

(1994) 08 CAL CK 0022

In the Calcutta High Court

Case No : Appeal From Order No. 691 of 1993

Kalyani Spinning Mills Ltd. and others

APPELLANT

Vs

Smt. Sudha Sashikant Shroff and another

RESPONDENT

Date of Decision : 08-08-1994

Acts Referred:

Companies Act, 1956 — Section 617

Constitution of India, 1950 — Article 12, 14, 19(1), 226, 298

Contract Act, 1872 — Section 32, 51, 52, 53, 54

Citation : AIR 1995 Cal 48

Hon'ble Judges : Mukul Gopal Mukherji, J; Basudeva Panigrahi, J

Bench : Division Bench

Advocate : Chittaranjan Panda and Ajoy Roy, for the Appellant; Jayanta Mitra, Sandip Ghosh and Mrs. Swapna Mukherjee, for the Respondent

Judgement

Mukul Gopal Mukherji, J.—This appeal filed by Kalyani Spinning-Mills Ltd., is Managing Director and its Sales Officer impugns a judgment and order dated 6th August, 1993 passed by P. K. Majumdar, J. in Matter No. 2922 of 1992.

2. The learned single Judge by virtue of the said order directed Kalyani Spinning Mills Ltd. to rescind and not to give any effect to advertisements published in "The Statesman" dated 4th Sept., 1992 in terms of prayer (a) of the petition and gave a further direction upon the said respondent, Kalyani Spinning Mills Ltd. forthwith to deliver the goods or machinery in favour of the writ petitioner (Respondent No. 1 in the present appeals). Smt. Sudha Sashikant Shroff carrying on business under the name and style of Sudha Textile Traders in terms of prayer (b) of the writ application in respect of 64 items which were the subject matter of a contract in between the writ petitioner on the one hand and Kalyani Spinning Mills Ltd. on the other on payment of the entire balance price of the said machines, subject to adjustment of the deposit which was lying with Kalyani Spinning Mills Ltd. in the form of an earnest money advanced by the writ petitioner.

3. It would be necessary for us to trace out the background of the entire case. On 22nd May, 1989 an advertisement was published in the Indian Express at the behest of Kalyani Spinning Mills Ltd. for sale of obsolete textile machineries on "as is where is basis" inviting tenders for the sixtyfour items of machinery. It was given out that machineries could be inspected at units at Kalyani Spinning Mills Ltd. at Kalyani and Ashoknagar during any working day. Earnest money at the rate of 5% of the quoted tender value must accompany the tender form by Account Payee/ Demand Draft/ Pay Order adjustable refundable drawn in favour of the Kalyani Spinning Mills Ltd. payable at Calcutta. The last date of submission of tender was within one month of the publication of tender notice. The authority reserved the right to reject any or all tenders in part or full without assigning any reason thereof. About the terms and conditions for sale of obsolete textile machineries, it was given out that earnest money at the rate of 5% of quoted value will be accepted only in the form of Account Payee/ Demand Draft or Pay Order on any Bank in Calcutta and drawn in favour of the Kalyani Spinning Mills Ltd. Payment of earnest money in cash will not be accepted, Tender papers without requisite earnest money will not be accepted. For the successful tenderers, the earnest money so deposited will be treated as security deposit bearing no interest and amount will be refunded or adjusted after the transaction has been completed successfully and satisfactorily. For unsuccessful tenderers, the earnest money will be refunded within a month after opening of the tender and will not bear any interest. Successful tenderers will be required to make full payments by Account Payee/Demand Draft or Bany Pay Order in favour of the company payable at Calcutta within 15 days from the date of acceptance of tender as per the proforma invoice issued by the company. If full payment along with taxes if any, applicable, is not received within the aforesaid 15 days, the earnest money will be forfeited.

4. By way of general instructions it was given out in the terms and conditions of the tender that price should be quoted per machine/per site basis. Any complaint or dispute regarding quality and/or condition of the materials will not be entertained afterwards. The company reserved the right to cancel the tender partially or fully without assigning any reason whatsoever. It was" the case of the petitioner that her tender on per machine per site basis was for a total sum of Rs. 36,97,960.00 and she deposited Rupees 23,000/- towards earnest money. She was found to be the highest bidder but even the highest bid was found to be below the reserved price. Hence all the tenders were asked to participate in a negotiation and to revise their rates.

5. On 3rd July, 1989 the writ petitioner submitted a revised tender and deposited a further sum of Rs. 1,40,500.00 towards earnest money. Thus the total earnest money deposited by the writ petitioner amounted to Rs. 1,63,500.00. On the 7th July 1989, the revised offers of all the tenders were opened by the company and the writ petitioner was again found to be the highest bidder. A letter of acceptance was issued by Kalyani Spinning Mills Ltd. accepting the offer of the writ petitioner in respect of four items covering 64 machines. It was given out in

the letter of acceptance that the writ petitioner will have to deposit full value of the said machines along with all taxes applicable if any, within 15 days from the date of acceptance and all other terms and conditions in the tender documents could be applicable. On 10th July, 1989 the writ petitioner deposited Rs. 2,32,420.00 by a pay order drawn on United Bank of India, Burra Bazar Branch towards purchase price of the items sold. It is however to be noted that the said amount of Rs. 2,32,420.00 did not cover the entire consideration money or the full value of the machines sought to be sold by Kalyani Spinning Mills Ltd. pursuant to which acceptance letter dated July 7, 1989 was issued. On July 12, 1989 a writ application was moved by one Sankit Textile Corporation challenging the sale in favour of the writ petitioner. An *ex parte* ad interim order was passed by one of the learned Judges of this Court to the effect that if the contract has not as yet been awarded, the same shall not be awarded to anyone and if the goods have not as yet been delivered, the same shall not be delivered till a particular date. The petitioner Sankit Textile Corporation was directed to serve notice along with the application upon all the parties to the writ application including the respondent No. 4 (present writ petitioner). On July 15, 1989 the present writ petitioner, Smt. Sudha Sashikant Shroff carrying business under the name and style of Sudha Textile Traders was informed by Kalyani Spring Mills Ltd. about the writ application being moved by Sankit Textile Corporation and the ad interim order passed by this Hon'ble Court. The appellant company expressed its inability to allow the writ petitioner to lift the goods and materials from the factory of the appellant No. 1 company. On that very date i.e., 15th July, 1989 the appellant No. 1 company returned the Bank Draft for Rs. 2,31,420.00 paid by the writ petitioner on 10th July, 1989 towards purchase price. On July 17, 1989 another contender for the self-same contract M/s. Mitesh Textiles filed another writ application before this Hon'ble Court challenging the sale effected in favour of the writ petitioner which was numbered as Matter No. 2350 of 1989. Another bidder M/s. Prova Textile also filed another application under Art. 226 of the Constitution of India invoking the writ jurisdiction of this Court challenging the said sale in favour of the writ petitioner which was numbered as Matter No. 3950 of 1989. On August 7, 1989 Kalyani Spinning Mills Ltd. filed its Affidavit-in-Opposition in the said proceeding wherein it was contended inter alia that there was a concluded contract with the present writ petitioner and that the offer of the writ petitioner on further negotiation was accepted.

6. On 1st Sept. 1992 all the three writ application aforementioned filed by Sankit Textile Corporation, Mitesh Textiles and Prova Textiles came up for final hearing before the Hon'ble Acting Chief Justice, A.M. Bhattacharjee and all the three applications were dismissed and all interim orders were vacated.

7. On 4th Sept. 1992 the appellant Kalyani Spinning Mills Ltd. caused an advertisement to be published in "The Statesman" inviting tenders in respect of the self-same machinery but only in respect of 44 items of machinery out of a total 64 items which were the subject matter of the writ petitioner's bid earlier accepted by the Kalyani Spinning Mills Ltd. thus leaving aside 20 items from the

purview of the advertisement. On 15th Sept. 1992 the writ petitioner wrote to the appellant No. 1 company Kalyani, Spinning Mills Ltd. for delivery of the machinery with an assurance that the value of the same would be deposited within 15 days on receipt of confirmation, in view of the fact that the earlier three writ applications challenging the sale in favour of the writ petitioner stood dismissed. There was a reminder sent by the writ petitioner to the appellant No. 1 company on 16th Sept. 1992 asking for delivery of the said machines failing which there was a threat to move a contempt application for not complying with the order dated 1-9-1992 passed earlier in respect of the three writ applications. On 21st Sept. 1992 writ petitioner filed the present writ application under Art. 226 of the Constitution of India challenging the publication of the advertisement dated 4th Sept. 1992 and the attempt of the appellant No. 1 company Kalyani Spinning Mills Ltd. to sell out 44 items of the said machinery. A learned single Judge on entertaining the writ application ordered that quotations may be received but no further steps are to be taken by Kalyani Spinning Mills Ltd. in pursuance of the tender notice dated Sept. 4, 1992 for the issuance of delivery order or acceptance of the offers. On 16th Nov. 1992 the interim order passed earlier on 21st Sept. 1992 was vacated apparently on the ground inter alia that the writ petitioner took the refund of Rupees 2,31,420.00 and this fact was suppressed from the court- and was not brought to the knowledge of our learned single Judge. On 23rd Nov. 1992 the writ petitioner preferred an appeal from the said order dated 16th Nov. 1992 as passed by the learned single Judge and made an application for stay of operation of the impugned order before the Division Bench. On 23rd Nov. 1992, a Division Bench of this Hon'ble Court admitted the appeal, granted leave in terms of prayer (a) of the said application and released the matter from the list and on 25th Nov. 1992 the application and the appeal were assigned to another Division Bench. An order was passed by the said Division Bench that if the offer has not been accepted, Kalyani Spinning Mills Ltd. would not accept it till further orders and if any offer has been accepted, no delivery order was to be issued until further orders. The matter was thereafter, released from the said Division Bench with liberty to mention for assignment of the matter before some other Division Bench but interim order was directed to continue. The matter was assigned to another Division Bench which directed the interim order as passed earlier to continue till the disposal of the main writ application and directed expeditious hearing of the writ application. The appeal and the said application were thus disposed of as above.

8. On 6th August, 1993 Prabir Kumar Majumdar, J. allowed the writ application in the manner as stated above holding inter alia that the writ petitioner having been declared the highest bidder by negotiations in respect of the machineries as mentioned in the letter dated 7th July, 1989 and it not having been in dispute that the writ petitioner's offer was accepted by the company and before entering into any negotiations with Kalyani Spinning Mills Ltd. the writ petitioner deposited the earnest money as also some money towards part of the price of the machines. Even though the writ petitioner later on got refund of a sum of Rs.

2,31,420.00, Kalyani Spinning Mills Ltd. has taken an unreasonable stand in refusing to deliver the goods in respect of which the writ petitioner's offer was accepted. All throughout it was the stand of Kalyani Spinning Mills Ltd. that there has been a concluded contract between the parties in respect of the said machines and Kalyani Spinning Mills Ltd. was ready to effect delivery to the goods pursuant to the said contract to the writ petitioner but could not do so in view of the interim order passed by this court restraining Kalyani Spinning Mills Ltd. from delivering the goods to anyone. On subsequent events, Kalyani Spinning Mills Ltd. cannot be allowed to change its stand that the contract was concluded and about to be performed but could not be performed in view of the intervention of the court by an order of injunction. Such order of injunction had been removed and all the three aforesaid writ applications were dismissed. Therefore, there was no impediment on the Kalyani Spinning Mills Ltd. from effecting delivery of the goods 10 the writ petitioner pursuant to the earlier contract. Even though Kalyani Spinning Mills Ltd. relied on Clause 7 of the terms and conditions of the contract which inter alia provided that successful tenders would be required to make full payments within 15 days from the date of acceptance of the tender and by the acceptance of letter dated 7th July, 1989 the writ petitioner was directed to deposit full value of the said machineries within 15 days from the date of acceptance and it is claimed by Kalyani Spinning Mills Ltd. that the writ petitioner failed to make the said deposit of full value since there was no more order of injunction of court restraining the writ petitioner from effecting the said deposit of full value, the contention of the Company that the writ petitioner committed a breach of its contractual obligation had no substance. The learned trial Judge further held that the petitioner on 10th July, 1989 deposited Rupees 2,32,420.00 and was supposed to pay the balance by 23rd July, 1989 but the writ petitioner could not so because by letter dated 15th July, 1989 addressed to the writ petitioner, the Company expressed its inability to allow the petitioner to lift the materials in view of the order of injunction restraining the Company from delivering any materials. Therefore, it cannot be said that the writ petitioner committed any breach of the terms and conditions of the contract. According to the view of the learned trial Judge an unreasonable and arbitrary stand was taken by the Company instead.

9. The learned trial Judge further held that in contractual sphere, as in all other state actions, the state and all its instrumentalities, have to conform to Art. 14 of the Constitution of which non-arbitrariness is a significant fact. A public authority possesses powers only to use them for public good, which imposed the duty to act fairly and to adopt a procedure which is fair play in action. Due observance of this obligation as a part of good administration raises a reasonable or legitimate expectation in every citizen to be treated fairly in its interaction within the state and its instrumentalities. The learned single Judge relied on the observance in Food Corporation of India Vs. M/s. Kamdhenu Cattle Feed Industries, in this context.

10. The learned single Judge further held that the Kalyani Spinning Mills Ltd. took

an unreasonable and arbitrary stand and the writ petitioner was justified in asking for an order directing the Company to deliver the goods pursuant to the contractual obligations in terms of concluded contract entered into between the parties. Accordingly, the learned single Judge allowed the writ application and directed the Kalyani Spinning Mills Ltd. to rescind and, not to give effect to the advertisement published in "The Statesman" dated 4th Sept. 1992 in terms of prayer (a) of the petition. The learned single Judge passed a further direction upon the Kalyani Spinning Mills Ltd. to forthwith deliver the goods or machinery in favour of the writ petitioner in terms of prayer (b) of the petition and directed that the delivery of the goods would include 64 items which formed the subject matter of the contract which should be done as early as possible upon payment of the entire balance price of the said machineries, subject to adjustment of the deposited money lying with the Company in the form of earnest, money already made by the writ petitioner.

11. Mr. Chittaranjan Panda, learned Advocate for the appellant contended before us that Kalyani Spinning Mills is in the nature of a Company and was not amenable to the writ jurisdiction of this Hon'ble, Court, we have gone through the Memorandum and Articles of Association of the said Company which is a Government Company and we are of the clear view that since it is fully a Government Company, it is amenable to the writ jurisdiction of the court within the extended meaning of Art. 12 of the Constitution of India and conform to the wider meaning of the State.

12. The next branch of arguments made by Mr. Panda was with regard to the application of the constitutional writs within the domain of contractual obligations. Both Mr. Panda appearing for the appellant and Mr. Jayanta Mitra, the learned counsel for the writ petitioner respondent relied upon a Division Bench Judgment of our court in *Marine Engineering v. Siddeswar Haldar* reported in 1991 (2) Cal HCN 161 : 1991 (1) CLJ 467. The Division Bench also relied upon several Supreme Court decisions on the field including the decision in *Radhakrishna Agarwal and Others Vs. State of Bihar and Others*, . The Division Bench also relied upon the observation of the Supreme Court in the case of *Kumari Shrilekha Vidyarthi and Others Vs. State of U.P. and Others*, . In *Radhakrishna Agarwal and Others Vs. State of Bihar and Others*, the different types of contract in connection with the exercise of power under Art." 226 of the Constitution of India were examined and it was found that the Patna High Court was of the view that they were mainly of three types at page 1500.

(i) where the petitioner makes a grievance of breach of promise on the part of the State in cases where on an assurance or promise made by the State, he has acted to his prejudice and predicament, but the agreement is short of a contract within the meaning of Art. 299 of the Constitution of India.

(ii) where the contract entered into between the person aggrieved and the State is in exercise of a statutory power under certain Acts or Rules framed thereunder and the petitioner alleges a breach on the part of the State and,

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

13. With regard to the first two cases Patna High Court expressed a view that a writ application under Art. 226 of the Constitution of India was maintainable. So far as the cases falling under third category were concerned, that is contracts entered into between the State and the person aggrieved being non-statutory and purely contractual and where the petitioner complains about breach of terms of such contract by the State, it had been held that no application invoking the jurisdiction of the High Court under Art. 226 of the Constitution of India was maintainable. The Supreme Court, however, referring to these type of cases under the third category observed inter alia as follows:--

"It then very rightly held that the cases now before us should be placed in the third category where questions of pure alleged breaches of contract are involved. It held upon the strength of *Dr. Umakant Saran Vs. State of Bihar and Others*, , *Lekhraj Satramdas, Lalvani Vs. Deputy Custodian-cum-managing Officer and Others*, and *B.K. Sinha Vs. State of Bihar and Others*, that no writ or order can issue under Art. 226 of the Constitution of India in such cases to compel the authorities to remedy a breach of contract pure and simple".

14. The Division Bench in *Marine Engineer v. Siddeswar Haldar* (ibid) observed that there may be yet some other cases which may be placed in the fourth category "where the contract entered into between the State and the person aggrieved is non-statutory and. purely contractual but such contract has been cancelled on a ground, de hors any of the terms of the contract and which is per se violative of Art. 14 of the Constitution". Even in such cases an application under Art. 226 of the Constitution of India shall be maintainable.

15. Mr. Panda referred to a Division Bench Judgment of our Court in *Hindustan Petroleum Corporation Ltd. v. Shyam Sunder Ganeriwala* reported in 1988 (2) Cal HCN 233 for the proposition that in a case of breach of agreement, the aggrieved party could not invoke a writ jurisdiction of this Court under Art. 226 of the Constitution of India. In the facts of the said reported decision, Hindustan Petroleum Corporation Ltd. entered into an agreement with Shyam Sunder Ganeriwala and in terms of the said agreement, a licence to operate a petrol-cum-diesel pumping station was granted in favour of Shyam Sunder Ganeriwala. The agreement included inter alia a right to terminate the agreement without any notice in the event of any act or default on the part of the licensee which is considered to be prejudicial to the interest of and good name of Hindustan Petroleum Corporation Ltd. On the basis of an enquiry and report of an officer of the Corporation about some malpractices of the licensee regarding the sale of petrol and diesel, the Corporation suspended the supply of petrol and diesel to the licensee. The Corporation issued a notice requiring the licensee to show cause why the license should not be terminated in terms of the agreement. The

licensee by a writ petition prayed for quashing of the proceeding and for a direction on the Corporation to restore the supply of petrol and diesel. The writ petition was contested by the Corporation contending inter alia that the writ jurisdiction could not be invoked in respect of any breach of agreement. The learned Trial Judge overruled the objection and held that the Corporation had no authority under the agreement to suspend the supply of petrol pending the adjudication of show cause notice and that such suspension is not only arbitrary but it effects the licensee's right to carry on trade and business guaranteed by Art. 19(1)(g) of the Constitution. The learned Trial Judge directed the Corporation to restore the supply of petroleum products until the licence is lawfully terminated. In the appeal preferred from the order, the contention were that in the writ jurisdiction the court cannot entertain an application for enforcement of any alleged right arising and based on an agreement and the Trial Judge misread the agreement in holding that its terms do not authorise the Corporation to suspend the supply pending adjudication proceeding and the dispute raised should have been referred to adjudication by an arbitrator in accordance with the arbitration clause in the agreement. On behalf of the licensee it was submitted that when one of the parties to the agreement is the State or its instrumentality, they were required to act reasonably and within the powers, so that any arbitrary act though committed in the realm of contract is liable to be challenged by a writ petition, the suspension order which is de hors the agreement itself can very well be challenged and that the arbitration clause would not stand in the way when the plea was that suspension of supply was de hors the agreement; The principal issue raised was with regard to the maintainability of the writ petition. The Division Bench took the view that the Supreme Court decisions establish the principle of law that Art. 226 of the Constitution is not the appropriate proceeding for enforcing any remedy for breach of a contract. Following the decision in C.K. Achuthan Vs. The State of Kerala and Others, and Radhakrishna Agarwal and Others Vs. State of Bihar and Others, , the Division Bench held that even assuming that the appellant Corporation is an instrumentality of the State, the case at its highest made out by the writ petitioner is that the Corporation acted beyond its powers under the agreement in directing suspension of supply of its products for sale through the writ petitioner. It is not the case of the writ petitioner that such an instrumentality of the State issued that direction in exercise of any statutory power or in exercise of any sovereign power of the State delegated to it. It is in act qua licensor and, as such, in purported exercise of its powers under the agreement or at least in exercise of powers reserved unto itself as a party to the agreement, it is wholly irrelevant as to whether the impugned act is an arbitrary act or an act in exercise of the powers under the agreement so long as it remains an act in the realm of the contract between the parties. Since the relief claimed emanates from the realm of contract, a proceeding under Article 226 of the Constitution is hardly an appropriate remedy. The Division Bench took into consideration the arguments made by the learned Advocate of the respondent that the earlier view as expressed by the Supreme Court must be deemed to

stand modified by the subsequent decisions of the same court where the distinctive position of the State and its instrumentalities having been noted, the Supreme Court has pointed out that the rule of law which governs all acts of the State enjoys it to be just and fair in all its dealings with the citizens. The Division Bench however, was unable to accept this contention. The Division Bench mainly went by the distinctive features of the case and expressed its opinion that a right derived from an agreement or a contract may be infringed by a breach thereof. In all such cases the remedy available is the usual remedy under the laws, namely specific performance or damages, irrespective of whether the party committing the breach is a private individual or the State and/or instrumentalities, in all such cases the parties to the agreement or contract having entered into contractual relationship, they would be governed exclusively by the laws relating to contract. But at the same time a right derived from an agreement with the State may as well be infringed by the State by way of breach thereof by some administrative action taken in exercise of any statutory power or in exercise of its sovereign power. A lease or interest derived on the lease obtained from the State, may itself be the subject matter of acquisition or requisition by the State and such acquisition or requisition would certainly infringe the lease holder's right under the lease. Similarly with ever increasing statutory control over the economic processes, it is often to be found that statutory prescriptions are often so far imposed on the terms of an agreement or a contract between the parties, particularly wherein the State or its instrumentality is a party thereto and in such cases, the right derived from an agreement may be infringed in exercise of powers under the agreement but subject to the statutory limitations. According to the Division Bench the best illustrations in this regard are various control legislations like mines and minerals regulations. In the latter group of cases where the right of a citizen is infringed, a writ proceeding would be available if it can be established that such infringement is in breach of the law, notwithstanding the fact that the right emanates from the agreement. The fundamental distinction in all these cases is that the right to the relief arises not for any breach of the agreement pure and simple but for breach of law. The Division Bench then referred to the decision of the Supreme Court in *Gujarat State Financial Corporation Vs. Lotus Hotels Pvt. Ltd.*, where the Supreme Court was found enforcing a right based on promissory estoppel which was not a case of breach of a contract pure and simple. In the case of *The D.F.O., South Kheri and Others Vs. Ram Sanehi Singh*, , the subject matter of challenge was an order made by a superior authority in exercise of its statutory authority and there was no case of agreement pure and simple. In the case of *Hindustan Sugar Mills Vs. State of Rajasthan and Others*, , the Supreme Court was found dealing with the question of reimbursement of sales tax. In the case of *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, , the Supreme Court was not called upon to go into an issue alike the present case and all observations made in the Division Bench judgment were with regard to the obligations of the State and its instrumentalities with regard to the conduct at the stage prior to the contract in contradiction to the other case of

International Airport Authority where it was at the stage of threshold to the contract. The Division Bench also took into consideration the other two Calcutta High Court decisions in *Serajuddin and Co. Vs. State of Orissa and Others*, and *Central Group v. Calcutta Metropolitan Development Authority* reported in 1982 (2) Cal HCN 90 and distinguished the two decisions holding inter alia that in *Sirajuddin's* case there was no concluded contract and the subject matter of challenge was revocation of a grant which was not in accordance with the provisions of the statute and thus a case of enforcement of any remedy against the breach of contract. Even though the Division Bench was of opinion that the terms of the agreement between the parties do not authorise the Corporation to suspend the supply as was so suspended in the said case, there could be no dispute that under the terms of the agreement forthwith it could also issue such direction as are needed from time to time. The wider power of termination included by necessary implication the lesser power of temporary termination by way of suspension as was directed by the Corporation. The Division Bench ultimately held that writ petition was not maintainable and the dispute is fully covered by the arbitration clause incorporated in the agreement itself and the parties were bound to avail of the forum mutually settled for redress of the grievance and such a forum must have precedence over others. A proceeding before the High Court under Art. 226 of the Constitution cannot derogate from the position as indicated by the Supreme Court in the case of *Indian Aluminium Company Vs. Kerala State Electricity Board*, and *Bisra Stone Lime Co. Ltd. and Another Vs. Orissa State Electricity Board and Another*, Basing on the conclusions as arrived at in the judgment Mr. Panda contended that for the kind of breach of the agreement as in the present case, even if so resorted to by the company for bringing in the advertisement dated 4th September, 1992, the remedy did not lie with writ petitioner to invoke the writ jurisdiction of the Court.

16. Mr. Panda referred to the Supreme Court decision in *Bareilly Development Authority and Another Vs. Ajay Pal Singh and Others*, for the proposition that when the contract entered into by the State is non-statutory and the relations are purely contractual relations, they are no longer governed by the constitutional provisions but by the legally valid contract which determines the right and obligations of the parties inter se. In this sphere, the parties can only claim rights conferred upon them by the contract in the absence of any statutory obligations on the part of the authority in the said contractual field. It was settled law that no writ or order can be issued under Art. 226 of the Constitution of India so as to compel the authorities to remedy a breach of contract pure and simple.

17. The Bareilly Development Authority hereinafter referred to as B.D.A. with a view to easing the acute housing problem in the District, undertook the construction of dwelling units for people belonging to different income groups. The B. D. A. issued an advertisement offering to register names of intending applicants desirous of purchasing dwelling houses/flats in any one of the different income groups intended to be constructed by the B.D.A. A brochure was issued by B.D.A. to the intending purchasers containing general terms and the

estimated costs of dwelling houses. The note given in the said brochure clearly stated that the cost shown therein is only estimated cost and it would increase or decrease according to the rise or fall in the price at the time of completion of the houses/flats. Many persons got themselves registered for allotment of houses/flats. A notice was subsequently issued by the Development Authority increasing the price of houses, the amount of instalment and interest. The allottees were asked to send their written acceptance of the revised price/ instalments to the Development Authority. Most of the allottees, except few, gave unequivocal and unconditional written consent. The allottees, however, challenged the revised terms and conditions of the B.D.A. on the ground that the Development Authority was estopped from changing the conditions subject to which the allottees had applied for registration and deposited the initial payment; that the enhancement of cost of the house/flat amounting almost double of the estimated cost as shown in the brochure while inviting the applications and the increase of the monthly instalments are much beyond the means of the allottees and that this arbitrary and unilateral stand of the petitioners is to be prejudice of the allottees.

18. The Supreme Court held that as all the persons who got themselves registered were educated, it could be said that they have sent their applications for registration with initial payment only after having fully understood the terms and conditions of the brochure as per which the B.D.A. has reserved its right to change, enhance or amend any of the terms and/or conditions as and when it felt necessary, and also the right to relax any of the conditions at its discretion, and that the cost shown in the brochure was only estimated cost, subject to increase or decrease according to the rise or fall in the price at the time of completion of the properly. So it could not be said that there was a mis-statement or incorrect statement or any fraudulent concealment in the information supplied in the brochure published by the B.D.A. on the strength of which all the applicants falling under the various categories applied and got their names registered. In such a circumstance the allottees could not be heard to say that the B.D.A. has arbitrarily and unreasonably changed the terms and conditions of the brochure to their prejudice, more so when the B.D.A. did not compel any one of the applicants to purchase the flat at the rates subsequently fixed by it and pay the increased monthly instalments. On the contrary, the option was left over only to the allottees.

19. The Supreme Court further held that the allottees after voluntarily accepting the conditions imposed by the B.D.A. have entered into the realm of concluded contract pure and simple with the B.D.A, and hence the allottees could only claim the right conferred upon them by the said contract and were bound by the terms of the contract unless some statute steps in and confers some special statutory obligations on the part of the B.D.A. in the contractual field. The contract between the parties not being statutory, the finding given by the High Court that there was arbitrariness and unreasonableness on the part of the B.D.A. in increasing the cost on ground that B.D.A. was "other authority" under Article 12 of the Constitution, was improper. ,

20. Mr. Panda further referred to us a decision of the Supreme Court in *Munindra Nath Upadhyaya Vs. State of U.P. and others*, where in a case of one of the parties claiming to be the highest bidder at an auction in respect of the right to collect the toll on a bridge seeking a mandamus against the authorities to accept his bid and award the privilege of collecting the toll in his favour, the Allahabad High Court expressed the view that the particular party was indeed the highest bidder and there was no impediment in implementing the auction and quashing the decision of the Commissioner. The High Court further issued a mandamus against the Commissioner to accept the bid of the petitioner being the highest bidder and directed the Commissioner to award the contract to the petitioner in respect of the auction. The Supreme Court ultimately found that a direction for the acceptance of the bid and award of the contract without satisfaction of other requisites and relevant conditions may not be appropriate. Government should have the liberty to decide the matter in the light to all considerations relevant to the matter. Even if the High Court is right in its direction to the Government to treat the particular party as the highest bidder, but in proceeding on that basis the Government must be at liberty to deal with the matter in the light of other conditions applicable to the matter. There-fore, the form in which the direction was couched required a modification in an appropriate manner. While the authorities were directed to accept the particular bidder as the highest bidder, it would be open to Government to decide whether they would, in the circumstances, accept the highest bidder as adequate and to ensure compliance with applicable conditions. Taking the clue from this judgment, Mr. Panda argued that when it was decided upon by Kalyani Spinning Mills Ltd. that the writ petitioner gave the highest offer and its offer was accepted by the Company, it is no more open to this Court, barring the declaration that the writ petitioner's offer was the highest one, to award the contract for its performance in the manner it was so done by the learned Trial Judge. Since there was a stipulation in the contract itself that the entire consideration money is to be put in within 15 days from the date of acceptance, even if there was a supervening factor by way of injunction orders issued in the three writ applications, as soon as the injunction order was lifted, the writ petitioner ought to have tendered the balance amount of consideration money and she not having so done, the earnest money was liable to forfeiture and the contract was bound to be considered as frustrated.

21. Mr. Panda further referred to another Supreme Court judgment in *Smt. Chand Rani (dead) by LRs. Vs. Smt. Kamal Rani (dead) by LRs.*, . That was a case of an agreement to sell immovable property where the intention of the parties was to make, time essence of the contract. The purchaser was not willing to make part payment of the amount within specified time without fulfilment of some conditions which were contrary to agreement. It was held that the purchaser was not entitled to specific performance of contract. It was held in this case that in case of sale of immovable property there is no presumption as to time being the essence of the contract. Even if it is not of the essence of the

contract, the court may infer that it is to be performed within a reasonable time if the conditions are manifest (i) from the express terms of the contract, (ii) from the nature of the property, and (iii) from the surrounding circumstances, for, example the object of making the contract. In the peculiar facts of the case it was held by the Supreme Court that even though as a general rule, time is not essence of the contract yet the party intended to make time as an essence under the agreement. On the analogy of this case Mr. Panda contended that where in an agreement to sell the immovable property it was stipulated that the amount in part was to be paid within 10 days with the execution of the agreement and the balance has to be paid at the time of registration of the deed and it was agreed that the vendor would redeem the property which was mortgaged and also obtain the Income Tax clearance certificate and the word "only" was used twice, i.e., to qualify the amount and to qualify the period of payment of such amount, that of ten days, it was held, by the Supreme Court that the intention of the parties was to make time as essence of contract and in such a case, when the purchaser was not ready and willing to pay the amount in part as agreed, before delivery of possession and produce Income Tax clearance certificate and cause redemption of property, it was contrary to the conditions of the agreement and the purchaser was not entitled to specific performance of contract. Even if there was a basic difference between the facts of this particular reported decision and the facts of the present one and in the present case we are primarily concerned with sale of movable property, Mr. Panda contended that time was indeed essence of the contract specially in case of sale of movable property and in the particular facts of the present case when the consideration money in full was not deposited with the Company within the stipulated period, the writ petitioner was not entitled to specific performance of the contract in the manner as directed by the Trial Court.

22. Mr. Panda further cited another decision of the Supreme Court in Food Corporation of India and others Vs. Jagannath Dutta and others, . In a case of Food Corporation of India terminating the agreement of the writ petitioner as regards private storage agency and the terms and conditions of the contract having permitted such termination, the notice of termination on the ground of absence of policy decision was struck down by the Calcutta High Court. It was held by the Supreme Court that the question of contractual obligations cannot be gone into in writ jurisdiction and the Supreme Court further held that there was a policy decision apparent from the evidence on record justifying the reversal of the Calcutta High Court decision. Mr. Panda however, contended that since the decision of the Kalyani Spinning Mills Ltd. emanates from the contract itself, in the fitness of things the High Court should not interfere with the same and allow the contract to have its full sway.

23. Mr. Panda then argued the question of applicability of Art. 12 of the Constitution of India in the case of Kalyani Spinning Mills Ltd. and contended in reference to two decisions of the Supreme Court in Chander Mohan Khanna Vs. The National Council of Educational Research and Training and

other[OVERRULED], and in *The Oil and Natural Gas Commission and another Vs. The Association of Natural Gas Consuming Industries of Gujarat and others, etc.*, , that even though it is a Government Company, it would not automatically come under the ambit of Article 12. Unfortunately in the *The Oil and Natural Gas Commission and another Vs. The Association of Natural Gas Consuming Industries of Gujarat and others, etc.* etc., it was conceded that ONGC is State within the meaning of Art. 12 and it was held that it was duty bound to act reasonably and fairly so as not to infringe the provisions of Arts. 14 and 19 and to act also in consonance with the directive principles of State policy set out inter alia in Arts. 38 and 39(b) of the Constitution. The challenge was primarily to the finding of the High Court that the ONGC is a public utility undertaking which was bound to supply gas to the request of any member of the public at large and to its discretion that it should continue to supply gas to the response till the price is fixed in accordance with the procedure outlined by it, notwithstanding that the contract under which the respondent procured such supply have expired long ago. It was ultimately held in this case that it was not a public utility undertaking and the Court could not direct the ONGC to effect Supply of materials without contract and without price fixation. In *Chander Mohan Khanna v. The National Council of Educational Research and Training* (ibid) it was held that the National Council of Educational Research and Training had activities comprising undertaking of programmes and activities connected with coordination of research services and training and it was not wholly related to governmental functions. The Government control was confined only to proper utilisation of Government grant which is one of the sources of income. It was ultimately found that this organisation is not "State". Thus we find that the said case was quite distinguishable from the facts of the present one.

24. Last but not least Mr. Panda argued with reference to the case in the matter of *H.E.H. The Nizam's Jewellery Trust M/s. Shanti Vijay & Co. v. Princes Fatima Fouzia* reported in AIR 1980 SC 17 and contended that by virtue of the High Court issuing injunction in the three writ applications filed by the three contenders for the self-same agreement, the contract died a natural death by virtue of the application of the law of frustration of contract. By virtue of the appellant Company returning the part of the consideration money paid by the writ petitioner and the writ petitioner also withdrawing the same, it could not be said that the entire consideration money was already deposited with the appellant company. That apart the contract was frustrated by virtue of the grant an ad interim injunction by this Hon'ble Court. The grant of such injunction prevented the performance of the alleged contract and the writ petitioner could not have tendered the balance amount of the contractual consideration towards the balance price by the stipulated date or taken delivery of the articles so long as the injunction lasted. The case of *H.E.H. The Nizam's Jewellery Trust* was a case where there was acceptance of tenders by the four trustees in terms of a resolution made by the trust but then the contract was frustrated by grant of an ad interim injunction by the Chief Judge of the City Civil Court, Hyderabad and it

was held by the Supreme Court that the grant of such injunction prevented the purpose of the alleged contracts and the appellants could not have tendered 90% of the tendered amount, that is the balance of the price, within stipulated date or taken delivery of the jewellery so long as injunction lasted. It was held by the Supreme Court in this context that the passing of property was dependent on tender of balance of the price by the successful bidders and only thereupon could the question of taking delivery of goods on such payment did arise. If any court in the meantime restrained the trustees by an ad interim injunction from finalising the sale, even after vacating of the injunction, the High Court could not have ordered restoration of status quo ante before any of such bidders paid the balance of price as stipulated and the contract relating to the sale of trust property must be deemed to have been frustrated.

25. After the argument was over Mr. Panda cited the decision in Assistant Excise Commissioner and Others Vs. Issac Peter and Others, . Mr. Panda on the basis of this judgment argued that doctrine of fairness or duty to act fairly and reasonably is evolved to ensure fair action where the function is administrative. This doctrine cannot be invoked to amend, alter or vary the express terms of the contract between the parties.

26. Mr. Jayanta Mitra appearing for the respondent No. 1, writ petitioner in this context drew our attention to the principles deduced from the same judgment as follows:

"Doctrine of fairness or the duty to act fairly and reasonably is a doctrine developed in the administrative law field to ensure the Rule of Law and to prevent failure of justice where the action is administrative in nature. Just as principles of natural justices ensure fair decision, where the function is quasi-judicial, the doctrine of fairness is evolved to ensure fair action where the function is administrative." In this decision it was held inter alia that the writ jurisdiction certainly is not to be invoked to amend, alter or vary the express terms of the contract between the parties. This is so, even if the contract is governed by statutory provisions, i.e., where it is a statutory contractor rather more so. It is one thing to say that every contract must be construed reasonably having regard to its language. But in this case the licencees sought to create an obligation on the other party to the contract, just because it happens to be the State. They are not prepared to apply the very same rule in a converse case, i.e., where the State has abundant supplies and wants the licencees will undertake an obligation to lift all those stocks even if the State suffers loss. This one sided obligation in modification of express terms of the contract in the name of duty to act fairly is what the Supreme Court was unable to appreciate. Thus this case has distinctive features of its own and cannot be held to be *pari materia* with the present one.

27. Mr. Jayanta Mitra appearing for the respondent No. 1, writ petitioner contended before us that no case of frustration was pleaded by the Company in the trial Court but on the other hand the Company always took the stand that

the writ petitioner herself caused a breach of the contract. The case of breach of contract on the part of the writ petitioner was negated by the appellant Company's own action in giving out the advertisement without waiting for the writ petitioner to complete the terms of the contract within the specified date for the completion thereof after the injunction was lifted in the other three writ applications. No case of improvement or improvisation of 20 of the machines have also been made out in course of the pleadings of the appellant company in the court below and no inspection to that effect was ever invited or offered in this regard in making an apposite prayer in this regard. Mr. Mitra placed before us the provisions of Sections 51,52,53,54 and 67 of the Contract Act and sought to distinguish the judgment in *Re: The Nizam's Jewellery Trust* reported in AIR 1980 SC 17 contended inter alia in the facts of the said case, both the parties took the stand that because of the interim order of injunction the contract could not be performed and the contract was thus taken as frustrated. Mr. Mitra relied upon the decision of our High Court in *Abdul Hashem and Another Vs. Balahari Mondal and Others*, and the decision in *Satyabrata Ghose Vs. Mugneeram Bangur and Co. and Another*, for the proposition that even if a supervening impossibility in matters of non- fulfilment of a contract by way of an intervening impediment was there, as soon as the impedient was lifted, the contract was called into play and the contract will not die a natural death by virtue of the application of the doctrine of frustration. Once injunction was lifted in the three writ applications, there was no supervening impediment on the part of the Company to perform its part of the obligation in the so-called concluded contract and thus on the part of the writ petitioner also to pay off her obligations under the contract in depositing the balance of the consideration money and to call for specific performance of the contract since the contract was very much alive.

28. In *Abdul Hashem and Another Vs. Balahari Mondal and Others*, it was a case where during the continuance of the tenancy a notice of requisition was served on the tenant requiring him to place a part of the land under his tenancy at the disposal of the Land Acquisition Collector for a period upto six months after the termination of the war, unless released earlier and the Land Acquisition Collector took possession of the land on a particular date as given out in the notice. It was held that the occurrence was unforeseen and was not contemplated by the landlord and the tenant when the lease was created but the occurrence was not so fundamental as to be regarded in law to strike at the root and destroy the basis of the relationship of landlord and tenant. The requisition deprived the tenant of part of his possession for a time. He could not in law have personal enjoyment of part of the demised premises during the period of the requisition but personal enjoyment is not a fundamental characteristic of a tenancy. Besides, the requisition was not expected to last for a very long period of time, and moreover was in respect of less than half the area covered by the tenancy with the result that the tenant was left in possession of the greater part of the tenanted lands. The requisition therefore, had not the effect of putting into an end the tenancy.

29. This decision quoted the observation of Lord Simon in *Cricklewood Property and Investment Trust Ltd. v. Leighton's Trust Ltd.* 1945 AC 221 where it was observed "Frustration may be defined as the premature determination, owing to the occurrence of an intervening event of change of circumstances so fundamental as to be regarded by the law both as striking at the root of the agreement and as entirely beyond what was contemplated by the parties when they entered into the agreement. If, therefore, the intervening circumstance is one which the law would not regard as so fundamental as to destroy the basis of the agreement, there is no frustration. Equally if the terms of the agreement show that the parties contemplated the possibility of such an intervening circumstances arising, frustration does not occur. Neither does it arise when one of the parties had deliberately brought about the supervening event by his own choice. But where it does not arise frustration operates to bring the agreement to an end as regards both parties forthwith and quite apart from volition."

30. In *Satyabrata Ghose Vs. Mugneeram Bangur and Co. and Another*, it was held that the essential idea upon which the doctrine of frustration is based is that of impossibility of performance of the contract. In fact impossibility and frustration are often used as interchangeable expressions. The changed circumstances make the performance of the contract impossible and the parties are absolved from the further performance of it as they did not promise to perform an impossibility. The doctrine of frustration is really an aspect or part of the law of discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done and hence comes within the purview of Section 56 of the Contract Act. To the extent that the Contract Act deals with a particular subject, it is exhaustive upon the same and it is not permissible to import the principles of English Law "dehors" these statutory provisions. The decisions of the English Courts possess only a persuasive value and may be helpful in showing how the Courts in England have decided cases under circumstances similar to those which have come before Indian Courts. In deciding cases in India, the only doctrine that we have to go by is that of supervening impossibility or illegality as laid down in Section 56. taking the word "impossible" in its practical and not literal sense. Section 56 lays down a rule of positive law and does not leave the matter to be determined according to the intention of the parties. In cases, where the Court gathers as a matter of construction that the contract itself contained impliedly or expressly a term, according to which it would stand discharged on the happening of certain circumstances, the dissolution of the contract would take place under the terms of the contract itself and such cases would be outside the purview of Section 56 altogether. They would be dealt with u/s 32 which deals with contingent contracts or similar other provisions contained in the Act. In the large majority of cases, however, the doctrine of frustration is applied not on the ground that the parties themselves agreed to an implied term which operated to release them from the performance of the contract. The relief is given by the Court on the ground of subsequent impossibility when it finds that the whole purpose or basis of a

contract was frustrated by the intrusion or occurrence of an unexpected event or change of circumstances which was beyond what was contemplated by the parties at the time when they entered into the agreement. When such an event, or change of circumstance occurs which is so fundamental as to be regarded by law as striking at the root of the contract as a whole, it is the court which can pronounce the contract to be frustrated and at an end. The Court undoubtedly has to examine" the contract and the circumstances under which it was made. The belief, knowledge and intention of the parties are evidence, but evidence only on which the court has basis of the adventure and its underlying object. This is really a rule of positive law and as such comes within the purview of Section 56 of the Contract Act.

31. Mr. Mitra relied upon an old decision reported in *Dwijendra Narain Roy Vs. Joges Chandra De and Others*, for the proposition that no party can blow hot and cold at the same time and reprobate and approbate simultaneously and take a contrary stand on different occasions. It is indeed true that what was actually held in *Dwijendra Narain Roy v. Joges de* (ibid) is that inconsistent pleas cannot be allowed even in a subsequent suit if such suit grows out of first judgment and a new defence can be ruled out mainly on two grounds (i) if it contradicts the prior decision and (ii) if the party cannot be allowed to take up in the subsequent proceeding a position entirely inconsistent with that adopted in the previous one. It is an elementary rule that a party litigant cannot be permitted to assume inconsistent positions in court to play fast and loose, to blow hot and cold, to approbate and reprobate to the detriment of his opponent. This wholesome doctrine applies not only to the successive stages of the same suit, but also to another suit than the one in which the position was taken up provided that the second suit grows out of the judgment in the first.

32. The Company having taken a firm stand in the earlier three writ applications to which the writ petitioner was also a party as respondent No. 4, that the contract between the Kalyani Spinning Mills Ltd. on the one hand and the Writ petitioner on the other being a concluded contract which was arrived at by virtue of the negotiations in between the parties and ultimately the writ court having given a verdict in favour of the Company allowing the contract to be performed with the writ petitioner, the Company could not turn round and take a contrary stand of its own and resile from the contract and contend that the terms of the contract have not been performed and directing breach of the conditions of the contract itself by giving out an advertisement in "The Statement" by inviting fresh tenders for the selfsame articles or at least part of it thereby setting up a clog on the part of the writ petitioner in performance of the contract. The writ petitioner as far as back on the 15th and 16th Sept. 1992 have written to the Company expressing her readiness and willingness to perform her part of the obligations under the contract but before she was allowed to do so, there was already a breach committed by the Company in the shape of an advertisement in "The Statement". Mr. Mitra further cited the decision in *Nagindas Ramdas Vs. Dalpatram Ichharam alias Brijram and Others*, for the proposition that

admissions if true and clear, are by far the best proof of the facts admitted and they by themselves can be made a foundation of the rights of the parties. The admission of the fact in the earlier three writ applications about the present contract being a concluded one being clear and ambiguous, the Company cannot wriggle out of the situation and take a stand contrary to what was taken earlier, moreover because the writ petitioner was a party respondent in the said three earlier proceedings. He asserted that unless there was a termination, no question of forfeiture of the earnest money does arise and the stand taken by the Company to treat the earnest money as forfeited is a stand contrary to law. The Company had not issued, prior to the filing of the writ application by the writ petitioner on 21st Sept. 1992, any letter of cancellation of the earlier contract which according to Company's version was a completed and concluded contract in the other three writ applications. Mr. Mitra further cited the decision in *The Union of India Vs. K.H. Rao*, for the proposition that forfeiture of earnest money could not be resorted to by the Company as was sought to be done in the facts and circumstances of the present case.

33. Mr. Panda's contention that the contract could not be in suspended animation because the contract itself delineated that the time was the essence thereto and clause 8 of the Contract gave out 15 days time to the writ petitioner to complete her part of the obligations in paying off the entire consideration money so as to make her entitled to lift the goods was sought to be replied to by Mr. Mitra contending inter alia that if the Company itself caused a breach of contract, there was no question of the writ petitioner seeking to perform her part of the obligation within the stipulated date. No cut off day could be fixed by the court because of the intervening circumstances. Mr. Panda citing the decision in *Madan Mohan v. Jawala Parshad* reported in AIR 1950 Punjab 278, *Dominion of India Vs. Raj Bahadur Seth Bhikhray Jaipuria*, and *Hindustan Construction Company Vs. The State of Bihar*, contended that the intention of the parties was very much relevant and subsequent conduct of the parties was liable to be taken into consideration for adjudging whether the contract was given a go by. Mr. Jayanta Mitra sought to repel this submission by contending inter alia that the subsequent conduct on the part of the Company was writ large from its decision to go in for a fresh advertisement inviting tenders for the selfsame articles, as was so done in the advertisement dated 4th Sept. 1992. Mr. Mitra contended that there was a legitimate expectation on the part of the writ petitioner and that the principle enunciated in *Food Corporation of India Vs. M/s. Kamdhenu Cattle Feed Industries*, supported the claim of the writ petitioner in this context. It was held in the case that in contractual sphere as in all other State actions, the State and all its instrumentalities have to conform to Art. 14 of the Constitution of which non-arbitrariness is a significant facet. To satisfy this requirement of non-arbitrariness in a State action, it is, therefore, necessary to consider and give due weight to the reasonable or legitimate expectations of the persons likely to be affected by the decision, Whether the expectation of the claimant is reasonable or legitimate is a question of fact in each case. Whenever the

question arises it is to be determined not according to the claimant's perception but in larger public interest wherein other more important considerations may outweigh what would otherwise have been the legitimate expectation of the claimant. A bona fide decision of the public authority reached in this manner would satisfy the requirement of non-arbitrariness and withstand judicial scrutiny.

34. It was held in the facts of the said case that even though the highest tenderer can claim no right to have his tender accepted, there being the power while inviting tenders to reject all the tenders, yet the power to reject all the tenders cannot be exercised arbitrarily and must depend for its validity on the existence of cogent reasons for such action. The object of inviting tenders for disposal of a commodity is to procure the highest price while giving equal opportunity to all the intending bidders to compete. Procuring the highest price for the commodity is undoubtedly in public interest since the amount so collected goes to the public fund. Accordingly, inadequacy of the price offered in the highest tender would be a cogent ground for negotiating with the tenderers giving them equal opportunity to revise their bids with a view to obtain the highest available price. A procedure wherein resort is had to negotiations with the tenderers for obtaining a significantly higher bid during the period when the offers in the tenders remain open for acceptance and rejection of the tenders only in the event of a significant higher bid being obtained during negotiations would ordinarily satisfy this requirement. This procedure involves giving due weight to the legitimate expectation of the highest bidder to have his tender accepted unless outbid by a higher offer, in which case acceptance of the highest offer within the time the offers remain open, would be a reasonable exercise of power for public good. In the facts of the said case before the last date up to which offer made in tender was to remain open for acceptance, the authority decided to negotiate with all tenderers when significantly higher amount was offered above the amount quoted in the highest tender, the action of the authorities satisfied the requirement of non-arbitrariness which was taken for the cogent reason: of inadequacy of the price offered in the highest tender, which reason was evident to all tenderers invited to participate in the negotiations and to revise their bids. Mr. Mitra contended on the basis of this decision that not only was the writ petitioner the highest bidder but there were negotiations made in the facts and circumstances of the case not only with the writ petitioner but also with other contenders and the writ petitioner's bid was taken to be the highest one and on the basis of the same a formal contract took place and it was too late in the day now to rescind from the concluded contract and to take an attitude which would be detrimental to the interest of the writ petitioner.

35-36. Mr. Mitra further contended that absence of reason on the part of the Company to go in for a fresh tender indicates its arbitrariness and relied upon on the observations in *Star Enterprises and Others Vs. City and Industrial Development Corporation of Maharashtra Ltd. and Others*, . That was a case where the respondent was a Government company within the meaning of Section 617 of the Companies Act constituted as New Town Development Authority u/s

113(3)(A) of the Maharashtra Regional Town Planning Act, 1966. The respondent No. 1 was empowered to dispose of land vested in it and it had formulated with the approval of the State Government u/s 159 of the Act a code for regulating inter alia disposal of land. It had the power to put on auction the different plots of land or on considering the individual applications may dispose of plots of land to the applicants. The respondent No. 1 reserved the right to amend, revoke or modify the scheme at its discretion as well as to reject any or all offers for allotment without assigning any reason. The appellant tenders claimed that they have given the highest offers by way of tender for certain specified plots by complying with the requirements of deposit but in exercise of the power under the scheme, their highest offers had not been accepted. The Bombay High Court rejected the writ petition in limine. Upholding the High Court's decision the Supreme Court held that the respondent is "State" within the meaning of Art. 12 and in its dealings with the citizens of India it would be required to act within the ambit of Rule of Law and would not be permitted to conduct its activities arbitrarily. The Supreme Court took into consideration the decision in *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, and *Ajay Hasia and Others Vs. Khalid Mujib Sehravardi and Others*, . The State is certainly entitled to look for the best deal with regards to its properties. In absence of any allegation of mala fides, it may be presumed that the respondent No. 1 acted bona fide and in refusing to accept the highest offers of the appellants with regard to specific plots had been actuated by the consideration of looking for best offers for the specific plots in the economic interests of respondent No. 1. When highest offers of the type in question are rejected, reasons sufficient to indicate the stand of the appropriate authority should be made available and ordinarily the same should be communicated to the concerned parties, unless there be any specific justification not to do so. In recent times, judicial review of administrative action has become expensive and is becoming wider day by day. The traditional limitations have been vanishing and the sphere of judicial scrutiny is being expended. State activity too is becoming fast pervasive. As the State has descended into the commercial field and giant public sector undertakings have grown up, the stake of the public exchequer is also large justifying larger social audit, judicial control and review by opening of the public gaze; these necessitate recording to reasons for executive actions including cases of rejection of highest offer. That very often involves large stakes and availability of reasons for actions on the record assures credibility to the action; disciplines public conduct and improves the culture of accountability. Looking for reasons in support of such action provides an opportunity for an objective review in appropriate cases both by the administrative superior and by the judicial process. The State of U.P. Vs. *Raj Narain and Others*, was relied on, in this context.

37. Mr. Mitra further contended that the respondent having always taken the stand that the contract is valid so far as writ petitioner is concerned it cannot now turn round in taking a contrary stand. Mr. Mitra cited the decision in *Dwarkadas Marfatia and Sons Vs. Board of Trustees of the Port of Bombay*, and

relied upon paragraphs 10, 21 and 21 of the said judgment in support of proposition that even with regard to government contracts a writ application was maintainable. When the State, the local bodies and public authorities which are "State" within the meaning of Article 12 are exempted from purview of Rent Control Legislation, the basis of exemption is that such bodies would not be actuated by any profit making motive so as to unduly enhance the rents or eject the tenants from their respective properties as private landlords are or are likely to be. They would not act for their own purpose as private landlords do, but must act for public purpose. It, therefore, follows that the public authorities which enjoy this benefit without being hidebound by the requirements of the Rent Act must act for public benefit. Being a public body even in respect of its dealing with its tenant, it must act in public interest, and an infraction of that duty is amenable to examination either in civil suit or in writ jurisdiction. Where there is arbitrariness in State action, Article 14 springs in and judicial review strikes such an action down. Every action of the executive authority must be subject to rule of law and must be informed by reason. So whatever be the activity of the public authority it should meet the test of Article 14. If the governmental policy or action even in contractual matters fails to satisfy the test of reasonableness, it would be unconstitutional. There is always a presumption that a governmental action is reasonable and in public interest. It is for the party challenging its validity to show that the action is unreasonable, arbitrary or contrary to the professed norms or not informed by the public interest, and the burden is a heavy one. The onus is entirely on the tenant and the burden lies on him to establish that the tenancy is terminated or the proceedings in eviction are taken not in public interest but for a collateral purpose or mala fide or that it had acted in a manner contrary to the provisions of Article 14 of the Constitution. It is not within the purview of a court to substitute a decision taken by a government authority if the governmental policy decision to allot a plot of land to the tenant holding major portion thereon and to evict other tenants from the plot. It could not be held that such policy decision was not in public interest.

38. Mr. Mitra further cited the decision in Mahabir Auto Stores and others Vs. Indian Oil Corporation and others, that reasonableness, fairplay and natural justice are bound to be there in every government action and unless the rule of fairplay in action is manifested enough from the stand taken by the Company, its decision can definitely be impeached. The State acts in its executive power under Article 298 of the Constitution in entering or not entering in contracts with individual parties. Article 14 of the Constitution would be applicable to those exercise of power. Therefore, the action of State organ can be checked under Article 14. Every action of the State executive authority must be subject to rule of law and must be informed by reason. So, whatever be the activity of the public authority, it should meet the test of Article 14 of the Constitution. If a governmental action even in the matters of entering or not entering into the contracts, fails to satisfy the test of reasonableness the same would be unreasonable. Rule of reason and rule against arbitrariness and discrimination,

rules of fairplay and natural justice are part of the rule of law applicable in situation of action by State instrumentality in dealing with citizens. Even though the rights of the citizens are in the nature of contractual rights, the manner, the method and motive of a decision of entering or not entering into a contract, are subject to judicial review on the touchstone of relevance and reasonableness, fairplay, natural justice, equality and non-discrimination. It is well settled that there can be "malice in law". Existence of such "malice in law" is part of the critical apparatus of a particular action in administrative law. Indeed "malice in law" is part of the dimension of the rule of relevance and reason as well as the rule of fairplay in action.

39. It was held by the Supreme Court that decision of the State/public authority under Article 298 of the Constitution is an administrative decision and can impeach on the ground that the decision is arbitrary or violative of Article 14 of the Constitution of India on any of the grounds available in public law field. In respect of Corporation like IOC when without informing the parties concerned, as in the instant case, an alleged change of policy and action is taken to seek to bring to an end the course of transaction over 18 years involving large amounts of money, it is not fair action, especially in view of the monopolistic nature of the power of the I.O. Corporation in this field. It is necessary that relevant persons concerned or who are to be affected, should be taken into confidence. Such transaction should continue as an administrative decision with the organ of the State. It may be contractual or statutory but in a situation of transaction between the parties for nearly two decades such procedure should be followed which will be reasonable, fair and just, that is the process which normally be accepted to be followed by an organ of the State and that process must be conscious and all those affected should be taken into confidence. It may not be necessary to give reasons but, in the field of this nature, fairness must be there to the parties concerned, and having regard to the large number or the long period and the nature of the dealings between the parties, the firm should have been taken into confidence. Equality and fairness at least demands this much from an instrumentality of the State dealing with a right of the State not to treat the contract as subsisting.

40. Mr. Mitra further cited the decision in Kumari Shrilekha Vidyarthi and Others Vs. State of U.P. and Others, especially paragraphs 18, 19, 20 and 21 in support of his proposition that the personality of the State requiring regulation of its conduct in all spheres by requirements of Article 14 does not undergo such a radical change after (the making of a contract merely because some contractual rights accrue to the other party in addition. It is not as if the requirements of Article 14 and contractual obligations are alien concepts, which cannot co-exist. The Constitution does not envisage or permit unfairness or unreasonableness in State actions in any sphere of its activity contrary to the professed ideals in the Preamble. Exclusion of Article 14 in contractual matters is not permissible in constitutional scheme. The scope and permissible grounds of judicial review in such matters and the relief which may be available are different matters but that

does not justify the view of its total exclusion. Even assuming that it is necessary to import the concept of presence of some public element in a State action to attract Article 14 and permit judicial review, it can be said that the ultimate impact of all actions of the State or a public interest, the requisite public element for this purpose is present also in contractual matters. Therefore, it would be difficult and unrealistic to exclude the State actions in contractual matters, after the contract has been made, from the purview of judicial review to test its validity on the anvil of Article 14. Thus 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.

41. Last but not least Mr. Mitra cited that the decision in *Sterling Computers Limited and Others Vs. M and N Publications Limited and Others*, highlighting (1993 AIR SCW 683) paragraphs 12, 14, 15 and 28 for the proposition that public authorities must not have malice in action. At times it is said that public authorities must have the same liberty that they have in framing the policies, even while entering into contracts because many contracts amount to implementation or projection of policies of the Government. But it cannot be overlooked that unlike policies, contracts are legally binding commitments and they commit the authority which may be held to be a "State" within the meaning of Article 12 of the Constitution in many cases for years. That is why the courts have impressed that even in contractual matter the public authority should, not have unfettered discretion. In contracts having commercial element, some more discretion has to be conceded to the authorities so that they may enter into contracts with persons, keeping an eye on the augmentation of the revenue. But even in such matters they have to follow the norms recognised by courts while dealing with public property. It is not possible for courts to question and adjudicate every decision taken by any authority, because many of the Government Undertakings which in due course have acquired the monopolist position in matters of sale and purchase of products and with so many ventures in hand, can come out with a plea that it is not always possible to act like a quasi-judicial authority while awarding contracts. Under some special circumstances a discretion has to be conceded to the authorities who have to enter into contract giving them liberty to assess, the overall situation for purpose of taking a decision as to whom the contract be awarded and at what terms. If the decisions have been taken in bona fide manner although not strictly following the norms laid down by Justice Holmes, that Courts while judging the constitutional validity of executive decisions, must grant certain measure of freedom of "play in the joints" to the executive, it is more or less the settled position of law that the action or the procedure adopted by the authorities which can be held to be "State" within the meaning of Article 12 of the Constitution, while awarding contracts in respect of properties belonging to the State can be judged and tested in the light of Article 14 of the Constitution. The judgments of the

Supreme Court in the cases of Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, , Kasturi Lal Lakshmi Reddy, Represented by its Partner Shri Kasturi Lal, Jammu and Others Vs. State of Jammu and Kashmir and Another, , Fertilizer Corporation Kamgar Union (Regd.), Sindri and Others Vs. Union of India (UOI) and Others, , Ram and Shyam Company Vs. State of Haryana and Others, , Haji T.M. Hassan Rawther Vs. Kerala Financial Corporation, , Mahabir Auto Stores and others Vs. Indian Oil Corporation and others, and Kumari Shrilekha Vidyarthi and Others Vs. State of U.P. and Others, all point out to the same principle of law. It has been said by this Court in Kasturi Lal Lakshmi Reddy's (ibid) case:

"It must follow as a necessary corollary from this proposition that the Government cannot act in a manner which would benefit a private party at the cost of the State; such an action would be unreasonable and contrary to public interest. The Government therefore, cannot for example, give a contract or sell or lease out in property for a consideration less than the highest that can be obtained for it, unless of course there are other considerations which render reasonable and in public interest to do so."

42. There is nothing paradoxical in imposing legal limits on such authorities by courts even in contractual matters because the whole conception of unfettered discretion is inappropriate to a public authority, who is expected to exercise such powers only for public good. The decision making process is open to judicial review and even though the court cannot act as an appellate authority but if the process is violative of Article 14, then court can strike down the decision and the action taken pursuant thereto. Courts should be conscious of urgency of disposal of matters relating to award of contracts by State.

43. Regard being had to all the submissions made (by) the respective parties we are of the view that the trial Court rightly directed the specific performance of the contract in passing a mandate on the appellant company to allow the writ petitioner to lift the articles which are the subject matter of the original contract in paying off the balance consideration money within a stipulated date. We direct accordingly that the consideration money must be paid within a fortnight hereof and the appellant No. 1 Company would be duty bound to sell the articles in "as is where is" basis condition. If the contention of the appellant No. 1 Company is treated that in respect of 20 articles, they have either caused an improvement or improvisation, it would be deemed that in respect of such articles the contract could not be performed and the writ petitioner would be entitled to proceed in accordance with law on account of the breach of such part of the contract, basing her claims in a separate action for damages. The advertisement dated 4th September, 1992 has rightly been directed to be rescinded and not to be given any effect to and we uphold the said decision.

44. In the result the appeal stands dismissed. There will be, however, no order as to costs. Let a xerox copy of the judgment be given to the parties upon usual undertaking.

Basudeva Panigrahi, J.

45. I agree.

46. Appeal dismissed.