurisdiction under Art. 226 of the Constitution of India only in the event the writ petition involves a public law element. The question as to whether a particular contract involves public law element or not would depend upon the facts of each case. The question as to whether the action of the State involved public law character or not is not only dependant on the fact situation but also the stage of the contract. There cannot be any doubt that at the stage of threshold any decision taken by the State would to a great extent, be the subject matter of judicial review inasmuch as every person has a fundamental and legal right to participate in a tender and the State is bound to take a fair and reasonable attitude in the matter.

102. In view of well settled principles of law by judicial precedents that arbitrariness is antithesis of law and in the event an action of the State suffers from such arbitrariness the Court would not hesitate to declare the same to be bad and illegal with a view to uphold the constitutional guarantee of equal protection as embodied in Art. 14 of the Constitution.

103. Public bodies are required to follow certain principles and guidelines. (See *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, In *Harinder Singh Arora Vs. Union of India (UOI) and Others*, , the Apex Court stated that the State need not enter into any contract with any-body, but it must do so fairly without discrimination and without unfair procedure. See also *Kasturi Lal Lakshmi Reddy, Represented by its Partner Shri Kasturi Lal, Jammu and Others Vs. State of Jammu and Kashmir and Another*, .

104. In *Council of Civil Services Unions v. Minister for Civil Services* (1984 III All ER 935) the parameters of judicial review of administrative action are stated to be under three heads which are as follows :--

- i) illegality, where the decision making authority has been guilty of an error of law, e.g., by purporting to exercise a power it does not possess.
- ii) irrationality, where the decision making authority has acted so unreasonably that no reasonable authority would have made the decision.
- iii) procedural impropriety, where the decision making authority has failed in its duty to act fairly."

105. In *Sterling Computers Limited and Others Vs. M and N Publications Limited and Others*, , the Supreme Court quoted extensively from *Wade's Administrative Law* and inter alia observed as follows:--

- i) It may not be always possible for a Government undertaking to act like a quasi judicial authority while awarding contracts.
- ii) The discretion has to be conceded to the authorities to have to enter into contract giving them liberty to assess over all situation for the purpose of taking a decision as to whom the contract awarded and what terms.
- iii) If the decision has been taken in a bona fide manner although without strictly following norms laid down by Cojurt, the same may not be interfered as the Court while judging the Constitutional validity of executive deci-sions must grant certain measures of freedom of "play in the joints" to the executive."

106. The Apex Court also observed :--

"But in normal course, some rules must exist to regulate the selection of persons for awarding contracts. In such matters a defence cannot always be entertained that contract has been awarded without observing the well-settled norms and rules prescribed, on the basis of the doctrine of "executive necessity". The norms and procedures prescribed by Government and indicated by Courts have to be more strictly followed while awarding contracts which have along with a commercial element a public purpose as in the present. The publication of directories by the MTNL is not just a commercial venture : the primes object is to provide service to the people."

107. However, in *G.B. Mahajan and others Vs. The Jalgaon Municipal Council and others*, the Supreme Court held that the materials placed before the Court fell far short of what the law require to justify interference. The Supreme Court held that although the principles of judicial review applied to exercise by a government body of its contractual power, the inherent limitations on the scope of the enquiry are themselves a part of those principles. The Apex Court observed that in a matter even as between the parties, there must be a public law element to the contractual decision before judicial review is invoked.

108. In *Tata Cellular Vs. Union of India*, the Apex Court after reviewing its earlier decision laid down the parameters of judicial review in the following terms:--

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

(b) The Court does not sit as a Court of Appeal but merely reviews the manner in which the decision was made.

(c) The Court does not have the expertise to correct the administrative decision. If a review of administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.

(d) The terms of the Invitation to Tender cannot be open to judicial scrutiny, because the Invitation to Tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by a process of negotiation through several tiers. More often than not, such decisions are made qualitatively by experts.

(e) The Government must have freedom of contract. In other words, "a play in the joints" is a necessary concomitant for an administrative body functioning in administrative sphere or quasi-administrative sphere.

(f) The decision must not only be tested by application of *Wednesbury* principle of reasonableness, but must be free from arbitrariness, not affected by bias or actuated by *mala fides*.

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

109. Yet recently the Supreme Court in *U. P. Financial Corporation v. M/s. Nayer Oxygen and Acetylene Gas Ltd.*, (Judgment delivered on CIT 1994 (7) SCC 551 laid down the law in the following terms:--

"However, we cannot lose sight of the fact that the corporation is an independent autonomous statutory body having its own constitution and rules to abide by and functions and obligations to discharge. As such, in the discharge of its functions, it is free to act according to its own light. The views it forms and the decision it takes are on the basis of the information to its own perspective and calculations. Unless its action is *mala fide* even a wrong decision taken by it is not open to challenge. It is not for the Courts or a third party to substitute its decision, however, not prudent, commercial or business like, it may be, for the decision of the Corporation. Hence, whatever the wisdom (or the lack of it) of the conduct of the Corporation, the same cannot be assailed for making the Corporation liable."

110. However, the situation may be different in a case where a contract has been terminated. In *Radhakrishna Agarwal and Others Vs. State of Bihar and Others*, , the Supreme Court while carving out three categories of cases vis-a-vis the right of judicial review, inter alia, held that where a contract entered into between the State and persons aggrieved is non-statutory and purely contractual of the rights and obligation of the parties thereto are governed by the terms of the contract, a

writ petition shall not lie. However, keeping in view the subsequent development in law in the field of contract vis-a-vis jurisdiction of the High Court to entertain the writ application, a full bench of the Patna High Court presided over by N. P. Singh, J. (as his lordship then was) in *Pancham Singh Vs. The State of Bihar and Others* held that apart from three categories adumbrated in *Radhakrishnan* there exists fourth category namely, that a writ petition shall also be maintainable where the contract has been terminated by the State on a ground dehors any of the terms of the contract and which is per se violative of Art. 14 of the Constitution of India.

111. B. L. Jain, J. in *Niranjan Papatia* Matter No. 3106 of 1993, D/- 8-9-93 (supra) has also accepted the said view. The division bench decisions of this Court in *Marine Engineer v. Siddeswar Haldar*, reported in 1991 (1) Cal LJ 467 and *Jute Corporation of India Ltd. v. Nillimarla Jute Mills Co. Ltd.*, reported in 1993(1) CLT 79 only reiterate the said legal position. However, this Court will have no jurisdiction to entertain a writ application, in a matter governed by contract, qua contract as in such a matter public law element is not involved. Reference in this connection may be made to *Life Insurance Corporation of India Vs. Escorts Ltd. and Others*, , *Food Corporation of India and others Vs. Jagannath Dutta and others*, , *State of Gujarat and Others Vs. Meghji Pethraj Shah Charitable Trust and Others*, , *Assistant Excise Commissioner and Others Vs. Issac Peter and Others*, which have been followed by me in a recent decision in *A.C. Roy Co. and others Vs. Union of India and others*, .

112. The Article by Sue Arrow Smith on Judicial Review and Contractual Powers of the public authorities took into consideration several areas of English Law relating to (a) Licensing of market traders, (b) Dismissal of public servants, (c) Public body's powers as landlord and (d) Judicial review of government procurement. The learned author, inter alia, observed that the possibility of review of the exercise of contractual rights in the said area which have been recognised by Canadian courts should also be adopted by the English Courts. The learned author observes :

"In other words, they should accept that these powers are reviewable as a matter of principle but that review may be negated or limited by specific policy factors, rather than continue searching for some "public law" element to the decision as a justification for applying public law doctrines to the case before them. Support for this approach is found in the judgments of the Court of Appeal in *Brown, Kelly and Emmett*, and also, implicitly, in the recent cases on review of procurement; and it is a pity that the Court of Appeal did not take the opportunity presented recently in *Jones v. Swansea City Council* to endorse such an approach, since this clearly commended itself to the Court."

113. The said Anicles is although thought provoking, this Court is bound by the decisions of the Supreme Court of India as well as of this Court and a distinction between a public law element and private law element although may be thin, has to be kept in view and taken into consideration while entertaining a writ

application.

114. The only question, therefore, which is required to be considered in this regard is (a) whether the contract was complete, (b) if so, whether termination thereof was dehors the terms and conditions of contract and/or violative of Art. 14 of the Constitution of India.

115. It is relevant to note that unlike the English Courts, the Indian Courts, as indicated hereinbefore, never hesitate to strike down an action of the State if it is arbitrary or if any decision of the State has not been reasonable or has not been arrived in good faith or for improper motive or unauthorised purposes.

116. In *Tata Cellular Vs. Union of India*, the Supreme Court has clearly indicated the parameters of judicial review of this Court in contractual fields. One of the situation where the Court can exercise its power of judicial review is where a violation of principles of natural justice takes place as would appear from paragraph 94 of the said judgment.

117. In *India Hotel Matter No. 3743 of 1994*, D/- 27-2-95 (supra) I have held that the general principles of natural justice as is understood in the normal parlance is not applicable in the matter, of acceptance of tender. It has, however, held that once a concluded contract was entered into, the same could not have been reopened for the purpose of consideration of a representation by some other persons, However, in the instant case although a contract came into being, it was sought to be rescinded despite the fact that the benefits received by the petitioner had been taken away thereby. In *Tata Cellular Vs. Union of India*, the Apex court clearly held that in such a situation principles of natural justice will apply.

118. In the instant case, it is not disputed that the impugned action was taken by the respondents without complying with the minimal requirements of the principles of natural justice. It is now a trite law that natural justice has to be viewed in circumstantial flexibility. It is also well known in view of the decision of the Supreme Court of India in *The Regional Manager and Another Vs. Pawan Kumar Dubey*, that one additional or different fact may make a world of difference between conclusion in two cases when the same principle are applied in each case to similar facts. The aforementioned decision has been followed by this Court in *Siben Kumar Mondal Vs. Hindustan Petroleum Corporation Ltd.* and another, .

119. Mr, Pal, however, submitted that the principles of natural justice have no application in a purely commercial procurement contract.

120. A distinction has to be borne in mind where a contract is terminated on the ground of violation of any condition of contract and where such contract is terminated arbitrarily and dehors the contract. In the latter case, as has been held by this Court as also the special bench of the Patna High Court in *Pancham Singh Vs. The State of Bihar and Others* a writ petition will be maintainable as in

a case of this nature in view of the decision of the Supreme Court in Tata Cellular principles of natural justice would be applicable and thus, it cannot be held that this Court cannot entertain writ application at all.

121. The question as to whether the principles of natural justice if complied with would be rendered in futility or not cannot be judged by this Court. The writ petitioner has made an attempt before this Court to show that the purported reasons assigned by the respondent No. 1 in support of its action cancelling the fax of acceptance is non est in the eye of law. It is not necessary for this Court to go into the merit of such submission inasmuch as it is well known that non-compliance of principles of natural justice itself may cause prejudice to the petitioner.

122. The question as to whether in a given situation compliance of the principles of natural justice would be impractical or not does not also fall for consideration in this application as nothing has been shown in the facts of the case that it would be impractical to give an opportunity of hearing particularly in view of the fact that the negotiation by and between the petitioner and the respondent No. 1 took place for a period of more than 9 months and thus, in my opinion, it was possible for the concerned respondents to comply with the principles of natural justice.

123. In a given case a writ Court can exercise its power of judicial review under Art. 226 of Constitution of India is evident from the decision of a Division Bench of this Court in Kalyani Spinning Mills Ltd. and others Vs. Smt. Sudha Sashikant Shroff and another, .

124. The question as to whether the principles of natural justice would be attracted or not depends upon facts and circumstances of each case. It has to be considered in circumstantial flexibility and situational fairness. The fact of the present case clearly suggests that in the instant case, in terms of Tata Cellular Vs. Union of India, the concerned respondent ought to have complied with the principles of natural justice. In this view of the matter it is not necessary to consider the other decisions cited at the bar.

125. However, Mr. Mitra is not correct in submitting that the impugned order must be set aside only on the ground that it does not contain any reason. While awarding a contract the role of a "State" within the meaning of Art. 12 of the Constitution would vary from case to case. Only where a statutory functionary passes an order, the reasons assigned in support thereof cannot be supplemented by an affidavit as has been held by the Apex Court in Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others, . The respondent No. 1 in the instant case has not acted as a statutory functionary and thus, in case a challenge is thrown that no reason exists for taking the impugned action, the authority may produce its records to show that such reasons are available on records. In any event in the instant case the reasons assigned for termination of the contract was techno administrative

reasons but although the said word is vague, it is entitled to show to this Court that reasons existed in support of its action. Reference in this connection may be made to Union of India and others Vs. E.G. Nambudiri, which has been noted with approval in Chandra Gupta, I.F.S. Vs. The Secretary, Govt. of India, Ministry of Environment and Forests and others, .

126. The question which now arises for consideration is as to whether the respondents could rectify its own mistake. It is one thing to say that mistake is apparent on the face of the records and it is another thing to say that such mistake may be found to be based on misconception of the aggrieved person.

127. In Bhagwan Shukla Vs. Union of India and others, the Supreme Court has also applied the principles of natural justice in the later cases. As the question raised in this writ application between the parties is contentious, in my opinion even for rectification for such mistake it was obligatory on the part of the respondents to comply with the principles of natural justice as has been held by me in Smt. Ratna Sen nee Roy v. The State of West Bengal, reported in 1995 (1) Cal LT 462.

128. In Divisional Superintendent, Eastern Railway, Dinapur and Others Vs. Shri L.N. Keshri and Others, it was held that reduction of scale of an employee without hearing him would be illegal.

129. The aforementioned decisions have been cited with approval by a learned single Judge of this Court in Mrs. Malabika Dhar and others Vs. University of North Bengal and others, where a decision to cancel an admission was taken by the Executive Council of the University on the ground of an accidental mistake, held that situational fairness demanded that the petitioner should be allowed to continue her studies as it was not a case of admission by collusion or manipulation. These decisions are being referred to only for the purpose of showing that even in the case of rectification of mistake, principles of natural justice can be taken recourse to.

130. The word "civil consequences" is of wide amplitude. See D.K. Yadav Vs. J.M.A. Industries Ltd., .

131. In view of my findings aforementioned, it is not necessary to advert to other questions raised in this application and consider the large number of decisions cited by the learned Counsel for the parties.

Re : -- Contention -

(3) Legitimate Expectations

132. It is no doubt true that doctrine of legitimate expectation holds its root in fairness.

133. In Wade & Forsyth's Administrative Law, 7th Edn. it is stated :--

"Claims based on legitimate expectation have been held to require reliance on

representations and resulting detriment to the claimant in the same way as claims based on estoppel. The argument under the table "estoppel" and the "legitimate expectation" argument are substantially the same. In this conflict of doctrines the demands of fairness are proving the stronger. But those demands cannot be pressed to the point where they obstruct changes of policy which a government should be at liberty to make within its discretionary powers or legitimate practices such as selective prosecution of tax offenders by the Inland Revenue."

134. At page 522 of the said treatise the doctrine of legitimate expectation is included within the doctrine of fair hearings. The learned author, however, has pointed out several exceptions to the said rules.

135. In *R. v. Board of Inland Revenue, ex parte MFK Underwriting Agencies Ltd.*, reported in (1990) 1 All ER 91, Bingham LJ and Judge J. (speaking for the Queen's Bench Division) held :--

"In so stating these requirements I do not, I hope, diminish or emasculate the valuable developing doctrine of legitimate expectation. If a public authority so conducts itself as to create a legitimate expectation that a certain course will be followed it would often be unfair if the authority were permitted to follow a different course to the detriment of one who entertained the expectation, particularly if he acted on it. If in private law a body would be in breach of contract in so acting or estopped from so acting a public authority should generally be in no better position. The doctrine of legitimate expectation is rooted in fairness. But fairness is not a one-way street. It imports the notion of equitableness, of fair and open dealing, to which the authority is as much entitled as the citizen. The Revenue's discretion, while it exists, is limited. Fairness requires that its exercise should be on a basis of full disclosure. Counsel for the applicants accepted that it would not be reasonable for a representee to rely on an unclear or equivocal representation. Nor, I think, on facts such as the present, would it be fair to hold the Revenue bound by anything less than a clear, unambiguous and unqualified representation."

136. In *R. v. Ministry of Agriculture, Fisheries and Food, ex parte Hamble (Offshore) Fisheries Ltd.*, reported in (1995) 2 All ER 714, Sedley, J. referring to a large number of decisions holding that the doctrine of legitimate expectation not only extends the procedural fairness but also substantive rights observed :--

"In my respectful view, principle as well as precedent points to these conclusions. As Laws J. points out in the passage I have cited, the real question is one of fairness in public administration. It is difficult to see why it is any less unfair to frustrate a legitimate expectation that something will or will not be done by the decision-maker than it is to frustrate a legitimate expectation that the applicant will be listened to before the decision-maker decides whether to take a particular step. Such a doctrine does not risk fettering a public body in the discharge of public duties because no individual can legitimately expect the

discharge of public duties to stand still or be distorted because of that individual's peculiar position. As I hope to show in what follows, legitimacy is itself a relative concept, to be gauged proportionately to the legal and policy implications of the expectation. This no doubt, is why it has proved easier to establish a legitimate expectation that an applicant will be listened to than that a particular outcome will be arrived at by the decision-maker. But the same principle of fairness in my judgment governs both situations."

137. The learned Judge further observed:

"It is precisely because public authorities have public duties to perform that they can no more be estopped from performing them than they can contract out of them. This is why the decision-maker's knowledge or ignorance of the extent of reliance placed by the applicant upon the factors upon which the expectation is founded has no bearing upon the existence or legitimacy of the expectation. It is upon the practices or promises of the public authority that any such expectation will be built : whether it stands up depends not at all on how much the decision maker knew of the applicant's reliance on the practice or promise. I do not think that any decision of the Court of Justice or any English case which has been put before me suggests otherwise."

138. There may not be any disputes so far as the aforementioned proposition is concerned. However, the Supreme Court of India in a large number of decisions has since considered the parameters of doctrine of legitimate expectation and inter alia held that no action can be based only on legitimate expectation. This aspect of the matter has also been considered by me in A.C. Roy Co. and others Vs. Union of India and others, wherein it was held :--

"However, the Supreme Court recently in Union of India v. Hindustan Development Corporation, reported in Judgments Today 1993(3) SC 15 has clearly held that no enforceable right is created in terms of the doctrine of legitimate expectation, but the same only checks arbitrariness on the part of the State.

139. This aspect of the matter has recently been considered by the Supreme Court upon reviewing its earlier decisions including Kamdhenu Cattle's case (supra) in Madras City Wine Merchants' Association and Another Vs. State of T.N. and Another, , wherein it has been held :--

"From the above it is clear that legitimate expectation may arise -

- (a) if there is an express promise given by a public authority; or
- (b) because to the existence of a regular practice which the claimant can reasonably expect to continue;
- (c) such an expectation must be reasonable. However, if there is a change in policy or in public interest the position is altered by a rule or legislation, no question of legitimate expectation would arise,"

140. In Ghaziabad Development Authority and State of U.P. Vs. Delhi Auto and General Finance Pvt. Ltd. and Maha Maya General Finance Co. Ltd. and another, , the Supreme Court held :--

"9. It is difficult to appreciate how the change of land use of the area in the Master Plan from "recreational" to "residential" could give rise to a legitimate expectation in a private coloniser owning land in that area that he could construct a housing colony therein simply because he had submitted some plan for approval, when grant of the permission under S. 15 of the U. P. Act is not automatic and the statute permitted amendment of the Master Plan by change of the land use even thereafter. The mere fact that the area was shown originally as meant for recreational use, shows that reversion to the original land use is equally permitted by the statute. No legitimate expectation of the kind claimed by these private colonisers could arise on these facts and in a situation like this clearly contemplated by the Statute itself."

141. The Supreme Court also held :--

"The aforementioned decision, therefore, Clearly lay down the law that the High Court in exercise of its jurisdiction under Art. 226 of the Constitution of India cannot interfere in a matter of contract or demand of money under a contract unless there exists a public law element:"

142. It was held that the case must involve a constitutional issue so as to make the same amenable to the jurisdiction of this Court.

143. It is interesting to note that in Union of India and others Vs. Hindustan Development Corpn. and others, the Apex Court while considering the question of legitimate expectation held :

"For legal purposes the expectation cannot be same as an anticipation. It is different from a wish, a desire or a hope nor can it amount to a claim or demand on the ground of a right. However, earnest or sincere a wish, a desire, a hope may be and, however, confidently one may look to them to be fulfilled, they by themselves cannot amount to a assertable expectation and a mere disappointment does not attract legal consequences."

144. It was further observed :--

"As countenanced in Attorney General for New South Wales" case the Court should restrain themselves and restrict such claims duly to the legal limitations. It is a well meant cautions. Otherwise a resourceful litigant having vested interests in contracts licences etc. can successfully indulge in getting welfare activities-mandated by a directive principles thwarted to further his own interests. The caution particularly in the changing scenerio, becomes all the more important."

145. In (1995) 2 All ER 714 also the Court ultimately dismissed the action holding that the petitioner therein had merely a "hope" and not legitimate

expectation.

146. In *R. v. Secretary of State for Transport, ex parte Richmond upon Thames London Borough Council*, reported in 1994 (1) All ER 577 it has been held :--

"Mr. Gordon's submission is that these reference to "the overriding public interest" imply that where a public authority has effectively given an assurance that it would continue to apply a policy which it has adopted, there are two conditions which must be fulfilled before it may lawfully change track; not only that a right to be heard must be accorded to those affected, but also that the change must be justified by reference to the overriding public interest. But this latter condition would imply that the Court is to be the judge of the public interest in such cases, and thus the judge of the merits of proposed policy change. Thus understood, Mr. Gordon's submission must be rejected. The Court is not the judge of the merits of the decision-makers policy."

147. The doctrine of legitimate expectation in my considered opinion has no application in contractual fields particularly when the contract stands concluded. This aspect of the matter has been considered by me in *A.C. Roy Co. and others Vs. Union of India and others*, .

148. The principles of legitimate expectation cannot apply in a contractual field in view of the fact that a procurement contract when granted cannot stand on a higher pedestal than a legitimate expectation. As soon as a contract becomes concluded, the expectation, if any, comes to an end; whereafter the parties will be bound only by the terms thereof. If the doctrine of legitimate expectation is invoked in the matter of enforcement of condition of contract, the same would result in an absurdity, as it is well known that this Court cannot grant a decree for specific performance of contract. Legitimate expectations does not confer a right, but Article 14 of the Constitution does. Thus, this court may invoke its jurisdiction in such matter only when the action of the respondent is found to be arbitrary and violative of Art. 14 of the Constitution. No person can have a legitimate expectation that his tender shall be accepted. He has merely a right to be considered fairly in terms of Art. 14 of the Constitution of India. No other or higher right can be claimed by any person. In a case where a concluded contract has been arrived at, there cannot be any legitimate expectation that he would be allowed to continue with contract inasmuch as indicated hereinbefore such a contingency is clearly stated in the decision of the Patna High Court in *Pancham Singh (supra)* and the other decisions referred to in *Marine Engineer v. Siddeswar Halder* reported in 1991 (1) Cal LJ 467, paragraphs 20 to 25 and an unreported decision of Babulal Jain, J. in *Niranjan Papalia v. Hindusthan Steel Works Construction Ltd.* in Matter No. 3743 of 1994 disposed of on 8th Sept. 1993.

149. In view of the foregoing reasons this writ application is allowed to the extent mentioned hereinbefore. The impugned orders dated 8-10-1995 and 10-10-1995 are quashed. Let a writ of mandamus issue accordingly. However, it

goes without saying that it would be open to the respondent to pass an appropriate order after giving an opportunity of being heard to the petitioner but in the facts and circumstances of this case there will be no order as to costs.

150. Petition allowed.