

(2008) 09 CAL CK 0084

In the Calcutta High Court

Case No : G.A. No. 442 of 2008 and W.P. No. 163 of 2008

Haldiram Ltd.

APPELLANT

Vs

The State of West Bengal and Others

RESPONDENT

Date of Decision : 19-09-2008

Acts Referred:

Constitution of India, 1950 — Article 12, 14, 19, 21, 226

Citation : (2009) 1 CALLT 158 : (2008) 2 ILR (Cal) 1098

Hon'ble Judges : Jayanta Kumar Biswas, J

Bench : Single Bench

Advocate : Prabir Ch. Sen and Manju Agarwal, Ajit Kr. Panja and L.C. Bihani and Manish Paul, in G.A. No. 442 of 2008, for the Appellant; Shyamal Ganguly and K.N. Mukherjee for first and fifth respondents and P.S. Basu, Fazul Haque and S. Talukdar for second, third and fourth respondents, for the Respondent

Final Decision : Dismissed

Judgement

Jayanta Kumar Biswas, J.—Haldiram Limited, a company incorporated under the provisions of the Companies Act, 1956, has taken out this writ petition dated February 14th, 2008 seeking the following final reliefs:

(a) Writ in the nature of Mandamus do issue commanding the respondents and/or each one of them: (i) To act and proceed in accordance with law; (ii) To execute the lease deed in favour of the petitioner in terms of plot No. C-5 being premises No. 1726, Rajdanga Road, Kolkata-700107 as stated in the notice inviting tender, brochure and Deed dated 22nd May 2003; (iii) To withdraw/rescind/set aside the order dated 8th January 2008 canceling the Licence Deed being Annexure "P55" and the Refund Advice dated 1st February 2008 being annexure "P51" hereof;

(b) A writ in the nature of prohibition do issue restraining the respondent authorities and/or each one of them from taking any steps in furtherance to the order dated 8th January 2008 including taking over possession of the land from the petitioner and/or creating any disturbance in carrying on business therefrom

situate at premises No. 1726, Rajdanga Road, Kolkata - 700107;

(c) Writ in the nature of Certiorari do issue calling upon the respondent authorities to transmit all the records, papers, files etc. with regard to the above case so that after considering the same the order dated 8th January 2008 passed for cancellation of license deed and refund advise may be quashed;

2. On January 13th, 2003 the second respondent, Kolkata Metropolitan Development Authority (in short "KMDA") published a tender notice offering to lease out a 122-cottah plot of land No. C-5, a prime location in the east Kolkata township, for institutional or commercial or mixed use purpose, and stating that booklets containing the details of the plot and the terms and conditions inviting sealed bids along with the application form, would be available from the office of its executive engineer concerned. Haldiram participated and emerged as the highest bidder. By a letter dated February 18th, 2003 KMDA accepted Haldiram's bid and expressed its willingness to offer an allotment of the plot for establishment of a supermarket-cum-food processing unit along with residential facility for company management and staff only compatible with the project, report whereof had been submitted by Haldiram under cover of its letter dated December 4th, 2002. It was further stated that initially the land would be allotted on licence basis for a period of 99 years, and that the licence deed would be converted into a lease deed in due course. By a letter dated February 20th, 2003 Haldiram accepted the offer. By a letter dated March 6th, 2003 KMDA allotted the plot to Haldiram for a premium of Rs. 8,04,69,511. After approval of the appropriate authority, KMDA prepared memo dated April 29th, 2003 recording the facts of its handing over and Haldiram's taking over possession of the land on April 29th, 2003.

3. The requisite deed of licence was executed on May 22nd, 2003. In Clause 5(iii) it was stated that at its own costs and within three years from May 22nd, 2003, or within such further time as KMDA might at its option allow in writing on sufficient and reasonable grounds, Haldiram would erect, construct and complete the proposed supermarket-cum-food processing unit along with residential facility for company management and staff with boundary walls, sewers and drains in accordance with plans, sections and specifications that should be approved by the appropriate authorities. In Clause 5(iv) it was provided that Haldiram would keep the land clean and free from all sorts of nuisance, and would not allow heavy accumulation of water on it. In Clause 5(viii) it was provided that without previous consent of KMDA, Haldiram would not use or allow to be used the land or any structure erected thereon or any part thereof for any purpose other than the purpose of allotment thereof; and in Clause 5(xiii) it was provided that Haldiram would make arrangement for water supply as well as for obtaining electricity connection within the land at its own costs. In Clause 7(i) it was provided that on breach of any covenant on Haldiram's part contained in the deed and to be performed or observed by it, it would be lawful for KMDA to re-enter upon the land after determining the licence. In Clause 7(iii) it was

provided that any relaxation or indulgence granted by KMDA to Haldiram or by Haldiram to KMDA would not in any way prejudice the rights of the parties under the deed of licence.

4. In a letter dated December 31st, 2007 KMDA alleged that having not taken any steps for construction of the project, Haldiram had failed to observe and perform the conditions mentioned in Sub-clauses (iii) and (viii) of Clause 5 of the deed of licence. By the letter KMDA called upon Haldiram to explain why the allotment should not be cancelled and KMDA should not re-enter upon the land in terms of provisions of Clause 7(i) of the deed of licence.

5. Haldiram submitted a written reply dated January 8th, 2008. It stated that it had applied to the municipal corporation for mutation, but did not receive the mutation certificate; that it had obtained approval from department of explosive on December 12th, 2004; that on March 10th, 2006 it applied for a no objection certificate from the pollution control board, and it was awaiting a reply; that it applied to the fire services authority for building permit and paid the demanded fee on July 26th, 2005; that it submitted project construction plan to the municipal corporation that was scrutinizing the papers; that it submitted a letter on October 5th, 2005 asking KMDA to clarify the actual status of the land, but no reply was received; and that since it was interested in starting the project, it should be permitted to start the work as soon as it received approval from the appropriate authorities, and hence KMDA should convert the licence deed into a registered lease deed to serve the requirement of appropriate related authorities to sanction the project plan.

6. After considering the reply and hearing Haldiram's representative, the special secretary of KMDA issued the letter dated January 8th, 2008 cancelling the licence on the ground that Haldiram having totally failed to take steps in terms of Sub-clauses (iii), (iv) and (xiii) of Clause 5 of the deed of licence, KMDA was entitled to exercise its right to determine the licence and re-enter upon the land. Questioning KMDA's such action and decision the writ petition has been taken out seeking the final reliefs quoted hereinbefore. One Smt Sumitra Dutta has taken out an application (G.A. No. 442 of 2008) for an order granting her leave to intervene in the case.

7. Mr Basu, counsel for KMDA, has raised the preliminary objection that questioning KMDA's action leading to the decision determining the licence, and seeking enforcement of clauses of the contract dealing with rights and liabilities of the parties regarding execution of a deed of lease, Haldiram is not entitled to approach the writ court under Article 226 of the Constitution of India. His contention is that since no public law element is involved in the action leading to the decision taken by KMDA in exercise of its pure private law contractual rights available under the deed of licence, and Haldiram has no public law right to seek enforcement of any clause of the contract, Haldiram's remedy, if any, is only before the appropriate civil court, and not before the writ court.

8. He has relied on Radhakrishna Agarwal and Others Vs. State of Bihar and Others, ; Union of India and others Vs. M/s. Binani Consultants (P) Ltd. and another, ; Kerala State Electricity Board and Another Vs. Kurien E. Kalathil and Others, ; Verigamto Naveen Vs. Government of Andhra Pradesh and Others, ; World Tel Inc. and Another Vs. Union of India (UOI) and Others,) ; Defense Enclave Residents Society Vs. State of U.P. and Others, ; National Textile Corpn. Ltd. and Others Vs. Haribox Swalram and Others, Master Marine Services Pvt. Ltd. Vs. Metcalfe and Hodgkinson Pvt. Ltd. and Another, ; Food Corporation of India and Others Vs. Harmesh Chand, ; Coal India Ltd Vs. Indian Explosive Ltd. and Others, ; my judgment dated 20.2.2006 in W.P. No. 2083 of 2005 (Shimnit Utsch India Pvt. Ltd. and Anr. v. W.B. Transport Infrastructure Development Corporation and Ors.); Rajasthan Housing Board and Another Vs. G.S. Investments and Another, ; Noble Resources Ltd. Vs. State of Orissa and Another, Ramchandra Murarilal Bhattad and Others Vs. State of Maharashtra and Others, ; and my judgment dated 9.3.2007 in W.P. No. 1491 of 2005 (S.R. Associated Construction Co. Pvt. Ltd. and Anr. v. Union of India and Ors.).

9. Submissions made by Mr. Sen, counsel for Haldiram, are these. The land was acquired under provisions of the Land Acquisition Act, 1894 for a public purpose. It was offered for allotment through a tender process for a public purpose by KMDA, a statutory authority constituted under the West Bengal Town and Country (Planning and Development) Act, 1979. Hence public law element is explicit in its decision, and it is evident from the impugned decision itself. Public law element was involved at the time of entering into the contract, in the subject matter of the contract, and also in the working out of the contract. If the contract is for a public purpose, then writ lies. In any case, the question of involvement of public law element in the action leading to the decision is irrelevant, since on determination of the licence the whole matter left the realm of contract, and there is no authority holding that when termination of a contract is questioned, writ will not lie. KMDA has given reasons for determining the licence, and Haldiram is inviting the writ court to examine whether the reasons can stand the test of reasonableness, fairness and non-arbitrariness in every State action. Since KMDA is a statutory body, and hence a State within the meaning of Article 12, Haldiram is entitled to seek judicial review of its decision determining the licence. The impugned decision is not supported by reasons. Every action of KMDA must be in public interest. Here the impugned decision was taken against the public interest. Public law element and public interest element are synonymous, no distinction should be made between public law and private law. Even if public law element is not involved, writ lies in contractual matters. Ouster of jurisdiction conferred by the Constitution should not be easily inferred, and the judicial trend is against refusal to exercise writ powers. Remedy before the civil court will not give adequate relief. In the present case no disputed question of fact requiring adjudication upon examination of witnesses and a detailed analysis of evidence is involved. Hence there is no reason to say that the writ petition is not maintainable.

10. He has relied on Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, ; Kumari Shrilekha Vidyarthi and Others Vs. State of U.P. and Others, ; Jute Corporation of India Ltd. v. Nellimarla Jute Mills Co. Ltd. and Anr. 1993 (1) CLT 79; LIC of India and Another Vs. Consumer Education and Research center and Others, ; Union of India and others Vs. M/s. Binani Consultants (P) Ltd. and another, ; Common Cause, A Registered Society Vs. Union of India and Others, ; ABL International Ltd. and Another Vs. Export Credit Guarantee Corporation of India Ltd. and Others, ; and Reliance Energy Limited and Another Vs. Maharashtra State Road Development Corporation Ltd. and Others, .

11. Since quite a substantial number of authorities have been cited by counsel for the parties, and their common submission is that the principles and propositions laid down in them will provide the answer to the issue in question, I think their examination in chronological order, rather than in order of their respective referring counsel, will be more convenient to ascertain what their respective ratios are, and the extent to which they are of assistance, if any, in this case.

12. In Radhakrishna Agarwal and Others Vs. State of Bihar and Others, , in 1970 the Government of Bihar executed a lease in terms whereof (a) the Government was entitled to revise, every three years, the rate of royalty payable by the lessee for collecting and exploiting Sal seeds from forest area, and (b) the lessee was to establish a factory in the State for processing Sal seeds and extraction of oil therefrom, within five years from the date of the agreement, failing which the agreement itself was to terminate. In 1974 the Government made an order revising the rate of royalty, and by a letter dated March 15th, 1975 it cancelled the lease. Two writ petitions were filed questioning the revision of royalty and cancellation of the lease contending that the Government action amounted to violation of Article 14 of the Constitution. The High Court held that since the contract was non-statutory and the rights and liabilities of the parties were governed by the terms of the contract, Radhakrishna, complaining breach of the contract by the Government, was not entitled to file the writ petitions under Article 226 seeking writ or order compelling the Government to remedy a breach of contract pure and simple. While dismissing the appeals, their Lordships of the Supreme Court said (para.9 of the report):

9. ...All constitutional powers carry corresponding obligations with them. This is the rule of law which regulates the operation of organs of Government functioning under a Constitution. And, this is exactly what was meant to be laid down by this Court in Erusian Equipment and Chemicals Ltd. Vs. State of West Bengal and Another, on which learned Counsel for the appellants sought to rely strongly....

13. Their Lordships explained the ratio of Erusian Equipment and Chemicals Ltd. Vs. State of West Bengal and Another, by saying (para.10 of the report):

10. It is thus clear that th Erusian Equipment and Chemicals Ltd. Vs. State of West Bengal and Another, involved discrimination at the very threshold or at the time of entry into the field of consideration of persons with whom the Government could contract at all. At this stage, no doubt, the State Act purely in its executive capacity and is bound by the obligations which dealings of the State with the individual citizens import into every transaction entered into in exercise of its constitutional powers. But, after the State or its agents have entered into the filed of ordinary contract, the relations are no longer governed by the constitutional provisions but by the legally valid contract which determines rights and obligations of the parties inter se. No question arises of violation of Article 14 or of any other constitutional provision when the State or its agents, purporting to act within this filed, perform any act. In this sphere, they can only claim rights conferred upon them by contract and are bound by the terms of the contract only unless some statute steps in and confers some special statutory power or obligation on the State in the contractual field which is apart from contract.

14. Then their Lordships noted and held (paras.11 and 17 of the report):

11. In the cases before us the contracts do not contain any statutory terms or obligations and no statutory power or obligation which could attract the application of Article 14 of the Constitution is involved here. Even in cases where the question is of choice or consideration of competing claims before an entry into the field of contract facts have to be investigated and found before the question of a violation of Article 14 could arise. If those facts are disputed and require assessment of evidence the correctness of which can only be tested satisfactorily by taking detailed evidence, involving examination and cross-examination of witnesses, the case could not be conveniently or satisfactorily decided in proceedings under Article 226 of the Constitution. Such proceedings are summary proceedings reserved for extraordinary cases where the exceptional and what are described as perhaps not quite accurately, "prerogative" powers of the Court are invoked. We are certain that the cases before us are not such in which powers under Article 226 of the Constitution could be invoked.

* * * * *

17. Learned Counsel contends that in the cases before us breaches of public duty are involved. The submission made before us is that, whenever a State or its agents of officers deal with the citizen, either when making a transaction or, after making it, acting in exercise of powers under the terms of a contract between the parties, there is a dealing between the State and the citizen which involves performance of "certain legal and public duties". If we were to accept this very wide proposition, every case of a breach of contract by the State or its agents or its officers would call for interference under Article 226 of the Constitution. We do not consider this to be a sound proposition at all.

15. It was argued before their Lordships that the State was under a special

constitutional obligation, in view of Article 14, while dealing with the public even when the contract was there to regulate the dealings. Their Lordships noticed that in the authorities cited it had been held that where the source of the right was contractual, but the action complained of was taken in exercise of a statutory power, relief could be claimed under Article 226. Counsel for Radhakrishna also argued that the Government had discriminated against Radhakrishna in that other parties governed by similar contracts for other areas had been treated otherwise. Dealing with this contention, their Lordships said (para.21 of the report):

21. In the cases before us, allegations on which a violation of Article 14 could be based are neither properly made nor established. Before any adjudication on the question whether Article 14 of the Constitution could possibly be said to have been violated, as between persons governed by similar contracts, they must be properly put in issue and established. Even if the appellants could be said to have raised any aspect of Article 14 of the Constitution and this Article could at all be held to operate within the contractual field whenever the State enters into such contracts, which we gravely doubt, such questions of fact do not appear to have been urged before the High Court. And, in any event, they are of such a nature that they cannot be satisfactorily decided without a detailed adduction of evidence, which is only possible in ordinary civil suits, to establish that the State, acting in the executive capacity through its officers, has discriminated between parties identically situated. On the allegations and affidavit evidence before us we cannot reach such a conclusion. Moreover, as we have already indicated earlier, the correct view is that it is the contract and not the executive power, regulated by the Constitution, which governs the relations of the parties on facts apparent in the cases before us.

16. Another argument made in the case was that the lease had been cancelled without giving any opportunity to Radhakrishna to show cause; and this was answered by their Lordships by saying (para.23 of the report):

23. This argument appears to us to be wholly irrelevant inasmuch as a question of the distinction between an administrative and quasi-judicial decision can only arise in the exercise of powers under statutory provisions. Rules of natural justice are attached to the performance of certain functions regulated by statutes or rules made thereunder involving decisions affecting rights of parties. When a contract is sought to be terminated by the Officers of the State, purporting to act under the terms of an agreement between parties, such action is not taken in purported exercise of a statutory power at all.

17. In *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, , Ramana, a person not participating in the tender process, filed the writ petition in the High Court questioning the acceptance of tender of a participant who was not eligible to participate, having not satisfied all the eligibility conditions mentioned in the tender notice. Ramana alleged violation of Article 14 in that he had been denied equal opportunity to participate in the tender process

as an ineligible tenderer. It was only in this context that their Lordships of the Supreme Court examined the extent of constitutional obligations of International Airport Authority of India, an instrumentality of the Government of India, and hence a State within the meaning of Article 12 of the Constitution; and held that it was not entitled to act arbitrarily in accepting the tender of the ineligible tenderer. There was no scope to consider Radhakrishna, which was actually not considered. Ramana's appeal was dismissed on the ground that he having moved the writ petition five months after acceptance of the tender, was not entitled to any relief under Article 226.

18. In Kumari Shrilekha Vidyarthi and Others Vs. State of U.P. and Others, , challenging a G.O. No. D-284-Seven-Law-Ministry dated February 6th, 1990 issued by the Joint Legal Remembrancer, Justice (Law Ministry) Section of the Government of Uttar Pradesh some writ petitions were filed before the Allahabad High Court, which were dismissed by a common judgment; and thereupon the special leave petitions and also some writ petitions under Article 32 were filed before the Supreme Court, before which two questions arose for decision: (i) whether the Government order was amenable to judicial review; and (ii) if so, whether it was liable to be quashed as violative of Article 14, being arbitrary. By the Government order the joint legal remembrancer informed all the district magistrates of the State that regarding renewal of tenure of all the existing Government counsel and calling of new panels for new appointments, the administration had taken a decision to extend the tenure of all the Government counsel, who were working at that time, till February 28th, 1990 only, and to receive immediately new panels from the district magistrates for new appointments in their places. The Government order was issued on the basis of a policy decision taken in exercise of the Government's executive power. In such context the nature of the appointments was examined limitedly, since it was contended by the State that the relationship between the parties being purely contractual, the appointees had no right to continue in the offices against the will of the State. Once again there was no scope to consider Radhakrishna, which was actually not considered.

19. Negating the contention on the ground that the appointees were actually holders of offices and posts as law officers of the State, their Lordships of the Supreme Court said (paras.23 and 34 of the report):

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

* * * * *

34. In our opinion, the wide sweep of Article 14 undoubtedly takes within its fold the impugned circular issued by the State of U.P. in exercise of its executive power, irrespective of the precise nature of appointment of the Government

counsel in the districts and the other rights, contractual or statutory, which the appointees may have. It is for this reason that we base our decision on the ground that independent of any statutory right, available to the appointees, and assuming for the purpose of this case that the rights flow only from the contract of appointment, the impugned circular, issued in exercise of the executive power of the State, must satisfy Article 14 of the Constitution and if it is shown to be arbitrary, it must be struck down. However, we have referred to certain provisions relating to initial appointment, termination or renewal of tenure to indicate that the action is controlled at least by settled guidelines, followed by the State of U.P., for a long time. This too is relevant for deciding the question of arbitrariness alleged in the present case.

20. In *Jute Corporation of India Ltd. v. Nellimarla Jute Mills Co. Ltd. and Anr.* 1993 (1) CLT 79, JCI cancelled the contract for sale of raw jute on the ground that Nellimarla had failed to make payment arrangement within the due date. Nellimarla's writ petition was allowed, and in the appeal JCI's one of the contentions was that the disputes arising out of a concluded contract could not be adjudicated by the writ court that was approached actually for specific performance of a contract; and in support of the contention reliance was placed on *Radhakrishna*, which was considered by their Lordships saying (para.55 of the report):

55. In the case of *Radhakrishna Agarwal* (supra) the facts required taking of detailed evidence involving examination and cross-examination of witnesses. It was found that the questions raised were of such a nature that they could not be satisfactorily decided without taking detailed evidence which is only possible in ordinary civil suit....

21. Their Lordships dismissed JCI's appeal on the basis of the following principles (para.56 of the report):

56. On the basis of the authorities mentioned above and particularly on the basis of the recent decisions of the Supreme Court as mentioned above, it is not possible for us to accept the absolute proposition that no writ petition can be entertained when the action challenged pertains to the domain of a concluded contract. If the arbitrariness on the part of the authority concerned is writ large and the matter may be decided on the basis of the documents on record and in our view it is open to the aggrieved party to challenge such arbitrary and illegal action by filing appropriate writ petition under Article 226 of the Constitution.

Further in our view, each case would have to be decided on its facts and circumstances and there cannot be said to be an absolute bar as regards the maintainability of the writ petition.

22. In *LIC of India and Another Vs. Consumer Education and Research center and Others*, , the writ petition under Article 226 was filed before the Gujarat High Court in 1980 questioning the constitutional validity of a restriction imposed by LIC that proposals for its policies under the scheme in Table 58 would be

entertained only from persons in Government or quasi-Government service, or in the service of reputed commercial firms. Against the decision of the Division Court of the High Court dated January 31st, 1994 declaring the clause to be unconstitutional, LICI filed the appeal, and a cross appeal was filed by the writ petitioners.

23. Dismissing the appeals their Lordships noted (para.19 of the report):

19. The question, therefore, is whether the appellant is free to incorporate as a part of its business principles, any term of its choice. It is true that the appellant is entitled to accept insurance policy from a person possessed of health with first class life and before acceptance of the policy the insured is required to undergo medical examination as per policy at his expense to satisfy his condition of health. The question is whether the term policy needs to be restricted only to the employees of Govt., quasi-government or reputed commercial firms and whether such condition is just, fair and reasonable or based on reasonable classification consistent with Articles 14 and 21 of the Constitution. The contention of the appellants is that life insurance policy being a contract of insurance becomes a binding contract on appellants' acceptance. Until a contract is entered into, the proposed insured does not acquire any right in insurance policy. The terms of the contract under Table 58 cannot be declared ultra vires before a concluded contract emerged. Contract of insurance operates in the arena of contractual relations. Refusal to enter into contract does not infringe any fundamental right or a legal right nor the respondents are entitled to compel the appellants to enter into favourable relations when they did not fulfill the essential terms of the proposal. Therefore, writ petition is not maintainable to enforce such rights in embryo nor they be entitled to declaration in their favour.

24. Having noticed the questions and the contentions, and after considering various authorities, their Lordships held (para.28 of the report):

28. ...The actions of the State, its instrumentality, any public authority or person whose actions bear insignia of public law element or public character are amenable to judicial review and the validity of such an action would be tested on the anvil of Article 14. While exercising the power under Article 226 the Court would be circumspect to adjudicate the disputes arising out of the contract depending on the facts and circumstances in a given case. The distinction between the public law remedy and private law field cannot be demarcated with precision. Each case has to be examined on its own facts and circumstances to find out the nature of the activity or scope and nature of the controversy. The distinction between public law and private law remedy is now narrowed down. The actions of the appellants bears public character with an imprint of public interest element in their offers with terms and conditions mentioned in the appropriate table inviting the public to enter into contract of life insurance. It is not a pure and simple private law dispute without any insignia of public element. Therefore, we have no hesitation to hold that the writ petition is maintainable to test the validity of the conditions laid in Table 58 term policy and the party need

not be relegated to a civil action.

25. In *Union of India and others Vs. M/s. Binani Consultants (P) Ltd. and another*,) , Binani that entered into an agreement with Calcutta Telephones for acting as operating agency of pay phones in the city of Calcutta and obtained statutory licence for the purpose, initially paid the bills raised by the authorities according to terms and conditions of a Government notification that was issued subsequent to the agreement, and when its pay phones were disconnected for default in payment of bills, it took out the writ petition contending that the terms and conditions of the agreement could not be revised by a subsequent Government notification; and in this context the question arose whether the writ petition involving contractual rights of the parties was maintainable.

26. Reversing the decision of the single Judge and dismissing the writ petition, their Lordships of the Division Court held that the relationship between Binani and Calcutta Telephones was that of agent and principal governed by the terms and conditions of the agreement falling exclusively in the contractual field having no connection with any fundamental right of anyone. In the process, after considering various authorities, their Lordships stated the following principles (para.13 of the report):

13. ...A Public Body may have a power to take decision which will in some way affect or vary existing private law right of an individual. An individual may challenge such a decision for judicial review. If the source of power is statutory indicating that the matter has a sufficiently public element to render it susceptible to judicial review. If it is a case of a private law right the individual had to proceed by an ordinary action....

27. In *Common Cause, a Common Cause, A Registered Society Vs. Union of India and Others*, , their Lordships of the Supreme Court were considering a petition seeking review of two judgments given in the writ petition concerned. Capt. Satish Sharma who took out the review petition contended that in exercise of limited jurisdiction under Article 32 the Supreme Court could not award exemplary damages for the tort of misfeasance in office, since in public law proceedings instituted under Article 32 damages could be awarded only for violation of fundamental rights of citizens either by the Government or its officers, but not for tort for which action, if any, could be initiated under private law by filing a suit in a court of competent jurisdiction. While turning down the contention their Lordships examined the question (para.38 of the report) whether action for tort could have been initiated against Capt. Satish Sharma under public law.

28. In such context their Lordships said (paras.40 and 41 of the report):

40. Essentially, under public law, it is the dispute between the citizen or a group of citizens on the one hand and the State or other public bodies on the other, which is resolved. This is done to maintain the rule of law and to prevent the State or the public bodies from acting in an arbitrary manner or in violation of

that rule. The exercise of constitutional powers by the High Court and the Supreme Court under Articles 226 and 32 has been categorised as power of "judicial review". Every executive or administrative action of the State or other statutory or public bodies is open to judicial scrutiny and the High Court or the Supreme Court can, in exercise of the power of judicial review under the Constitution, quash the executive action or decision which is contrary to law or is violative of fundamental rights guaranteed by the Constitution. With the expanding horizon of Article 14 read with other articles dealing with fundamental rights, every executive action of the Government or other public bodies, including instrumentalities of the Government, or those which can be legally treated as "Authority" within the meaning of Article 12, if arbitrary, unreasonable or contrary to law, is now amenable to the writ jurisdiction of this Court under Article 32 or the High Courts under Article 226 and can be validly scrutinized on the touchstone of the constitutional mandates.

41. In a broad sense, therefore, it may be said that those branches of law which deal with the rights/duties and privileges of the public authorities and their relationship with the individual citizens of the State pertain to "public law", such as constitutional and administrative law, in contradistinction to "private law" fields which are those branches of law which deal with the rights and liabilities of private individuals in relation to one another.

29. In Kerala State Electricity Board and Another Vs. Kurien E. Kalathil and Others, , Kurien participated in the tender process initiated by Kerala State Electricity Board for construction of a dam, and ultimately the parties executed agreements; and during subsistence of the agreements the Government issued a notification under the Minimum Wages Act, 1948 revising the minimum wages payable to the employees employed in the works specified in the notification. Kurien claimed that he started paying revised minimum wages and that applying the labour escalation formula the board initially paid for the work, but later on declined to pay. The parties got involved in litigation and the disputes and differences ultimately led the board issue a recovery order dated December 23rd 1994, and questioning such recovery order Kurien filed a writ petition. He also prayed for an order directing the board to pay the claimed amounts on account of labour escalation with interest. When the writ petition was pending the board issued an order dated February 26th, 1997 terminating the contract, and this led to the filing of the second writ petition by Kurien.

30. The High Court held that the termination order was arbitrary, unjust and not in public interest, and directed the board to pay Kurien labour escalation amounts with interest. Their Lordships of the Supreme Court were considering the correctness of such decision of the High Court. As to maintainability of Kurien's first writ petition their Lordships said (para.8 of the report):

8. Elaborating the first submission, learned Counsel for the appellant submits that the dispute relating to interpretation of a clause in a contract and implementation of such clause cannot be made the subject-matter of a writ

petition and remedy of the aggrieved person lies in approaching the civil court or some other appropriate forum. It was further contended that all contracts entered into by a body whose existence may be governed by the provisions of a statute are not statutory contracts.

31. Accepting the contention and holding that the writ petition was liable to be dismissed, their Lordships said (paras.10 and 11 of the report):

10. We find that there is a merit in the first contention of Mr Raval. Learned Counsel has rightly questioned the maintainability of the writ petition. The interpretation and implementation of a clause in a contract cannot be the subject-matter of a writ petition. Whether the contract envisages actual payment or not is a question of construction of contract. If a term of a contract is violated, ordinarily the remedy is not the writ petition under Article 226. We are also unable to agree with the observations of the High Court that the contractor was seeking enforcement of a statutory contract. A contract would not become statutory simply because it is for construction of a public utility and it has been awarded by a statutory body. We are also unable to agree with the observation of the High Court that since the obligations imposed by the contract on the contracting parties come within the purview of the Contract Act, that would not make the contract statutory. Clearly, the High Court fell into an error in coming to the conclusion that the contract in question was statutory in nature.

11. A statute may expressly or impliedly confer power on a statutory body to enter into contracts in order to enable it to discharge its functions. Dispute arising out of the terms of such contracts or alleged breaches have to be settled by the ordinary principles of law of contract. The fact that one of the parties to the agreement is a statutory or public body will not by itself affect the principles to be applied. The disputes about the meaning of a covenant in a contract or its enforceability have to be determined according to the usual principles of the Contract Act. Every act of a statutory body need not necessarily involve an exercise of statutory power. Statutory bodies, like private parties, have power to contract or deal with property. Such activities may not raise any issue of public law. In the present case, it has not been shown how the contract is statutory. The contract between the parties is in the realm of private law. It is not a statutory contract. The disputes relating to interpretation of the terms and conditions of such a contract could not have been agitated in a petition under Article 226 of the Constitution of India. That is a matter for adjudication by a civil court or in arbitration if provided for in the contract. Whether any amount is due and if so, how much and refusal of the appellant to pay it is justified or not, are not the matters which could have been agitated and decided in a writ petition. The contractor should have relegated to other remedies.

In *Verigamto Naveen Vs. Government of Andhra Pradesh and Others*, , by a decision dated December 1st, 1993 the Government of Andhra Pradesh that previously issued two notifications and an order at first leasing certain areas for mining purpose to Andhra Pradesh Mineral Development Corporation, and then

granting the corporation permission to sub-let, decided to put an end to all existing sub-leases; and questioning the validity of such decision the writ petitions were filed. The single Judge allowed the writ petitions and the appeals lodged against the decisions were referred by the Division Court to a Full Bench that dismissed the appeals. Holding that some of the appeals lost utility by efflux of time, and hence it was not necessary to decide the questions involved in them, their Lordships of the Supreme Court allowed the other appeals to the extent the High Court granted relief of extension of the sub-leases, and in the process considered the question whether relief sought and granted by the High Court arose purely in the contractual field disentitling Veriganto and Ors. to any relief under Article 226. After considering various authorities, their Lordships said (para.21 of the report):

21. ...Though there is one set of cases rendered by this Court of the type arising in Radhakrishna Agarwal case much water has flown in the stream of judicial review in contractual filed. In cases where the decision-making authority exceeded its statutory power or committed breach of rules or principles of natural justice in exercise of such power or its decision is perverse or passed an irrational order, this Court has interceded even after the contract was entered into between the parties and the Government and its agencies. We may advert to three decisions of this Court in Dwarkadas Marfatia & Sons v. Board of Trustees of the Port of Bombay, Mahabir Auto Stores v. Union Oil Corporation and Shrilekha Vidyarthi (Kumari) v. State of U.P. Where the breach of contract involves breach of statutory obligation when the order complained of was made in exercise of statutory power by a statutory authority, though cause of action arises out of or pertains to contract, brings it within the sphere of public law because the power exercised is apart from contract. The freedom of the Government to enter into business with anybody it likes is subject to the condition of reasonableness and fair play as well as public interest. After entering into a contract, in cancelling the contract which is subject to terms of the statutory provisions, as in the present case, it cannot be said that the matter falls purely in a contractual field.

Therefore, we do not think it would be appropriate to suggest that the case on hand is a matter arising purely out of a contract and, therefore, interference under Article 226 of the Constitution is not called for. This contention also stands rejected.

32. I do not think the observations in World Tel Inc. and Another Vs. Union of India (UOI) and Others, made by their Lordships of the Supreme Court that the High Court should not have entertained the writ petition filed by World Tel making a claim for refund from Doordarshan, and that World Tel should have approached the appropriate civil court, are of any real assistance in the present case.

33. In ABL International Ltd. and Another Vs. Export Credit Guarantee Corporation of India Ltd. and Others, , ABL that was to export certain quantity of

tea, on a direction issued by the Reserve Bank of India, approached the Export Credit Guarantee Corporation of India Ltd. to insure the risk of payment involved in the contract of export. The corporation issued a comprehensive risk policy covering the risk. ABL made a claim, since it did not get payment from Kazak Corporation. The Export Credit Guarantee Corporation repudiated ABL's claim stating that it was not obliged to compensate for the loss, since ABL had changed the terms of the contract of payment without consulting it. Feeling aggrieved, ABL moved this Court by filing a writ petition for orders quashing the letters of repudiation and directing the Export Credit Guarantee Corporation to pay under the contract of insurance. The single Judge allowed the writ petition, but the Division Court reversed the decision holding that disputed questions of fact involved in the case could not be adjudicated in writ proceedings.

34. Before their Lordships of the Supreme Court counsel for Export Credit Guarantee Corporation contended (para.7 of the report):

7. ...on facts and circumstances of this case, a writ petition was not maintainable nor can it be construed as an appropriate remedy. She pointed out that the subject-matter is a dispute arising out of a contract and is not a matter falling under the purview of administrative law. According to her, the doctrine of fairness and reasonableness applied only in the exercise of statutory or administrative actions of a State and not in the exercise of a contractual obligation and issues arising out of contractual matters will have to be decided on the basis of the law of contract and not on the basis of the administrative law. It was her argument that at the most in matters involving statutory contracts where action of the State involves a public duty, a writ may lie but in the instant case, the contract was neither a statutory contract nor did the duty of the first respondent under the contract have any public law element involved in it....

35. Thus one of the questions that fell for their Lordships' consideration was (para.8 of the report):

8. whether a writ petition under Article 226 of the Constitution of India is maintainable to enforce a contractual obligation of the State or its instrumentality, by an aggrieved party.

36. Observing (para.9 of the report) that the question was no more *res integra* and was settled by a large number of pronouncements of the Supreme Court, their Lordships considered the authorities cited by counsel and turned down the contention holding (para.24 of the report):

24. It is clear from the above two objects of the Company that apart from the fact that the Company is wholly a Government-owned company, it discharges the functions of the Government and acts as an agent of the Government even when it gives guarantees and it has a responsibility to discharge such functions in the national interest. In this background it will be futile to contend that the actions of the first respondent impugned in the writ petition do not have a touch of public function or discharge of a public duty. Therefore, this argument of the first

respondent must also fail.

37. After considering the authorities cited in support of the contention that the writ petition seeking in effect enforcement of a money claim was not maintainable, and turning down the contention, their Lordships said (para.27 of the report):

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

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

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

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

38. In *Defense Enclave Residents Society Vs. State of U.P. and Others*, , the writ petitions were filed under Article 32. The Meerut Development Authority formulated a scheme known as "Defence Enclave." On the basis of the original fixed rate for allotment of plots the society took possession of the plots. Subsequently, the development authority decided that the plot holders would have to pay an additional amount, and accordingly it called upon the society to pay. Questioning such action the society filed the writ petition contending that in view of the concluded contract demand of the development authority amounted to violation of the contract between the parties, and hence infringed its members' fundamental right to property. The development authority claimed that the sale deeds executed by the purchasers contained a clause entitling it to realize additional amount.

39. In such context their Lordships of the Supreme Court said (para. 11 of the report):

11. In our view, this writ petition is entirely misconceived. A perusal of the grounds on which relief is sought makes it clear that what is really a contractual dispute is sought to be masqueraded as breach of fundamental rights under Articles 14, 19 and 21 of the Constitution.

40. As to the allegation of breach of Article 14 their Lordships said (para.14 of the report) that the issue could not be adjudicated unless the full facts of the contractual dispute were ascertained and the contractual rights of the parties were adjudicated. Their Lordships further said (para.19 of the report) that the question whether there was a right reserved in the development authority to pass on the additional liability to the purchasers, was to be determined by the terms of the contract between the parties.

41. In *National Textile Corpn. Ltd. and Others Vs. Haribox Swalram and Others*, ,

Haribox with another person moved this Court by filing the writ petition seeking a mandamus commanding National Textile Corpn. to deliver the withheld goods upon adjustment of advance payment. The single Judge dismissed the writ petition, and the Division Court reversed the decision; and allowing the appeal and dismissing the writ petition on more than one ground, their Lordships of the Supreme Court said (para.17 of the report):

17. ...It is well settled that in order that a mandamus be issued to compel the authorities to do something, it must be shown that there is a statute which imposes a legal duty and the aggrieved party has a legal right under the statute to enforce its performance. The present is a case of pure and simple business contract. The writ petitioners have no statutory right nor is any statutory duty cast upon the appellants whose performance may be legally enforced. No writ of mandamus can, therefore, be issued as prayed by the writ petitioners.

42. In Master Marine Services Pvt. Ltd. Vs. Metcalfe and Hodgkinson Pvt. Ltd. and Another, , the High Court allowed Metcalfe's writ petition filed questioning decision of Container Corporation of India that floated a tender for hiring professional services to give the work to Master Marine. Metcalfe contended that Master Marine was not eligible to participate in the tender process. It is in this context that while allowing the appeal and dismissing the writ petition their Lordships of the Supreme Court said (para.12 of the report):

12. After an exhaustive consideration of a large number of decisions and standard books on administrative law, the Court enunciated the principle that the modern trend points to judicial restraint in administrative action....

43. In Food Corporation of India and Others Vs. Harmesh Chand, , the writ petition was filed questioning a decision cancelling Harmesh's contract. The High Court issued a mandamus directing Food Corporation to permit Harmesh to continue to work. Their Lordships of the Supreme Court held that the High Court ought not to have gone into the seriously disputed questions of fact, and that it was not an appropriate case to exercise writ powers. I do not think in that case any law was declared by their Lordships.

44. In Coal India Ltd Vs. Indian Explosive Ltd. and Others, , Indian Explosive that participated in the tender process initiated by Coal India inviting offers for supply of bulk loading explosives, cartidge explosives, etc. and got the work order as the successful tenderer, and then entered into a contract, filed the writ petition in this Court questioning the decision of Coal India to incorporate a supplementary clause in the concluded contract. Their Lordships of the Division Court were examining whether Coal India's action fell within the realm of public law entitling Indian Explosive to invoke the jurisdiction of the writ court. After examining the authorities including Shrilekha Vidyarthi and ABL International, their Lordships, while holding that the writ petition was not maintainable, said (para.19 of the report):

19. ...However, the further question would be as to whether in the matter of a

non-statutory contract where no public law element is available, whether the actions of the State could be questioned by way of a writ petition. In our opinion, in *Shrilekha Vidyarthi's* case, the whole thrust is on the public law element. Therefore, even if the contract is non-statutory but there is a public law element in the same, the State action can be assailed if it is unreasonable and arbitrary. However as was expressed in *LIC of India's* case (supra), such public law element would have to be found out on the basis of the facts of that case. In *Shrilekha Vidyarthi's* case, such public law element was actually found out and the clear finding to that effect is to be found in the judgment. The questions is whether such public law element was there in the present contract.

45. In *Shimnit Utsch India Pvt. Ltd. and Anr. v. W.B. Transport Infrastructure Development Corporation and Ors.* W.P. No. 2083 of 2005, decided on February 20th, 2006, nothing was decided regarding the scope of judicial review of any action taken by a State in exercise of its contractual right flowing from a contract between the parties. There the writ petition was filed questioning the validity of a tender process initiated by the State concerned.

46. In *Noble Resources Ltd. Vs. State of Orissa and Another*, , their Lordships of the Supreme Court were considering (para.2 of the report) whether a writ petition was maintainable in contractual matter. There Noble filed the writ petition in the Orissa High Court questioning decision of OMC Ltd. not to supply iron ore fines in terms of the contract, and the writ petition was dismissed on the ground that it involved enforcement of a contract, and thus not maintainable. One of the contentions before their Lordships of the Supreme Court was that a writ petition for specific performance of contract would not lie when damages can be awarded for breach of contract, and after considering the precedents including *ABL International*, their Lordships held (para.26 of the report):

26. Contractual matters are, thus not beyond the realm of judicial review. Its application may, however, be limited.

47. Then their Lordships said (paras.28 and 32 of the report):

28. Although the scope of judicial review or the development of law in this field has been noticed hereinbefore particularly in the light of the decision of this Court in *ABL International Ltd.* (supra), each case, however, must be decided on its own facts. Public interest as noticed hereinbefore, may be one of the factors to exercise power of judicial review. In a case where a public law element is involved, judicial review may be permissible, [See *Binny Ltd. and Another Vs. V. Sadasivan and Others*, and *G.B. Mahajan and others Vs. The Jalgaon Municipal Council and others*,].

***** 32.
The case at hand may be considered having regard to the aforementioned legal principles in mind. The parties indisputably were bound by the terms of the contract.

48. Noble's appeal was dismissed by their Lordships, and in the process it was said (para.43 of the report):

43. Ordinarily, a specific performance of contract would not be enforced by issuing a writ of or in the nature of mandamus, particularly when keeping in view the provisions of the Specific Relief Act, 1963 damages may be an adequate remedy for breach of contract.

49. In Rajasthan Housing Board and Another Vs. G.S. Investments and Another, , their Lordships of the Supreme Court were considering the question whether sale of plots by Rajasthan Housing Board at auction, essentially a commercial transaction, called for any interference in exercise of discretionary power under Article 226. Holding that the writ petition should not have been entertained by the High Court, their Lordships said (para.11 of the report) that even if some defect was found in the ultimate decision cancelling the auction, the High Court should have exercised its discretionary power with great care and caution and only in furtherance of public interest that did not call for an interference in the matter.

50. In Ramchandra Murarilal Bhattad and Others Vs. State of Maharashtra and Others, , Ramchandra Murarilal that emerged as the highest bidder in a tender process initiated by the Mumbai Metropolitan Region Development Authority for establishing a convention and exhibition centre filed the writ petition questioning the decision of the authority to reject all the bids, and their Lordships of the Supreme Court were considering the question whether the authority had any jurisdiction to cancel the bids. While dismissing the appeals, their Lordships said (para. 50 of the report):

50. Noticing some of the areas where judicial review would be permissible, this Court opined that ordinarily, this Court would not enforce specific performance of contract where damages would be adequate remedy. It was also held that conduct of the parties would also play an important role.

51. With respect to the question whether for rejecting the bids the authority was required to assign any reason, their Lordships said (para.55 of the report):

55. ...A power to deal with a contractual matter and a power of a statutory authority to exercise its statutory power in determining the rights and liabilities of the parties are distinct and different. Whereas reasons are required to be assigned in a case where civil or evil consequences may ensue, the same may not be necessary where it is contractual in nature, save and except in some cases e.g. Star Enterprises.

52. In S.R. Associated Construction Co. Pvt. Ltd. and Anr. v. Union of India and Ors. W.P. Nos. 1491 and 1495 of 2005, decided on March 9th, 2007, the writ petitions were filed questioning decisions taken by the Superintending Engineer, Calcutta Central Circle No. 1, CPWD levying compensation in exercise of pure contractual rights conferred by the non-statutory contracts concerned. Question

of maintainability of the writ petitions was raised, and the writ petitions were dismissed on the ground that no public law element was involved in the actions of the authority leading to the decisions.

53. In *Reliance Energy Limited and Another Vs. Maharashtra State Road Development Corporation Ltd. and Others*, , Reliance Energy and one Hyundai Engineering and Construction Company Ltd. that formed a consortium and intended to bid for a work for which a tender was floated by the State of Maharashtra moved the writ petition before the High Court when they were declared disqualified to participate at the second stage of the bidding process. Questioning the decision dismissing the writ petition the consortium moved the Supreme Court, and while allowing the appeal holding that the consortium had been erroneously excluded from the bidding process, their Lordships examined the ambit of Article 14 and said (para.36 of the report):

36. ...Article 14 applies to government policies and if the policy or act of the Government, even in contractual matters, fails to satisfy the test of "reasonableness", then such an act or decision would be unconstitutional.

54. According to Mr. Sen, in view of the law declared by the Supreme Court in the decisions he has relied on and the Division Court decision of this Court in *Jute Corporation of India Ltd. v. Nellimarla Jute Mills Co. Ltd. and Anr.* 1993 (1) CLT 79, there is absolutely no reason to say that this writ petition is not maintainable. His submission is that what was said a several decades ago in *Radhakrishna Agarwal and Others Vs. State of Bihar and Others*, is not the law today on the question of scope of judicial review of State action in contractual field by the writ court. In his opinion, the two Division Court decisions of this Court in *Jute Corporation of India Ltd. v. Nellimarla Jute Mills Co. Ltd. and Anr.* 1993 (1) CLT 79 and *Coal India Ltd Vs. Indian Explosive Ltd. and Others*, are in apparent conflict with each other, and hence it is perhaps appropriate that I should consider the question of referring the issue involved in this case for decision by a Division Court of more than two Judges.

55. Here the question for decision is when an action of a State leading to a decision terminating a non-statutory contract, taken in exercise of a private law right the sole source whereof is the contract between the parties, is questioned by filing a writ petition under Article 226 of the Constitution, whether such writ petition is maintainable.

56. In my reading and understanding of the authorities the principles relevant for the question involved in this case emerge from the decisions in *Radhakrishna Agarwal and Others Vs. State of Bihar and Others*, ; *Kumari Shrilekha Vidyarthi and Others Vs. State of U.P. and Others*, ; *Union of India and others Vs. M/s. Binani Consultants (P) Ltd. and another*, ; *Common Cause, a Common Cause, A Registered Society Vs. Union of India and Others*, ; *Kerala State Electricity Board and Another Vs. Kurien E. Kalathil and Others*, ; *Verigamto Naveen Vs. Government of Andhra Pradesh and Others*, ; *ABL International Ltd. and Another*

Vs. Export Credit Guarantee Corporation of India Ltd. and Others, ; and Ramchandra Murarilal Bhattad and Others Vs. State of Maharashtra and Others, .

57. Principles which emerge from Radhakrishna Agarwal and Others Vs. State of Bihar and Others, are these. All constitutional powers carry corresponding obligations with them, and this is the rule of law which regulates the operation of organs of the Governments functioning under the Constitution. At the time of entry into the field of contract the State acts purely in executive capacity and exercises its constitutional powers carrying with them the corresponding obligations, but after entry into the field of ordinary contract the relations are no longer governed by the constitutional provisions, but by the legally valid contract which determines the rights and obligations of the parties, who can claim rights conferred upon them only by the contract and are bound by the terms of the contract, unless some statute steps in and confers some special power or obligation on the State apart from the contract. When the State deals with the citizen in exercise of powers available under the terms of a contract between the parties, the action does not involve any public duty. When the State acts in exercise of right the source whereof is the contract between the parties, no relief can be sought under Article 226 of the Constitution alleging failure to discharge constitutional obligation under Article 14, but relief under Article 226 can be claimed if the action complained of, though related to the contract between the parties, is taken in exercise of a statutory power. When a contract is sought to be terminated by the State in terms of the agreement between the parties, there is no requirement of giving any opportunity to the other party to the contract of showing cause and hearing.

58. The following are the principles which emerge: From Kumari Shrilekha Vidyarthi and Others Vs. State of U.P. and Others, If the Government takes a decision on an issue related to a contract, not in exercise of its rights conferred by the contract, but in exercise of its executive powers, the person aggrieved is entitled to question the decision by filing a writ petition under Article 226. From Union of India and others Vs. M/s. Binani Consultants (P) Ltd. and another, A writ petition involving contractual rights is maintainable only if the action leading to the decision of the State involves any public law element, not when it is taken in exercise of a power the source whereof is only the contract. From Common Cause, a Common Cause, A Registered Society Vs. Union of India and Others, Those branches of law which deal with the rights, duties and privileges of the public authorities and their relationship with the individual citizens of the State pertain to public law such as constitutional and administrative law, in contradistinction to private law fields which are those branches of law which deal with the rights and liabilities of private individuals in relation to one another.

59. Principles which emerge from Kerala State Electricity Board and Another Vs. Kurien E. Kalathil and Others, are these. A statute may expressly or impliedly confer power on a statutory body to enter into contracts in order to enable it to discharge its functions. Dispute arising out of the terms of such contracts or

alleged breaches have to be settled by the ordinary principles of law of contract. The fact that one of the parties to the agreement is a statutory or public body will not by itself affect the principles to be applied. The disputes about the meaning of a covenant in a contract or its enforceability have to be determined according to the usual principles of the Indian Contract Act, 1872. The question of interpretation and implementation of a clause in a contract cannot be the subject matter of a writ petition. Every act of a statutory body need not necessarily involve an exercise of statutory power. Statutory bodies, like private parties, have power to contract or deal with property. Such activities may not raise any issue of public law. A contract will not become statutory simply because it is for the construction of a public utility or it has been awarded by a statutory body.

60. The following are the principles which emerge: From *Verigamto Naveen Vs. Government of Andhra Pradesh and Others*, Where the breach of contract involves breach of statutory obligation, or when the order complained of is made in exercise of statutory power by a statutory authority, though the cause of action arises out of or pertains to contract, the action falls within the sphere of public law, because the power exercised is apart from the contract. From *ABL International Ltd. and Anr. v. Export Credit Guarantee Corporation of India Ltd. and Ors.* (2004) 3 SCC 554: For enforcing a contractual obligation that a Government or its instrumentality is to discharge by way of a public function or public duty a writ petition under Article 226 of the Constitution is maintainable. From *Ramchandra Murarilal Bhattad and Others Vs. State of Maharashtra and Others*, Whereas a statutory authority determining the rights and liabilities of the parties in exercise of his statutory power is under the obligation to give reasons in support of his decision, when civil or evil consequences may ensue, ordinarily he is, however, not under any obligation to give reasons in support of his decision determining contractual rights and liabilities of the parties.

61. In *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, , heavily relied on by Mr. Sen, what was examined and decided was the extent of powers and obligations of a State to enter into contract through the process of a tender, and it was held that the State concerned, International Airport Authority of India, was not empowered or entitled to enter into contract arbitrarily with an ineligible tenderer. It is to be noted that there the State did not enter into the contract in exercise of its pure private law contractual right. I am unable to agree with Mr. Sen that Ramana's ratio is that on the allegation of unreasonableness and arbitrariness a State action can be challenged by filing a writ petition even when no public law element is involved in the action. In *Kumari Shrilekha Vidyarthi and Others Vs. State of U.P. and Others*, their Lordships of the Supreme Court were examining whether the policy decision taken and issued by the Government of Uttar Pradesh in exercise of its executive power deciding not to extend tenure of its counsel beyond a particular date was arbitrary and hence violative of Article 14 of the Constitution. That was not a case where the Government terminated the appointments in exercise of its pure private law

contractual right conferred by an ordinary contract between the parties. In such context their Lordships held that even if the relationship was contractual entitling the aggrieved persons to any other relief, the validity of the policy decision could be challenged by filing a writ petition.

62. It is apparent from the decision (para. 55 of the report) in *Jute Corporation of India Ltd. v. Nellimarla Jute Mills Co. Ltd.* and Anr. 1993 (1) CLT 79 that only the aspect of violation of Article 14 dealt with by their Lordships of the Supreme Court in *Radhakrishna* (para.21 of the report) was considered relevant by their Lordships of the Division Court of this Court for deciding JCI's appeal. It therefore cannot be said that in *Jute Corporation* their Lordships of the Division Court explained those ratios of *Radhakrishna* which I have noted hereinbefore. In any case, their Lordships while discarding the absolute proposition that no writ petition can be entertained when the action challenged pertains to the domain of a concluded contract, did not hold that an action of a State pertaining to a nonstatutory contract can be challenged by filing a writ petition, even if no public law element is involved in it. In *Union of India and others Vs. M/s. Binani Consultants (P) Ltd. and another*, , though it was not a case regarding determination of any contract by a State, the question whether a writ petition involving contractual rights of the parties was maintainable was examined, and it was held that a writ petition would be maintainable only if the action leading to the decision of the State involves public law element, and not when it is taken in exercise of a power the source whereof is only the contract. In my opinion, *Jute Corporation* and *Binani or Coal India* are not in conflict with each other, and hence there is no question of referring the issue involved in this case for decision by a Division Court of more than two Judges.

63. *LIC of India and Another Vs. Consumer Education and Research center and Others*, was not a case regarding termination of any contract by the State concerned. There decision of LICI to make its policy concerned available only to certain categories of service holders was questioned as violative of Article 14, and in such context their Lordships of the Supreme Court held that the action leading to the decision involved public law element, and hence the writ petition questioning it was maintainable. *Common Cause, a Common Cause, A Registered Society Vs. Union of India and Others*, reiterated the law that every executive or administrative action of a State can be questioned by filing a writ petition under Article 226. In *ABL International Ltd. and Another Vs. Export Credit Guarantee Corporation of India Ltd. and Others*, , once again heavily relied on by Mr. Sen and in which *Radhakrishna* was not considered, their Lordships of the Supreme Court while examining the question whether a writ petition under Article 226 would be maintainable for enforcement of a contractual obligation of the State proceeded on the basis that the question was no longer *res integra*. It is against the special backdrop of the objects of the corporation that their Lordships found that the actions taken by the corporation had a touch of public function or discharge of public duty. For this reason the contention of the corporation that the writ petition was not maintainable was turned down.

64. In my view, the test that should be applied for getting answer to the question is what is the basis of the action complained of. If the action is taken in exercise of any power or right the sole source whereof is not the contract itself, then a writ petition questioning the action is maintainable. On the other hand, if the action leading to the impugned decision is taken in exercise of a right conferred on the State by the contract, then no writ petition questioning such action and decision is maintainable. When any action leading to a decision is taken by a statutory authority in exercise of a right conferred on it by an ordinary contract, the authority does not act in the discharge of its any public law or statutory power, duty, or obligation conferred on it by any provision of the Constitution or any statute, nor does it act in the discharge of its any executive or administrative duty, obligation or function, but it acts wholly in exercise of its pure private law contractual right, and in such case the remedy of the aggrieved party, qua a party to the contract, is before the ordinary civil court or any other forum, if provided by the contract. A public law right or obligation is one the source whereof is the Constitution or a statute, or an executive or administrative decision or instruction, and for enforcing it a writ petition under Article 226 of the Constitution can be filed. But for enforcing a right or obligation the source whereof is a pure ordinary non-statutory contract, a writ petition under Article 226 is not maintainable, even if one of the parties to the contract is a State within the meaning of Article 12. In such case remedy, if any, of the aggrieved party is before the ordinary civil court or the forum provided by the contract.

65. The question of involvement of public interest element in an action or inaction of a State within the meaning of Article 12 is absolutely irrelevant for deciding the question of maintainability of a writ petition, unless it is a public interest litigation in which case involvement of public interest element in the complained of action or inaction is the sole consideration for deciding the question of maintainability of the writ petition. As to an action, the elementary principle is that every action of a State is presumed to be taken in public interest; for a State cannot have any private interest. Hence even when in exercise of its pure private law contractual right conferred on it by a non-statutory contract entered into with a private person a State terminates the contract, it acts only in public interest. It is altogether a different thing that the action or inaction may ultimately be found to be wrong and hence prejudicial to public interest. But citing prejudice to public interest a writ petition under Article 226 cannot be filed by the other party to the contract either for questioning the decision of the State terminating the contract in exercise of right conferred on it by the contract, or for enforcing an obligation cast on the State by the contract. Even when after issuing a show cause notice and giving the party to the contract an opportunity of hearing a State gives a decision terminating a non-statutory contract in exercise of rights conferred on it by the contract, such decision cannot be questioned by filling a writ petition under Article 226 of the Constitution, because mere undertaking of the decision making process that the State was not obliged to undertake does not create a public law right of the other party to the

contract to seek public law remedy against the decision not otherwise susceptible to judicial review of the writ court.

66. Keeping these principles in mind it is to be seen whether Haldiram is entitled to take out this writ petition seeking mandamus quashing KMDA's decision dated January 8th, 2008 cancelling the licence, and commanding it to execute a lease deed in discharge of its obligation cast on it by the terms and conditions of the licence deed, and other incidental reliefs including an injunction restraining KMDA from taking possession of the land.

67. Here the dispute is not regarding allotment in terms of offer made to Haldiram, the successful Bidder in the tender process initiated in January, 2003. The allotment having been made on March 6th, 2003, and accepted by Haldiram that took actual physical possession of the land on April 29th, 2003, the tender process stood concluded and attained finality. Then Haldiram and KMDA entered into the licence agreement dated May 22nd, 2003 and thus they decided to maintain and regulate their relationship strictly according to the terms and conditions of the licence agreement creating and conferring their respective rights and liabilities. As licensor KMDA remained entitled to terminate the agreement on breach or non-performance of any duty and obligation by Haldiram, and KMDA has done exactly that. This means that KMDA has not terminated the agreement in exercise of any right or power other than the one conferred on it by the licence agreement. It has not taken the decision in exercise of any statutory or administrative power, in which case there could be no reason to say that the decision was to remain beyond the scope of judicial review of the writ court, once assailed as unfair, unreasonable or arbitrary and hence violative of Article 14. Here it is entitled to take all defences available under the law of contract, and such defences cannot be overlooked or ignored.

68. Admittedly, before taking the decision the authority of KMDA issued a letter dated December 31st, 2007 offering Haldiram an opportunity to show cause why the deed of licence should not be cancelled, and Haldiram that filed a written reply and was offered an opportunity of hearing was actually heard by the authority who took the decision. The authority took the decision in exercise of KMDA's right that was conferred on KMDA by Clause 7(i) of the contract. It is therefore apparent that the action leading to the decision was not taken by KMDA in exercise of any power or right the source whereof was anything other than the contract concerned. The action leading to the decision was not taken in exercise of any statutory or administrative power, duty or obligation. The sole source of the right in exercise whereof the decision was taken is the contract KMDA entered into with Haldiram. Hence Mr. Sen is not right in saying that public law element is explicit in the decision itself.

69. The land in question was acquired by the Government of West Bengal under provisions of the Land Acquisition Act, 1894, for a public purpose to be implemented by KMDA, a statutory authority constituted under the West Bengal Town and Country (Planning and Development) Act, 1979. KMDA floated a tender

offering the land for allotment to the highest bidder. Haldiram emerged as the highest bidder and got allotment of the land on the terms and conditions incorporated in the deed of licence. Neither these features made the contract a statutory contract, nor did they cast any duty or obligation on KMDA to act in the discharge of its any administrative or statutory power, duty or obligation while deciding, if required, whether in exercise of its right conferred by the contract it would terminate the contract.

70. Mr. Sen is right in saying that public law element was involved at the time of entry into the contract, because at that stage KMDA acted in the discharge of its powers, duties and obligations the source whereof was not any contract. It is incorrect to say that public law element was involved in the subject matter or working out of the contract. One can say that public interest element, in furtherance whereof KMDA was supposed to act, was involved in both these things. Mr. Sen is not right in saying that if a contract is for a public purpose, then writ lies. A contract executed by a statutory authority cannot be for any purpose other than a public purpose. If his proposition is to be accepted, then it has to be held as a blanket proposition that in all contractual matters in which a statutory authority is involved as a party to the contract writ will lie.

71. I am unable to agree with Mr. Sen that question of involvement of public law element in the action leading to the decision became irrelevant once the licence was determined by KMDA. I do not see how it can be said that on determination of the licence the whole matter left the realm of contract. The controversies between the parties are to be adjudicated and determined on the basis of the terms and conditions of the contract and by applying the private law of contract in force in the country. It is not correct to say that there is no authority holding that when termination of a contract is questioned writ will not lie; for *Radhakrishna Agarwal and Others Vs. State of Bihar and Others*, is the most formidable authority on the question.

72. For terminating the contract on the ground that Haldiram failed and neglected to perform and discharge its obligations KMDA was not required to give any notice to show cause and opportunity of hearing to Haldiram, or to give a reasoned decision. Hence, simply because it issued a show cause notice, heard Haldiram and then took the decision, Haldiram did not acquire any public law right to seek public law remedy before the writ court inviting it to test the validity of the decision on the anvil of Article 14 of the Constitution. Mr. Sen is not right in advancing a broad proposition that since KMDA is a statutory body and hence a State within the meaning of Article 12, Haldiram is entitled to seek judicial review of its decision determining the licence. Every action of a State, though must be in public interest only, is not subject to judicial review of the writ court, unless the action complained of is taken in the discharge of any public law or statutory power, duty or obligation; and that is not the case here.

73. Since KMDA has taken the action in exercise of its ordinary private law contractual right and it is apparent that no public law element is involved in the

action, Haldiram is not entitled to approach the writ court alleging that the decision is prejudicial to public interest. I am unable to agree with Mr Sen that public law element and public interest element are synonymous, and hence no distinction should be made between public law and private law. In my opinion, there is a clear distinction between public law and private law. When a public interest element is involved in every action of a State, a public law element is not of course involved in every action of a State. When a State exercises its pure private law contractual rights available under an ordinary contract it entered with anyone, no public law element is involved in its such act. Its such act has nothing to do with the discharge of its any constitutional, executive, statutory or administrative power, duty or obligation.

74. Mr. Sen is not right in saying that even if no public law element is involved in the action complained of writ in contractual matters lies. There cannot be any such general proposition. Ouster of jurisdiction is not a test to be applied while deciding such question of maintainability of a writ petition as the present one. The test rather is whether the aggrieved person has a public law or statutory right to approach the writ court questioning the action leading to the impugned decision. I do not think the question whether the remedy before the civil court will provide the person adequate relief is relevant either. While deciding the question of maintainability of a writ petition, in my opinion, the question cannot be decided, since any opinion expressed on it is bound to cause undeserved prejudice to the parties to the case. The question whether any disputed question of fact is involved is not relevant as well, because the disputed question test is applied not for deciding the question of maintainability of a writ petition, but for deciding whether on the facts of the case the writ court will exercise its discretion in favour of adjudicating and determining the disputed questions of fact which are bound to arise in every case. It is not the rule that whenever a disputed question of fact arises the writ court is not to interfere.

75. I therefore find that in the present case neither any public law element is involved in KMDA's action leading to the impugned decision, nor has Haldiram any public law or statutory right to seek a mandamus commanding KMDA to execute the deed of lease or not to take possession of the land in question, and hence questioning the action and the decision, or seeking enforcement of its contractual right conferred on it by the deed of licence, or seeking an injunction restraining KMDA from taking possession of the land, it is not entitled to approach the writ court. Its remedy, if any, is only before the ordinary civil court or before the forum, if any, provided by the contract.

76. For these reasons, the writ petition is dismissed. As a result, nothing remains to be decided in G.A. No. 442 of 2008 and accordingly it shall be deemed to be disposed of. There shall be no order for costs.

77. Urgent certified xerox copy of this judgment, if applied for, shall be supplied to the parties within three days from the date of receipt of the file by the section concerned.