
(2007) 06 MP CK 0001

In the Madhya Pradesh High Court

Case No : Writ Petition No. 720 of 2007

M/s A.S. Motors Pvt. Ltd.

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 18-06-2007

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Contract Act, 1872 — Section 74

Citation : (2007) 2 MPJR 88

Hon'ble Judges : Rajendra Menon, J

Bench : Single Bench

Advocate : A.K. Chitley, with Mr. Yogesh Chaturvedi, for the Appellant; V.K. Sharma, Assistant Solicitor General for Respondent No. 1, Mr. K.N. Gupta with Mr. Ashish Saraswat, Advocate for respondent no. 2, 3, 4 and 5 and Mr. Sanjay Dwivedi, Advocate, for the Respondent

Final Decision : Allowed

Judgement

Rajendra Menon, J.

M/s A.S. Motors Pvt. Ltd. a company registered under the Companies Act, 1956, represented by Shri Sanjay Garg Director, has filed this petition under Article 226/227 of the Constitution, challenging communications made vide Annexure P/1 dated 25-01-07 by respondent no.2 to 5 cancelling a contract granted for collection of user fee in National Highway No.3, imposing of penalty of Rs. 2,41,097/- and forfeiting the performance security to the tune of Rs. 2,20,00,125/- and letter Annexure P/ 2 dated 27-01-05 issued by respondent no.2 to 5 to respondent no.6 Bank seeking revocation of a bank guarantee for Rs. 2,20,00,125/-. Brief facts necessary for disposal of this petition are that National Highway Authority of India is incorporated under the National Highway Authority of India Act 1988 (hereinafter referred to as "Act 1988")- It is a statutory authority discharging functions as contemplated under the Act, 1988. The Act of 1988 and the National Highway (Rate of fee) Rules 1997 contemplates

procedure for collection of fee for use of National Highway, permanent Bridges and Public Funded Projects etc., for the purpose of collection of fee statutory rules namely the National Highways Section and Permanent Bridge- Public Funded Project Rules, 1997 have been formulated. The Act 1988 read with the Rule 1997 contemplates a detailed procedure to be followed for collection of user fee, its payment and various other aspects relating to use and functioning of National Highways. The rate of fee to be collected and the agency through whom fee can be collected are contemplated in the Act of 1988 and the Rules framed thereunder.

On 6-12-05 a notice was issued by the National Highway Authority of India Limited inviting offers for collection of fee for use of National Highway through private contractors on the basis of competitive bidding, bids were invited for Kilometer 85/87 in Village Choundha District Morena for collection of user fee from Km. 61.00 to Km. 103 on Morena-Gwalior Section of National Highway No. 3.

In pursuance to the notice petitioner submitted their offer on 06-02-06, the bid submitted by the petitioner being the most appropriate one was accepted by the National Highway Authority of India Limited and a letter of acceptance dated 14-03-06 Annexure P/4 was issued to the petitioner conveying to them acceptance of their bid, by this letter petitioner was directed to take the following steps, (a) submit a demand draft for Rs. 2,20,00,125/- as performance security by way of a crossed account, payee demand draft or pay order drawn on any public sector Bank, the amount of performance security was equal to three months agreed remittance, (b) A bank guarantee as per format prescribed by the National Highway Authority of India from any public sector bank in India amounting to Rs. 2,20,00,125/- which is also equal to three months agreed remittance. The bank guarantee was to be valid for a period of 15 months and was a guarantee for due observance of the terms and conditions contained in the contract and performance of the contractors obligation. It is the case of petitioner that they complied with both the aforesaid requirement, the bank guarantee and demand drafts were submitted and thereafter the contract Annexure P/5 was entered into between the parties, the contract contemplates various provisions, it was for a period of one year starting from 01-04-2006, 00.00 hrs and ending on 31-03-07, 24.00 hrs. During the aforesaid period of 12 months the total amount of remittance to be paid by the petitioner was Rs. 8,80,00,500/-. This amount was to be paid in installments by the 5 of every month and the monthly remittance to be deposited was Rs. 73,33,375/-. The contract contemplated a provision for extension subject to enhancement of the amount of remittance by 10%. The rate to be collected from the user as per the type of vehicle were incorporated in the contract. According to the petitioner after all the documents were executed and after the performance guarantee by way of demand draft drawn on Central Bank of India and, the Bank Guarantee was submitted through respondent no.6 Central Bank of India, user plaza at Village Choundha was handed over to the petitioner w.e.f. 00.00 hrs on

01-04-06. The user plaza was known as Plaza-Choundha situated in Morena District. It is submitted that after grant of contract petitioner started collecting user fee as per terms and conditions of the agreement and also deposited monthly installment @ Rs. 73,33,375/- on or before the 5th of every month in the office of respondent no.3 i.e. Project Director, National Highway Authority of India (Project). Petitioner also deposited TCS amount of Rs. 1,64,561/- on or before 5 of every month. According to the petitioner at the time of filing of this petition on 5th February 2007 the amount of monthly installment i.e. Rs. 73,33,375/- and TCS amount of Rs. 1,64,561/- due till the said date were deposited on 5-1-07. Annexure P/6 to P/7 are the documents witnessing deposit of these amount i.e., the remittance upto 5-1-07, according to the petitioner when the petitioner started working in accordance with contract and when he started collecting user fee from vehicles using the highway in question, certain persons and transport companies situated in Gwalior and Morena started creating problems. It is stated that these persons and companies were not interested in paying user fee for passage of their vehicles through the user plaza as a result petitioner faced various problems. It is the case of the petitioner that certain interested persons who were politically influential wanted some how to get the contract of the petitioner cancelled and it was with this view that they started harassing the petitioner in the first month itself i.e. April 2006. Petitioner made a complaint to the Town Inspector, Police Station Morena, vide Annexure P/8, thereafter, various complaints were made by the petitioner to the Police authorities, so also to the Project Director and other Officers of National Highway Authority at Gwalior and New Delhi. Copies of complaints made by the petitioner on 3rd June 2006 and thereafter are filed as Annexure P/9 to P/12 collectively, it is stated that instead of cooperating with the petitioner, protecting them and helping them in running the Plaza and getting user fee collected respondents no.2 to 5 cancelled the contract vide letter dated 27-07-06 Annexure P/13. By the said letter not only the contract was cancelled but the performance security of Rs. 2,20,00,125/- was forfeited and the bid security was also forfeited. It is stated that the contract was terminated and amount was forfeited on the false allegations that the petitioner has collected excess fee from the vehicles passing through the plaza. It is the case of the petitioner that this was an act done malafidely with the collusion of certain influential political personalities.

Being aggrieved by this illegal action petitioner filed writ petition no. 3961/06 before this court, this court issued notice and found that the contract was cancelled without giving opportunity of hearing to the petitioner and without issuing any show cause notice to them, accordingly the order dated 27-07-06 Annexure P/13 was quashed and vide order dated 30-01-06 Annexure P/14 this court directed respondent no.4 The Chief General Manager (CM) National Highway Authority of India, to issue notice to the petitioner on the basis of facts that have come in the enquiry report, furnish a copy of the enquiry report and decide the matter afresh after giving opportunity of hearing to the petitioner. Accordingly it is stated that respondent no. 1 to 5 became annoyed with the

petitioner because of filing of this petition and they started harassing the petitioner, on 6-11-06 petitioner sent a notice to the respondents seeking surrender or termination of contract under Clause 34(1)(II) of the agreement Annexure P/5, 90 days notice was given on 6-11-06, Annexure P/15 and P/16 are these notice and letters issued by the petitioner. Further grievance of the petitioner is that without considering the aforesaid letters for termination or surrender, a fresh show cause notice dated 24-11-06 Annexure P/17 was issued to the petitioner asking them to show cause as to why the contract should not be terminated, the performance security forfeited and the Bank Guarantee revoked and petitioner punished for the illegal act of recovering excess user fee. Petitioner submitted reply to the show cause vide Annexure P/18 dated 8-12-06 thereafter, petitioner was asked to appear before the authorities for personal hearing at New Delhi on 12-01-07. In the meanwhile petitioner preferred another writ petition being WP No. 6338/06 for quashing the second show cause notice Annexure P/17 issued on 24-11-06, however this court refused to interfere in the matter as only a show cause notice was issued. This second writ petition being WP No. 6338/06 was disposed of vide order Annexure P/19 dated 13-12-06 with a direction to the respondents to decide the matter after following the principles of natural justice and affording full opportunity of hearing to the petitioner and after considering the application for surrender/termination of contract submitted by them under Clause 34(1)(II) of the agreement. It is seen that after this order was passed petitioner was called for personal hearing on 12-01-07, petitioner company appeared through their Director Sanjay Garg and thereafter impugned orders have been passed and action taken. By the impugned orders as indicated hereinabove the contract of the petitioner has been cancelled, the performance security of Rs. 2,20,00,125/- has been forfeited and a penalty of Rs. 2,41,097/- is imposed upon the petitioner, these three actions are taken in accordance with clause 18 of the contract agreement Annexure P/5, thereafter, the letter Annexure P/2 is issued to the Bank for revocation of Bank Guarantee on the ground that the contract has been cancelled under sub clause 2 of clause 34 due to breach committed by the petitioner. Challenging the aforesaid action of the respondents no. 1 to 5 Shri A.K. Chitley Senior Counsel who has argued the matter at length on behalf of the petitioner submitted that the entire action has been taken and termination of the contract is brought out on the allegation of charging excess user fee in a Section of the National Highway in question, these allegations of charging excess user fee is not proved. Shri Chitley, Senior Counsel points out that there is no cogent evidence available on record to show that the allegations are correct, the allegations are held to be proved on their basis of certain complaints said to have been submitted against the petitioner mainly by M/s. Rinku Transport Company Morena. It is submitted that M/s Rinku Transport Company, Morena had submitted similar complaint not only against the petitioner but also against the contractor of Baretha Toll Plaza, subsequently the complaint submitted against Baretha Toll Plaza was withdrawn and no action was taken against this contractor. Inter alia contending that M/s. Rinku Transport Company, Morena has submitted complaint on false ground and the action is taken against

the petitioner without giving them proper opportunity of hearing, petitioner seeks interference in the matter. Shri Chitley Senior counsel points out that in this case certain enquiry were conducted behind the back of the petitioner, certain agencies from Gurgaon and Delhi were appointed for investigating into the allegations of charging excess fee and the report of the said agency formed the basis for taking action. However the agency conducted the enquiry behind the back of the petitioner, petitioner was never informed about the enquiry, evidence were collected by this agency without notice and knowledge of the petitioner. It is emphasized that on the basis of such a enquiry no action can be taken against the petitioner. Shri A.K. Chitley, Senior Counsel also submitted that inspite of order passed by this court in W.P. No. 3961/06 and W.P. No. 638/06 proper opportunity for giving evidence was not extended to the petitioner. Witnesses who had deposed against the petitioner and on the basis of which report was submitted by the agency were not made available for cross examination, petitioner was not afforded assistance of lawyer to represent it in the personal hearing that was held at New Delhi on 12-01 -07. It was emphasized by Shri A.K. Chitley, Senior counsel that on 12-01-07 Director of the petitioner company Sanjay Garg was present alone whereas the National Highway Authority was represented by more than 5 persons namely Shri S.C. Jindal CGM(CM) Shri Vishal Gupta, GM(CO), Shri Aswani Kumar Project Director, Agra, Shri K.D. Saini, SAO, Shri A.K. Goyal, Manager (CO), petitioner was handicapped in facing all these 5 persons in the personal hearing. It was also submitted that petitioner had submitted documents Ex. P/100 to P/120 all these documents issued by various transport companies indicated that petitioner had never collected excess charges, ignoring these documents produced, action taken only on the basis of complaint of M/s. Rinku Transporters which is a mala fide complaint is argued to be illegal. Shri Chitley, Senior counsel argued that the entire action was taken by violating the principle of natural justice and without granting proper opportunity to give evidence and hearing to the petitioner, the entire action taken being contrary to the principles of natural justice stands vitiated.

It was further emphasized by learned counsel that action taken for revocation of the bank guarantee is illegal, the bank guarantee was furnished to compensate the loss caused due to breach of contract, in the present case no loss is caused to the respondents and therefore, revocation of the bank guarantee without any loss being caused is said to be unsustainable. It was emphasized by Shri A.K. Chitley, Senior Counsel that the action taken by the Chief General Manager is without jurisdiction as it is only the Project Director who is empowered to take action as per the contract and as the action is taken by CGM who is not the competent authority as per the agreement, the entire action stand vitiated.

It was further argued by Shri Chitley Senior Counsel that by the aforesaid process a sum of Rs. 4,40,00,000/- and a penalty under Clause 18 for Rs. 2,41,097/- is being recovered from the petitioner. According to the contract the total amount to be paid for the entire contract was Rs. 8,80,00,500/- out of this upto 31 January 2007 a sum of Rs. 7,33,33,750/- was already paid by the

petitioner. That being so when only a sum of Rs. 1,46,66,750/- was to be paid and when the user fee was collected by awarding contract to some other agencies, there being no loss to the respondents, recovery of 4 crore and above is said to be illegal. Shri Chitley, Senior counsel emphasized that by making the recovery of more than 4 Crores rupees respondents are being unduly enriched, respondents being a creation of statute, a State within the meaning of Article 12 of Constitution cannot be permitted to act in such a unreasonable, unfair and arbitrary manner. It was further emphasized by Shri A.K. Chitley, Senior Counsel for petitioner that action taken without considering the application for surrender submitted by petitioner vide Annexure P/15 and P/16 under Clause 34(1)(II) of the agreement is also illegal.

Finally taking me through the provision of Section 74 of the Contract Act and placing reliance of various judgments Shri A.K. Chitley, Senior Counsel argued that the action taken in the matter is contrary to the provision of Section 74 of the Contract Act and therefore, the entire action stands vitiated. It is the alternate case of the petitioner that respondents are only entitled to recover a reasonable compensation by way of penalty and in recovering more than 4 crores of rupees respondents are acting in a unreasonable manner. It was argued by him that the manner in which the bank guarantee is tried to be revoked and the amount realized shows the high handedness of respondents no. 2 to 5 in harassing the petitioner. Shri Chitley Senior counsel for the petitioner placing reliance on various judgments submitted that the entire action taken by respondents in the matter is vitiated, it is unfair and unreasonable for a public authority, a creation of statute to act in such a manner and therefore, he prays for interference in the matter. The judgment relied upon by Shri Chitley, Senior counsel in support of his contention are as under:

(I) Hetram Verma Vs. State of M.P. (2007)(1) MPJR SN 20. (II) Mrs. Sanjana M. Wig Vs. Hindustan Petro Corporation Ltd., .

(III) ABL International Ltd. and Another Vs. Export Credit Guarantee Corporation of India Ltd. and Others, .

(IV) National Highway Authority of India Vs. Ganga Enterprises and Another, .

(V) Harbanslal Sahnia and Another Vs. Indian Oil Corpn. Ltd. and Others, . (VI) Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others, .

(VII) The D.F.O., South Kheri and Others Vs. Ram Sanehi Singh, . (VIII) Haji Abdul Sattar, Vs. State of M.P. 1989 JLJ 185. (IX) State of Karnataka Vs. Shree Rameshwara Rice Mills, Thirthahalli, .

(X) Union of India (UOI) Vs. Rampur Distillery and Chemical Co., Ltd., .

(XI) Maula Bux Vs. Union of India (UOI), . (XII) Fateh Chand Vs. Balkishan Das, . (XIII) Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another, .

Refuting the aforesaid contention Shri K.N. Gupta, Senior Counsel representing respondents no. 2 to 5 raised a preliminary objection with regard to maintainability of this petition. It was argued by him that as disputed questions of fact are being agitated, this writ petition under Article 226/227 of the Constitution is not maintainable, it is also stated that as the matter arise out of a contract which is not a statutory contract, writ jurisdiction of this court cannot be invoked for challenging the action of respondents. It was argued by Shri K.N. Gupta, Sr. Counsel for respondents that petitioner wants performance of a contract and as the matter in question relates to breach of contract, petitioner should file a suit for damages or for specific performance or should resort to remedy of arbitration if available.

As far as the merits of the claim made by the petitioner is concerned Shri K.N. Gupta, Sr. Counsel emphasized that in the present case immediately after the contract was granted to the petitioner respondents started receiving complaints with regard to collection of excess user fee by the petitioner. Inviting my attention to the gazette notification issued prescribing the schedule of fee to be collected from various vehicles passing through the plaza, contained in page 60 to 72 of the return filed by respondents no. 1 to 5. It is emphasized that petitioner was found to be indulging in collection of excess user fee from various persons. It was found that petitioner was collecting user fee even from vehicles which were exempted from payment of fee. It is further pointed out by the learned Sr. Counsel that the Plaza was handed over to the petitioner on 1st April 2006 and within a few days thereafter, complaints were received from Morena Kerosene Dealers Association on 07-05-06, pointing out that petitioner is charging excess fee from vehicles passing through the plaza and is indulging in unfair means in the matter of collecting user fee. Shri Gupta invited my attention to the complaints received from various organizations on 6-5-06 as contained in page 75, receipts issued by the petitioner for collection of user fee as contained in page 74-76 and other documents filed along with the return of respondent no. 2 to 5 to point out that petitioner was indulging in various illegal activities and therefore, action was taken against him, respondents have filed copies of the complaints received from the road users passing through the plaza. It was found that petitioner was charging Rs. 232.54 against a permissible charge of Rs. 155 from HCM and EME vehicles and from truck and buses was charging higher amount, instead of the prescribed amount of Rs. 70/- a amount of Rs. 105/- was being charged. It is stated that because of the aforesaid irregularities notices were issued to the petitioner on 29-05-06, petitioner's reply was found to be unsatisfactory and therefore, a independent agency was employed to conduct investigation into the matter, from 1st June 2006 to 5th June 2006 members of the agency in various vehicles conducted operation in the Agra - Dhaulpur-Morena Section of the Highway for verifying the complaints received, not only with regard to user plaza of the petitioner situated in Village Choundha but also the other user plaza situated at Baretha, after conducting a discreet enquiry into the matter the team/agency submitted a detailed report Annexure R/7. This

report clearly established the allegations levelled against the petitioner with regard to charging excess user fee, the team also submitted certificate and receipts issued by the petitioner during the period of verification along with their report Annexure R/7 i.e., from page 106 to 126, of the return accordingly action was taken against the petitioner, after the earlier order passed on 27-07-06 Annexure R/10 was quashed by this court, a fresh show cause notice was issued. Petitioner submitted reply to the said show cause notice and thereafter the impugned action has been taken. Shri K.N. Gupta, learned Sr. Counsel by taking me through various documents emphasized that in this case an inquiry as is normally conducted in a departmentally or domestic inquiry is not required, the enquiry has to be in such a manner that the modus operandi of the petitioner can be established. Learned Sr. Counsel emphasized that no officer of the respondents is biased and prejudiced against the petitioner, there is no allegation of personal bias and prejudice or mala fide and as the entire action is taken after giving a fair opportunity of hearing which included a personal hearing at New Delhi on 12-01-07, it is argued that there is no violation of the principle of natural justice. However emphasizing that the entire action is taken after giving due opportunity of defence and representation to the petitioner Shri K.N. Gupta, Sr. Counsel argued that no case for interference in the matter is made out. It was submitted that once breach of contract is proved respondents are entitled to take action in accordance with the terms and conditions of contract, as the action of cancelling the contract, imposing the penalty and forfeiting the performance security and revocation of bank guarantee is taken strictly in accordance with terms and conditions of contract. Learned counsel argued that no case for interference exercising jurisdiction under Article 226/227 of the Constitution is made out.

Refuting the contentions with regard to applicability of Section 74 of the Indian Contract Act, the question of recovery, and imposing of penalty without proof of loss, Shri Gupta, learned Senior counsel taking me through the observation made by the Supreme Court in the case of Fateh Chand (supra) argued that once a pre-determined amount is agreed to by the parties and if this amount is forfeited for breach of contract the provision of Section 74 will not apply, accordingly he prays for dismissal of this petition. In support of his contention Shri K.N. Gupta, Sr. counsel relied upon the following judgments:

- I. Tata Cellular Vs. Union of India, .
- II. State of U.P. and others Vs. Bridge and Roof Co. (India) Ltd., .
- III. Apparel Export Promotion Council Vs. A.K. Chopra 1998(1) SCC 759.
- IV. National Highway Authority of India Vs. Ganga Enterprises and Another, .
- V. Directorate of Education and Others Vs. Educomp Datamatics Ltd. and Others, .
- VI. Union of India (UOI) and Another Vs. Ayub Ali, . VII. State of Jammu and Kashmir Vs. Bakshi Ghulam Mohammad, .

VIII. Grosons Pharmaceuticals (P) Ltd. and Another Vs. The State of Uttar Pradesh and Others, .

IX. BSES Ltd. (Now Reliance Energy Ltd.) Vs. Fenner India Ltd. and Another, . X. Daewoo Motors India Ltd. Vs. Union of India (UOI) and Others, .

Shri V.K. Sharma Assistant Solicitor General for respondent no. 1 supported the contention advanced by Shri K.N. Gupta and argued that the action taken in this case being in accordance with law, no case for interference is made out.

Shri Sanjay Dwivedi learned counsel for respondent no.6 Bank submitted that the Bank has only issued Bank guarantee and is bound by guarantee issued, it was however submitted by him that respondents no. 2 to 5 have tried to revoke the bank guarantee without giving a fair treatment to the petitioner.

I have heard learned counsel for parties at length and perused the records. From the facts that have come on record and on the basis of the contentions advanced by learned counsel representing the parties it is seen that following points arise for determination in this petition:

(I) Whether a writ petition under Article 226/227 of the Constitution is maintainable and this court can interfere in the matter exercising jurisdiction?

(II) Whether in taking action against the petitioner for terminating the contract fair and proper opportunity of hearing is granted to the petitioner and whether the principles of natural justice are followed?

(III) Whether the action for termination of the contract is done by the competent authority and whether cancellation of contract is based on proof of breach committed by the petitioner?

(IV) Whether the petitioner was entitled to seek surrender or cancellation of contract under clause 34(1)(II) of the agreement Annexure P/5?

(V) Whether the provision of Section 74 of the Contract Act applies in the present case and forfeiture of the performance security and revocation of bank guarantee in arbitrary and unfair warranting interference by this court.

As the question of jurisdiction to be exercised by this court is involved question No. 1 is taken up for consideration at the very outset.

Normally when the dispute between the parties arise out of a contract and agreement executed, parties are required to resort to the common law remedy available and exercise of jurisdiction in a writ petition is not normally permitted, however there are various exception to this proposition. Even though learned counsel for parties have placed reliance on various judgments, the question with regard to interference into matters of contract and maintainability of a petition under Article 226/227 of Constitution has been considered by the Supreme Court in the case of ABL International Ltd. (supra) relied upon by Shri Chitley, Sr. Counsel. In the aforesaid case most of the cases relied upon by the parties in

support of their rival contentions on this point is considered and it has been held in para 10 of the aforesaid judgment that if one of the party to the contract is a State and if the State acts in an arbitrary manner then the aggrieved party can approach the court by way of writ u/s 226 of the Constitution and the court depending on the facts is empowered to grant relief. Referring to two earlier judgments of Supreme Court in the case of K.N. Guruswamy Vs. The State of Mysore and Others, and DFO Vs. Ram Sanahi Singh, (1973) 3 SCC 864, it has been held that a writ petition can be entertained. In para 14 it has been held after considering the law laid down in the case of State of U.P. & others Vs. Bridge & Roof Company (Supra) that if no arbitration clause in the contract is available aggrieved parties/persons can take recourse to the remedy of filing of writ petition, therefore, in this case it would be appropriate to consider the question with regard to availability of the remedy of arbitration. From the impugned order of cancellation Annexure P/1 dated 25-01-07, it is seen that contract is cancelled under clause 18 on the ground of charging excess fee from the road users. Clause 18 of the contract agreement contemplates a penalty if it is found that the contractor has charged fee in excess to the prescribed rate, according to this provision, the authority is entitled to terminate the contract forthwith, impose a penalty of Rs. One lakh or an amount equal to one days fee receivable by the authority, and after termination under this clause forfeit the performance security. In the present case the contract is terminated, penalty of 2,41,097/- being one day's collection is imposed and the performance security of Rs. 2,20,00,125/- is forfeited. All the three action is taken under clause 18 of the contract agreement, Clause 25 in a non-arbitrable clause in the agreement and it contemplates that any dispute or difference between the parties in regard to a matter covered under Clauses 3, 7, 8, 10, 14, 18 & 19 shall be referred to the Project Director of the Authority and his decision shall be final. Thereafter clause 26 contemplates that all disputes and difference except those which are mentioned as non-arbitrable under clause 25 can be referred for arbitration under the Arbitration and Conciliation Act, 1996. It is therefore, clear that any action taken under clause 18 is not arbitrable as per clause 25 and in the present case as the action impugned is taken under clause 18 the remedy of arbitration is not available to the petitioner and therefore, the principles laid down in the case of ABL International Ltd. (supra) will apply, in the said case it has been observed by the Supreme Court that merely because one of the party raise a dispute about facts the jurisdiction under Article 226 of the Constitution is not taken away, in a given case jurisdiction under Article 226 of the Constitution can be exercised. It has been held in the aforesaid case that if "a State" or an instrumentality of the State is a party to the contract, it has an obligation under law to act fairly, justly and reasonably these are the requirement of Article 14 of the Constitution and if it is found that State or its instrumentality has acted in violation of the Article 14 of the Constitution writ court can interfere. The principle has been laid down in the following manner in para 27 and 28 of the judgment:

27. From the above discussion of ours the following legal principles emerges 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.

However, while entertaining an objection as to the maintainability of a writ petition under Article 226 of the Constitution of India, the Court should bear in mind the fact that the power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provisions of the Constitution. The High Court having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. The court has imposed upon itself certain restrictions in the exercise of this power, (see *Whirlpool Corpn. V. Registrar of Trade Marks* 15) And this plenary right of the High Court to issue a prerogative writ will not normally be exercised by the Court to the exclusion of other available remedies unless such action of the State or its instrumentality is arbitrary and unreasonable so as to violate the constitutional mandate of Article 14 or for other valid and legitimate reasons, for which the Court thinks it necessary to exercise the said jurisdiction." The judgment of *ABL International* (supra) is followed in the case of *Sanjana Wig Vs. Hindustan Petroleum Corp.* (supra) and after considering various judgment including the judgment in the case of *Harbanslal Sahnia* (supra), it has been observed in this case that the question as to whether discretionary jurisdiction under Article 226 of the Constitution is to be exercised or refused has to be determined having regard to the facts and circumstances of each case and no hard and fast rule can be laid down. In the case of *Ram Sanahi* (supra), the question is considered in para 5 of the aforesaid judgment wherein it has been so observed.

It is one of the fundamental rules of our constitutional set-up that every citizen is protected against exercise of arbitrary authority by the State or its officers. The Divisional Forest Officer in the present case set aside the proceeding of a subordinate authority and passed an order which involved the respondent in considerable loss. The order involved civil consequences. Without considering whether the order of the Divisional Forest Officer was vitiated because of irrelevant considerations, the order must be set aside on the simple ground that it was passed contrary to the basic rules of natural justice.

Keeping in view the principles laid down in the aforesaid cases this writ petition cannot be rejected at the very outset on the ground that the matter arises out of a contract, this court can look into the dispute and if it is found on scrutiny of the material available on record that serious disputed question of fact are involved

then only the petition can be dismissed and the petitioner relegated to take recourse to the alternative remedy of filing a suit. Once it is seen that arbitration is not permissible in a dispute covered under clause 18 of the contract and when the respondents are creation of statute, "a State" within the meaning of Article 12, discharging statutory function the allegations of unfair treatment, arbitrariness and violation of natural justice are required to be examined. That being so merely on the ground that the matter arises out of contract I am not inclined to dismiss this petition. Accordingly question no. 1 framed is answered by holding that a writ petition is maintainable, even in a matter pertaining to contract and in a case when one of the party of contract is "a State" this court by exercising jurisdiction under Article 226 of the Constitution can examine as to whether the "State" or the statutory authority has acted in a fair and reasonable manner and that their action is not vitiated by acts of arbitrariness, mala fide etc., to that extent enquiry in a petition under Article 226 of the Constitution is permissible particularly when the dispute falls under a non-arbitrable clause as per the agreement.

The next question pertains to giving a fair opportunity of hearing to the petitioner commensurate to the principle of natural justice. From the facts that have come on record it is seen that initially when the contract was terminated on 27-07-06 petitioner challenged the same in writ petition no. 3961/06, this court vide order dated 31-10-06 quashed the order dated 27-07-06 on the ground of non-grant of opportunity of hearing. Petition was disposed of with a direction to the respondent no. 5 to grant opportunity of hearing on the report of enquiry and thereafter, to take action in the matter. In compliance with the order dated 31-10-06 passed by this court, show cause notice dated 24-11-06 was issued to the petitioner, along with this show cause notice all relevant documents were given, the complaints received against the petitioner from various quarters including that from M/s Rinku Transport company Morena, so also the enquiry report submitted by the agency appointed and their observation report Annexure R/7 were supplied to the petitioner. All these documents which formed the material for taking action against the petitioner was supplied by the respondents on 24-11-06. When this show cause notice was issued petitioner again filed writ petition no. 6338/06, wherein this court refused to interfere in the matter, petitioner submitted his reply to the show cause notice on 8-12-06 and 18-12-06. A perusal of the reply submitted by the petitioner on 8-12-06 and 18-12-06 vide Annexure P/18 to P/20 indicates that in this reply to the show cause notice petitioner merely stated that some politically influential transporters and bad elements are not willing to pay user fee and are bent upon getting the contract cancelled. Except for denying allegations indicated in the show cause notice and insisting upon harassment by the transporters/bad elements of Morena and contending that the investigating agency has given a false report, petitioner has not given any material to show that the proposed action is vitiated or illegal. Even in the reply Annexure P/20 dated 18-12-06 petitioner has emphasized on the letter of surrender/termination dated 6-11-06 and sought a

decision on the same. Petitioner sought a date to be fixed for evidence and cross examination of the complainants, personal hearing and representation by lawyer was requested as can be seen from para 19 of Annexure P/20, vide Annexure P/21 dated 6-1-07 petitioner was permitted a personal hearing before Shri S.C. Jindal, Chief General Manager (CM) respondent no. 5, who was specifically directed by this court in W.P. No. 6338/06 to hear and decide the matter, permission to be represented by a lawyer was rejected on the ground that National Highway Authority of India is not represented by lawyer, it was indicated in the letter Annexure P/21 issued to the petitioner and that the matter is being decided on the basis of documents and no further cross examination is permissible. Records indicate that petitioner appeared before the authority on 12-01-07 and submitted his written statement vide Annexure P/20. Further petitioner has filed another statement as Annexure P/23 along with this petition and it is said that various documents and certificates issued by transporters indicating that petitioner has not committed any default were enclosed with this statement. These documents are from page 101 to page 120 of Annexure P/23 as annexed by the petitioner, it is the case that both Annexure P/22 to P/23 along with documents were submitted by the petitioner at the time of personal hearing. In Annexure P/22 endorsement and signature of all persons present in the hearing is available, whereas in Annexure P/23 except signature of Sanjay Garg, (Petitioner's representative) acknowledgment or receipt of this statement with documents is not available. Respondents have categorically stated that Annexure P/23 and enclosures were never given by the petitioner at the time of hearing on 12-01-07, this court has to accept this contention of respondents no. 2 to 5. It is clear from a perusal of Annexure P/22 and P/23 that petitioner only submitted the letter Annexure P/22 dated 11-01-07 at the time of personal hearing on 12-01-07 and the letter Annexure P/23 and the enclosure were never submitted by the petitioner at the time of personal hearing. This fact is evident from the record as acknowledged and receipt of Annexure P/22 is made by all the persons who were present at the time of personal hearing whereas in Annexure P/23 no such acknowledgment or receipt is present, this letter is signed by Shri Sanjay Garg on behalf of the petitioner.

It is clear from these facts that show cause notice was issued to the petitioner all the documents forming the material on the basis of which allegations were levelled against the petitioner were issued to him and in the reply submitted by the petitioner except for contending that petitioner is being harassed, no allegation of mala fide, bias or prejudiced against any officer of respondents is indicated. Petitioner has also not given any cogent reason to hold that the allegations are not correct. Petitioner wanted cross examination of complainants in the personal hearing and wanted representation by lawyer. Action was taken against the petitioner for breach of contract and for violating the terms of a contract, the proceeding for personal hearing was conducted by the Officers of the National Highway Authority in the enquiry no procedure for recording statement of witnesses was undertaken nor was any lawyer present to conduct

the enquiry or represent the authority. In a case for breach of contract, the procedure normally followed in a domestic enquiry cannot be insisted upon. The principle of natural justice in such a case will be limited to issuance of a show cause notice, disclosing the material available on the basis of which action is proposed to be taken, giving a opportunity for representation and explanation. In this case these requirements have been fulfilled, it was not necessary to give any opportunity for cross examination or representation by a lawyer. Petitioner was issued with the show cause notice and all the material documents on the basis of which show cause notice was issued were made available to the petitioner, on this being done at the first instance it was incumbent upon the petitioner to prima facie show that the allegation levelled in the show cause notice is not correct and to produce cogent material in support thereof, petitioner having failed to discharge this primary responsibility and having failed to give any suitable explanation or material to indicate that he was being harassed it was not at all necessary for the National Highway Authority to conduct any further enquiry and in the facts and circumstances of the case I am of the considered view that Principle of natural justice has been followed and a fair opportunity of hearing was given to the petitioner. Even in these proceedings except for emphasizing that proper opportunity was not given, petitioner has not shown as to what was the prejudice caused to him because on non grant of permission to engage a lawyer or due to refusal of permission to cross-examine any witness. In the enquiry and investigation conducted by the agency no witnesses were examined, the report Annexure R/7 only discloses the facts that were observed by the investigating team of the agency.

It is not the case of the petitioner that respondents were biased and prejudiced. There is no allegation of bias and prejudice against any officer of National Highway Authority i.e. respondents no.2 to 5 or the agency which conducted the investigation. In the absence of male fide, bias and prejudice being pleaded or established it has to be assumed that respondents have acted in a fair manner in the matter of conducting enquiry into the allegations received against the petitioner and as the material collected by the respondents were made available to the petitioner and action was taken, after giving opportunity of representation and explanation to the petitioner, it cannot be said that petitioner did not receive a fair hearing.

During the course of hearing it was emphasized that the Team/ agency which was deployed to collect material conducted enquiry behind the back of the petitioner and therefore, report of this team cannot be accepted. While deciding this question this court has to be keep in mind the pecuniary facts that are available on record. Contract given to the petitioner was for collecting user charges from various vehicles passing through the National Highway in question, allegations against the petitioner is that by harassing the road users excess charge is being collected, to conduct a enquiry into such a allegation respondents no. 2 to 5 cannot be expected to notice the petitioner and thereafter conduct the exercise of finding out true fact, if this was to be done after notice to the

petitioner then on the dates when the discreet enquiry were conducted petitioner would have been alert and ensured that he does not commit any illegality, on the contrary the only method to investigate into the allegation was to conduct a discreet enquiry by permitting a team to pass through, the plaza and see how the petitioner was collecting the user fee and what was his attitude towards the road users. Report of the team/agency Annexure R/7 indicates that the team between 1st June 2006 to 5th June 2006 passed through the plaza on various times and noted the activities of the petitioner which included payments collected from the road users. The representatives of the agency while passing through the plaza have paid the user fee and receipt issued by the petitioner shows that excess fee was collected. The conclusion drawn by this agency is that the petitioner has charged excess fee from various road users, for the sake of convenience the conclusion recorded by the agency is reproduced herein-below which clearly shows that the petitioner has indulging in certain irregular means and has collected excess fee.

CONCLUSION

The exercise of discreet observation of activities of toll plaza staff and toll fee collection as decoy customer at toll plaza "Barettha" (Agra- Dholpur Section) and toll plaza "Chondha" (Morena- Gwalior Section) on NH-03 was completed in 5 days duration from 01-06-06 to 05-06-06, constant and regular 20 visits (10 ups and 10 down) to each plaza had been made to have an analytical study of the behavior of the staff and also to unearth their modus operandi, nefarious activities and ways and means adopted to execute their existing malpractices. The team travelled in a Heavy Leyland truck (2005 model) no HR-55C-5690 hired from Gurgaon in order to avoid any exposure and maintain utmost confidentiality of the assignment.

The team was successfully able to cross the plaza on all 40 occasions by paying Rs. 105/- for single journey against the prescribed toll road user fee of Rs. 70/- by the NHAI. A battery of muscle man/strong armed man could be seen at all the plazas, who were manning the toll collection operations and threatening any kind of action against the toll road fee user in case they did not pay the toll fee as decided by them which was 50% extra from the toll fee notified by the NHAI. The number of these strong armed personnel was approximately 40-50 at each plaza at a time equipped with lathies, fire arms, cellphones and jeeps/cars and motorcycles. In case of necessity, their number could be increased if there was any resistance by the toll road users. Never the less, both the plazas are being run by the local goons and mafias, who were well connected with the local political parties and administrative machinery at appropriate level and maintaining relationship to run their roaring business. Interaction with the drivers of LCVs, HCVs and heavy construction machinery/earth moving machines have revealed as under:

Type of Vehicle Actual single Entry fee Prescribed by NHAI Over charged by the contractor Actual Multiple Entry fee. Prescribed by NHAI Over charged by the

contractor

LCV 35 50 52 75

Truck/

Bus 70 105 105 155

HCM/E. Not known

M.E.Q. 155 230 232

3. On 04-06-06 at about 0035 hrs it had been gathered from the driver of HP 38-7583 who was plying from Amritsar to Mumbai in a heavy A/C container and carrying Mutton (Approximately 20 tons) that he was over charged of Rs. 330/- for single journey instead of Rs. 230/- at Baretha toll plaza by the toll operator. Similarly the driver of HR- 26-4761 and HR-26-4749 who were carrying cranes attached with their HCVs and moving towards Gwalior informed that they have been overcharged at toll plaza Chondha @ Rs. 320/-each against the actual toll fee of Rs. 232/-. It will not be out of place to mention here that toll rates depicted on the notice board near the toll plaza "Chondha" at one place had been black painted whereas at some other places it had been covered by pasting posters and hand bills. But, presently due to pre- monsoon, showers there posters have become faint at both the plazas.

The modus operandi for collecting the extra toll fee was to issue a multiple entry ticket of Rs. 105/- for the journey of Rs. 70S- but the vehicle was never allowed to cross the plaza on return journey on that ticket. In other words, they were charging 50% extra for each journey. The full registration numbers of the vehicles along with time of crossing were never recorded. Only four last digits were indicated these too, were found incorrect.

Sometimes toll fee was charged on the basis of wheels in the vehicle, for example TATA 407, Eicher and Mazda falls under the category of LCVs. In some cases the bodies of these vehicle had been enlarged/extended by the transporters and six wheels have been fitted. In this case, the toll tax was charged against a HCV instead of LCV.

The behavior of all those, who were deployed at the toll collection booth was found in humane, rude and uncivilized. Sometimes they were very harsh with the toll road users. They did not hesitate in using abusive and filthy language.

Some HCVs drivers have been noticed quarrelling with the toll collectors over extra toll fee charged by them. As and when any driver showed his resistance, he was brought down from the vehicle and manhandled by the staff. Although all the toll road users, both locals and outsiders have a feeling that they are being over charged by the toll contractors they find themselves hapless and helpless since the letter are well connected with all those who matter in this regards. One of the toll collector disclosed during the course of altercation with a driver that even local administration couldn't harm them since they have developed a better

understanding with them.

(Emphasis supplied)

There is no allegations of mala fide, personal prejudice or bias against any of the members of agency conducted the discreet inquiry. In the facts and circumstances of the case I am of the considered view that the method adopted by the National Highway Authority to detect the illegalities being committed by the petitioner is a fair and reasonable method and it has not caused any prejudice or bias to the petitioner. There is no material available on record on the basis of which the report submitted by the agency as contained in Annexure R/7 can be discarded by this court, this report cannot be rejected merely on the ground that it is collected behind the back of the petitioner. The nature of irregularity committed by the petitioner can be detected only if a discreet enquiry in the manner as done by the respondents is conducted and in doing so it cannot be said that respondents have acted in a manner which is violative of the principle of natural justice. The report submitted was placed before the petitioner he was given opportunity of submitting his defence and explanation both in writing and personally. Records indicated that petitioner was unable to produce any cogent material to show that this report is unsustainable and cannot be relied upon.

From the procedure that was followed by the respondents as indicated hereinabove it is clear that a show cause notice was issued to the petitioner, he was given opportunity of hearing and the procedure followed in the matter cannot be termed as illegal or arbitrary in any manner what so ever, accordingly the second question formulated in the matter has to be answered by holding that in the facts and circumstances of the case it has to be held that the petitioner has received a fair opportunity of hearing and in the matter of granting hearing and opportunity of defence to the petitioner respondents no. 2 to 5 have not committed breach of the principle of natural justice. In the matter of enquiry into breach of contract respondents are not obliged to follow the procedure normally followed in a criminal trial or a departmental enquiry.

As far as third question with regard to termination being justified and breach proved is concerned, the overwhelming material available on record, the modus operandi adopted by the petitioner as was detected by the agency which conducted the discreet enquiry from 1st June 2006 to 5th June 2006 clearly indicates that the petitioner had committed breach of contract by charging higher rate from the road users, petitioner had challenged the finding with regard to the breach of collection higher fee by contending that M/s. Rinku Transport, Morena had made the complaint not only against the petitioner but also against the contractor of Baretha Plaza. It was emphasized that no action was taken against the contractor of user plaza Baretha because M/s. Rinku Transport withdrew the complaint made by them against this user plaza, therefore, terminating the contract of petitioner is said to be illegal. This contention of learned counsel for petitioner is wholly misconceived, Shri K.N. Gupta, Sr. counsel pointed out that

even though M/s. Rinku Transport, Morena had withdrew the complaint against the contractor of Baretha plaza the discreet enquiry conducted between 1st June 2006 to 5th June 2006 included the allegations against the user plaza Baretha and report Annexure Resubmitted by the agency indicated that even in the user plaza Baretha excess amount was being charged from the road users and inspite of withdrawal of complaint similar action is said to have been taken against this contractor also, that being so merely on the ground of withdrawal of complaint, no relief can be granted, petitioner's conduct in collecting excess fee is established not only from the report Annexure R/7, but also from the complaints submitted against the petitioner by the BJP Vyapar Prakostha, Jhansi (U.P.) on 06-05-06 receipt enclosed by them and a complaint of Morena Kerosene Dealer Association dated 07-04-06 and the various receipts submitted by them, the complaints showing excess fee collected are contained in page 83 of the return submitted by respondents, these documents if read along with report of agency Annexure R/7 indicates that allegations of collecting excess user fee from the road users is established and overwhelming material was available with respondents no. 2 to 5 to hold that the petitioner had collected fee at higher rate than that prescribed by the statutory notification issued under the Act 1988 and the Rules of 1997.

Clause 18 of the contract contemplates the penalty for charging excess fee. This clause 18(a) empowers the authority to terminate the contract forthwith in case the allegations of charging excess fee is proved. In the present case as the allegations of charging excess fee is found to be proved, respondents had authority to terminate the contract under clause 18(a) and therefore, it has to be held that the breach being proved, the termination of contract was fully justified and in terminating the contract respondents have not committed any illegality. Another question canvassed was that action is not taken by the competent authority, it was emphasized that in the contract it is only the Project Director who is empowered to take action in the matter and therefore, action taken by respondent no. 5 was said to be illegal, this argument of the petitioner cannot be accepted, when action was being taken by Project Director and when a show cause notice was issued to the petitioner, petitioner approached this court. Notice dated 24-11-06 Annexure P/17 was issued to the petitioner, petitioner filed W.P. No. 6338/06 challenging this notice before this court, the contention advanced was that the application submitted under clause 34 of the agreement for surrender is not considered, this court did not interfere in the matter, however prior to issuing show cause notice dated 24-11-06 petitioner had filed another writ petition no. 3961/06 and in this petition when the earlier order of termination dated 27-07-06 was quashed, direction was issued to the respondent no. 4 i.e. Chief General Manager (CM) to take action in the matter, issue show cause notice to the petitioner, supply him copies of documents and enquiry report and decide the matter after giving opportunity of hearing. It is the petitioner himself who invited this order dated 31-10-06 in WP No. 3961/06 and it is because of this order that the entire action is taken by the respondent no. 5

CGM(CM), as the action is taken by the said authority i.e., respondent no. 5 on the basis of a direction issued by this court and as the direction was issued at the instance of the petitioner, now the petitioner cannot put up a grievance that the action is taken by an unauthorized persons, petitioner cannot now challenge the authority of respondent no.5 is taking action.

As far as fourth question with regard to non consideration of the notice dated 6-11-06 submitted by the petitioner for surrender or termination of contract under clause 34(1)(II) is concerned it is seen that in accordance with directives issued by this court in W.P. No. 6338/06 dated 13-12-06 respondents have considered this matter and it is found by them that petitioner with a view to evade penalty and enquiry into the breach committed had submitted the letter dated 6-11-06 for withdrawal from the contract, finding that at this stage petitioner cannot be permitted to terminate the contract as there are serious allegations of breach of contract rendering the petitioner liable to be proceeded against by imposing of penalty respondents have rejected the prayer for surrender or termination of contract under clause 34, in doing so respondents have not committed any error, petitioner sought for withdrawal of contract by surrendering/terminating under clause 34 only after his contract was terminated at the first instance on 27-07-06 and after termination was quashed on 31-10-06 in W.P. 3961/06 and when enquiry into the matter was in progress and show cause notice was issued to the petitioner for breach of contract, respondents no. 2 to 5 were entitled to direct enquiry into the matter and as the petitioner was trying to avoid the enquiry and wanted to run away for the same only to avoid the penal consequences, respondents were right in not accepting or refusing the offer of surrender submitted on 6-11-06 under clause 34(1)(II), accordingly in the facts and circumstances it has to be held that in refusing the request made by petitioner vide letter dated 6-11-06 submitted under clause 34(1)(II) respondents have not committed any error which warrants interference in this petition.

The only defence put forth by the petitioner in response to the show cause notice was that he is being harassed by some influential politicians and transporters of Morena, however through out the proceedings neither in reply to show cause notice nor at the time of personal hearing on 12-01-07 nor in this petition petitioner has given any details or particulars of the so called politicians or transporters who have harassed the petitioner. Merely by making vague allegations and by trying to evade the show cause notice on merit petitioner complains of unfair and unreasonable treatment. In the absence of any specific particulars being furnished by the petitioner and the same being prima facie established no cognizance can be taken about the allegations made by the petitioner with regard to harassment etc.

Having decided the aforesaid four questions now the only question that remains for consideration is with regard to reasonableness of the action taken and examination of the same with reference to the provision of Section 74 of the

Contract Act and justification in the matter of forfeiting the performance Security and revocation of the Bank guarantee, i.e., imposition of the penalty.

To decide the question of applicability of Section 74 of the Indian Contract Act, effect of the same on the facts and circumstances of the present case and the reasonableness of the amount to be recovered from the petitioner for breach of contract, it would be proper to take note of various provisions of the agreement. The contract agreement Annexure P/5 contemplates that during the period 1-4-06 to 31-03-07 petitioner shall pay a sum of Rs. 8,80,00,500/- and the monthly installment in this regard is fixed at Rs. 73,33,375/-, the rate of fee to be collected by the petitioner is indicated in clause 3 of the agreement to be as per the notification issued by the Central Government from time to time and schedule 1 of the agreement, clause 4 contemplates that the contract or shall collect only the prescribed rate and shall issue receipt for the same, exemption and concession to be granted are provided in clause 7 and 8. The manner of handing over the plaza is provided in clause 10 and clause 11 onwards contains procedure for display of rate of fee and its notification, requirement of personnel, their deployment and requirement of paying minimum wages, employees provident fund etc clause 17 indicates that the contractors shall furnish a bank draft as detailed therein to the tune of Rs. 2,20,00,125/- all the drafts are to be drawn on Central Bank of India and payable at Gwalior. This clause also contemplates a provision for submitting a bank guarantee as per the format prescribed valid for a period of 15 months and the amount of bank guarantee is indicated as Rs. 2,20,00,125/- sub clause c-(ii) of clause 17 gives right to the authorities to forfeit whole or in part this amount in its absolute discretion if any default is committed by the contractor. Thereafter, clause 18 of the agreement contemplates a procedure pertaining to penalty for charging excess fee, this clause is very relevant for deciding the present dispute, for the shake of convenience the clause is reproduced herein under: "18. Penalty for charging Excess Fee:

(a) In case, it is observed and/or established to the satisfaction of the Authority that the Contractor has charged fee in excess of the prescribed rate, the Authority may terminate the contract forthwith and/or may impose a penalty of Rs. One lakh or an amount equivalent of one day's fee receivable by the Authority, which ever is higher and may provide the Contractor another opportunity of continuing the Fee Collection. However, in non case the Authority shall afford more than one opportunity to the Contractor.

(b) The Authority also, reserves the right to estimate the excess collection of fee made by the Contractor and recover the same, which will be over and above the penalty imposed and to be recovered from the Contractor.

(c) The termination under this clause shall make the Contractor liable for unconditional forfeiture of the performance security.

It is seen from this clause of the contract that it deals exclusively with penalty to

be imposed for charging excess fee by the contractor, it contemplates the action to be taken in the event of excess fee being collected by the contractor, the manner in which the action is to be taken, the quantum of penalty to be imposed, the right to estimate the excess fee and termination of contract and a provision for unconditional forfeiture of the performance security. Clause 22 of the agreement speaks about obligations of contract and clause 23 contemplates a procedure with regard to inspection. Clause 24 to 26 pertains to matters which are non arbitrable and arbitration, proceeding for termination of contract is contained in clause 34, this only speaks about termination of the contract there is no penal clause in this provision.

In the present case a perusal of the show cause notice issued and the impugned order Annexure P/1 indicates that the only allegations levelled against the petitioner is with regard to collection of excess fee and consequential harassment of road users for the purpose of collecting excess fee, there is no other allegation with regard to any other breach committed by the petitioner in the execution of the contract. The sole allegation for which action is taken is excess collection of fee from the road users, the question is as to whether for this breach of excess collection as contemplated under clause 18, the action taken in the present case is fair and reasonable. At this stage it would be proper to take note of Section 74 of the Indian Contract Act, reads as under:

74. When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused hereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

Explanation -A stipulation for increased interest from the date of default may be a stipulation by way of penalty. Exception - When any person enters into any bail-bond, recognizance or other instrument of the same nature, or under the provisions of any law, or under the orders of the Central Government or of any State Government, gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned therein.

Explanation.- A person who entered into a contract with Government does not necessarily thereby undertake any public duty, or promise to do an act in which the public are interested." A perusal of this provision indicated that it contemplates a provision for recovery of reasonable compensation in case of breach of contract and imposition of penalty. The aforesaid provision has been subject matter of deliberation and consideration in various cases and the most important case in this regard is the case of Fateh Chand (supra), in this case the provision of Section 74 is considered and it has been observed by the Supreme Court that this Section deals with a measures of damages in two class of cases.

After considering the object of this section and after comparing it with that of the English Law, it has been held by the Supreme Court that the measure of damages in case of breach by way of penalty is a reasonable compensation. After considering various provisions in para 11 it has been observed by the Supreme Court in the said case as under:

11. Before turning to the question about the compensation which, may be awarded to the plaintiff, it is necessary to consider whether S. 74 applies to the stipulations for forfeiture of amounts deposited or paid under the contract. It was urged that the section deals in terms with the right to receive from the party who has broken the contract reasonable compensation and not the right to forfeiture who has already been received by the party aggrieved. There is however no warrant for the assumption made by some of the High Courts of India, that S. 74 applies only to cases where the aggrieved party is seeking to receive some amount on breach of contract and not (sic) cases whereupon breach of contract an amount received and the contract is sought to be forfeited. In our judgment the expressly "the contract contains any other stipulation by way. of penalty comprehensively applies to every covenant involving a penalty whether it is for payment on breach of contract of money or delivery of property in future, or for forfeiture, of right to money and (sic); property already delivered. Duty not to enforce the penalty (sic) but only to award reasonable compensation is sta(sic) upon Courts by S. 74. in all cases, therefore. where (sic) stipulation in the nature of penalty for forfeiture (sic) deposited pursuant to the terms of contract which expressly provides for forfeiture, the court has jurisdiction to an and such (sic) it considers reasonable, but not exceeding the a(sic) the contract as liable to forfeiture.

(emphasis supplied)

This judgment have been considered by a Division Bench of this in the case of Haji Abdul Sattar (supra) and after considering the (sic) judgment a Division Bench has observed as under:

The Supreme Court in Fateh Singh v. Balkrishno Das (sic) held "the measure of damages in the case of breach of (sic) way of penalty is by S. 74 reasonable compensation (sic) the penalty stipulated for. In assessing damage the (sic) subject to the limit of the penalty stipulated. jurisdiction (sic) such compensation as it deems reasonable having regards (sic) circumstance of the case. Jurisdiction of the Court (sic) compensation in case of breach of contract is unqui(sic) as to the maximum stipulated; but compensation (sic) reasonable, and that imposes upon the Court (sic) compensation according to settled principles. Rely(sic) or the decision, the Supreme Court in Maula Bux v.. Umon (sic) 2 held that" where under the terms of the contract the party in breach has undertaken to pay a sum of money or to forfeiture a (sic) money which he has already paid to the party complaining (sic) breach of contract, the undertaking is of the nature of a penol(sic) Again, in Union of India V. R.D.&C. Co. (1), the Supreme Court (sic) that the party to a contract taxing security deposit from the

other party to ensure due performance of the contract is not (sic)ded to forfeit the deposit on ground of default when no loss is cause (sic) him in consequence of such default. Therefore, in view of S. 74 of the Contract Act and the principles laid down by the Supreme Court, the party to a contract taxing security deposit from the other party to ensure due performance is not entitled to forfeit the deposit on ground of default when no loss is caused to him on consequence of such default."

(emphasis supplied)

Again the matter was considered by the Supreme Court in the case of Union of India Vs. Rampur Distillery and Chemical Co. Ltd. (supra) and in the aforesaid judgment it is indicated as under:

3. Only one contention was urged on behalf of the appellants before us. that the security deposit was taken from the respondents in order to ensure the due performance of the contract and respondents having defaulted, the entire amount was liable to be forfeited. A similar contention was advanced before this Court but was rejected in *Maula Bux Vs. Union of India*. The appellant therein had entered into a contract with the Government of India for the supply of certain goods and had deposited a certain amount of security for the due performance of the contract. As in the instant case, it was stipulated in the contract there that the amount of security deposited was to stand forfeited in case the appellant neglected to perform his part of the contract. On the appellant committing default in the supply, the Government rescinded the contract and forfeited the security deposit. It was held by this Court that forfeiture of earnest money under a contract for sale of property does not fall within section 74 of the Contract Act, if the amount is reasonable, because the forfeiture of a reasonable sum paid as earnest money does not amount to the imposition of a penalty. But "where under the terms of the contract the party in breach has under taken to pay a sum of money or to forfeit a sum of money which he has already paid to the party complaining of a breach of contract, the undertaking is of the nature of a penalty." It was further held that the amount deposited by way of security for guaranteeing the due performance of the contract cannot be regarded as earnest money.

(emphasis supplied)

The matter again received consideration of the Supreme Court in the case of *Maula Bux* (supra) and in the aforesaid case the Supreme Court has observed as under:

In the present case the deposit was made not of a sum of money by the purchaser to be applied towards part payment of the price when the contract was completed and till then as evidencing an intention on the part of the purchaser to buy property or goods. Here the plaintiff had deposited the amounts claimed as security for guaranteeing due performance of the contracts. Such deposits cannot be regarded as earnest money.

Section 74 of the Contract Act provides:

When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

There is authority, no doubt coloured by the view which was taken in English cases, that Section 74 of the Contract Act has no application to cases of deposit for due performance of a contract which is stipulated to be forfeited for breach. *Natesa Aiyar V. Appayu Padayachi*; *Singer Manufacturing Company V. Raja Prasad*; *Manian Pattar V. The Madras Railway Company*, But this view is no longer good law in view of the judgment of this court in *Fateh Chand's case*(supra). This court observed at P. 526: "Section 74 of the Indian Contract Act deals with the measure of damages in two classes of cases: (i) where the contract names a sum to be stipulation by way of penalty XXX."The measure of damages in the case of breach of a stipulation by way of penalty is by Section 74. reasonable compensation not exceeding the penalty stipulated for:

The Court also observed:

It was urged that the section deals in terms with the right to receive from the party who has broken the contract reasonable, compensation and not the right to forfeit what has already been received by the party aggrieved. There is however no warrant for the assumption made by some of the High Courts in India, that Section 74. applies only to cases where the aggrieved party is seeking to receive some amount on breach of contract and not to cases whereupon breach of contract an amount received under the contract is sought to be forfeited. In our judgment the expression "the contract contains any other stipulation by way of penalty "comprehensively applies to every covenant involving a penalty whether it is for payment on breach of contract of money or delivery of property in future, or for forfeiture of right to money or other property already delivered. Duty not to enforce the penalty clause but only to award reasonable compensation is statutorily imposed upon courts by Section 74. In all cases, therefore, where there is a stipulation in the nature of penalty for forfeiture of an amount deposited pursuant to the terms of contract which expressly provides for forfeiture, the court has jurisdiction to award such sum only as it considers reasonable, but not exceeding the amount specified in the contract as liable to forfeiture, and that.

There is no ground for holding that the expression "contract contains any other stipulation by way of penalty" is limited to cases of stipulation in the nature of an agreement to pay money or deliver property on breach and does not comprehend covenants under which amounts paid or properly delivered under

the contract, which by the terms of the contract expressly or by clear implication are liable to be forfeited.

Forfeiture of earnest money under a contract for sale of property movable or immovable. If the amount is reasonable, does not fall within Section 74. That has been decided in several cases: Kunwar Chiranjit Singh V. Har Swarup(supra): Roshan Lal V. The Delhi Cloth and General Mills Company Ltd. Delhi: Muhammad Habibullah v. Muhammad Shaf: Bishan Chand V. Radhakishan Das. These cases are easily explained, for forfeiture of reasonable amount paid as earnest money does not amount to imposing a penalty. But if forfeiture is of the nature of penalty. Section 74 applies. Where under the terms of the contract the party in breach has undertaken to pay a sum of money or to forfeit a sum of money which he has already paid to the party complaining of a breach of contract, the undertaking is of the nature of a penalty.

(emphasis supplied)

From a complete reading of the principles laid down by the Supreme Court and the Division Bench in the aforesaid cases, it is seen that Section 74 of the Contract Act speaks about imposition of penalty for breach of contract and the reasonableness of the compensation to be claimed for, merely because some breach is proved or established forfeiture of the security amount deposited or bank guarantee submitted is not a consequential result, even if actual loss is not proved a reasonable compensation is only which the aggrieved person is entitled to, but if the party which complains is in a position to prove before the court the actual damages caused, there is no difficulty in granting the same. However when an amount is already determined by the parties as mentioned in the contract as the amount to be paid in case of breach, this amount indicated is not the amount of loss but it is in the nature of penalty. That being so it is clear from the principles laid down in the aforesaid cases that even if a pre determined amount is indicated by the parties as the amount which can be recovered for breach of contract, reasonableness of the amount to be recovered as penalty can be looked into by the court when actual loss is not proved.

Accordingly this court is not now required to consider as to whether the recovery ordered and the action taken is reasonable and the amount forfeited is a reasonable compensation for the breach committed by the petitioner and therefore, recoverable.

As already indicated the only allegation or breach committed is collection of excess fee, act, in to be taken for this breach is contained in clause 18 of the contract, t(sic) consequences that follow this breach are termination of contract, forfeiture of the performance security, imposition of penalty of Rs. 1 lakh or the amount of one day fee payable to the authority. A amount of Rs. 2,41,957 being one day's fee is recovered from the petitioner, petitioner has already paid his amount thereafter right is given to the authority to colled the fee by engaging other agency or contractor, this right has been exchr(sic)y the authority. In the

present case all the action as contemplated under clause 18 is taken against the petitioner. The contract is cancelled, one day's fee of Rs. 2,41,947. (sic) is recovered and the entire performance security of Rs. 2,20,00,125/- is recovered, this amount is equal to three months installment which is to be paid by the contractor as is evident from the letter Annexure P/4 dated 14-03-06, when the contract was terminated the amount of fee upto January 2007 was paid by the petitioner. The plaza was surrendered and taken over by the authority on 1st February 2007, that being so the authority may have suffered loss of collection through the contractor i.e. the petitioner for the month of February and March 2007, against this amount of two months fee, by way of forfeiture of performance security three months fee i.e. Rs. 2,20,00,125/- is recovered, that means one month extra collection have been received by the authority. That apart penalty has been imposed to the tune of Rs. 2,41,097/- and contract is terminated, all these actions both penal and otherwise as contemplated under Clause 18 is taken against the petitioner. It is not in dispute that after the plaza was taken over by the authority on 1st February 2007 collection of fee has been done the respondents authority has not lost anything by way of collection in the subsequent period i.e., from February to March 2007. In fact there is no material made available by the National Highway Authority to show that they have suffered any financial loss due to cancellation of the contract. It is therefore, clear that in the present case respondents have not suffered any loss. However u/s 74 of the Indian Contract Act even without proof of loss respondents are entitled to impose penalty and recover the compensation, but this compensation has to be a reasonable one. In the present case the amount recovered under clause 18 is more than the amount which the respondents would have received, in case no breach is committed and contract was completed on the date fixed i.e. 31st March 2007. On the contrary respondents have received certain amount more than the amount which they would have received if the contract was completed.

Once the allegation of charging excess fee is proved respondents are entitled to invoke the provision of clause 18 of the agreement and in terminating the contract, imposing the penalty of Rs. 2,41,097/- and in forfeiting performance security of Rs. 2,20,00,125/- respondents have taken action strictly in accordance with provision of clause 18 of the agreement. It is seen that the respondents have acted in accordance with terms of the contract as agreed to between the parties, this court while exercising jurisdiction in a writ petition is not required to nor is it proper to interfere with the action taken by the authority, once it is seen that action in accordance with terms and conditions of the agreement is taken. Accordingly the action taken for terminating a contract imposing the penalty of Rs. 2,41,097/- and forfeiting the performance security to the tune of Rs. 2,20,00,125/- respondents have not committed any breach or illegalities which warrants interference. This action is strictly in accordance to clause 18 of the agreement and no interference into the same is called for. However having held so the question of forfeiting of bank guarantee has to be

considered.

As per letter Annexure P/4 dated 14-03-06 Bank guarantee to the tune of Rs. 2,20,00,125/- that is a amount equal to three month agreed remittance is submitted in a proforma prescribed by the National Highway Authority, the bank guarantee submitted is valid upto 30th June 2007 i.e. Annexure R/19. A perusal of this guarantee indicates that Central Bank of India a body corporate constituted under the Banking Regulation Act having its head office at Chandra Mukhi, Nariman Point, Mumbai, and branch at Jayendra Ganj, Gwalior, the request of petitioner contractor has agreed to give to the respondents authority guarantee for an amount not exceeding 2,20,00,125/- and this guarantee is against any loss or damage caused to or suffered or would be caused to or suffered by reason of any breach by the said contractor of any of the terms and conditions of the said contract. It is clear from a perusal of this bank guarantee indicates that the guarantee is to compensate for the loss or damage caused because of breach. Under clause 18 what is to be forfeited is the amount of performance security which is given under clause 17, the bank guarantee is therefore, in addition to the security towards performance as contemplated under clause 17(a) of the agreement, the bank guarantee is an additional guarantee for any loss or damage caused or suffered due to breach. In the present case because of breach committed penalty under clause 18 is already imposed, the breach is only of charging excess fee from the road users not other breach is alleged or established, no other loss or breach or illegality is established or proved. Under such circumstances the question is as to whether after having imposed the penalty and action taken as contemplated under clause 18 of the contract agreement, revocation of bank guarantee also to the tune of Rs. 2,20,00,125/-i.e., a sum equal to three months remittance is reasonable, which can be termed as fair and justified.

Normally in cases arising out of contract and when a bank guarantee is proposed to be revoked a writ court will not normally interfere as the matter is as per the agreement however if one of the party to the contract is the government or a statutory authority as contemplated under Article 12 of the Constitution, action of the State or authority has to be judged on the touch stone of the requirement as contemplated under Article 14 of the Constitution. In the case of Kumari Shrilekha Vidyarthi and Others Vs. State of U.P. and Others, , it has been held that even in a matter of contract a instrumentality of the State is required to act in a fair and just manner, if the instrumentality of State or Statutory authority acts contrary to public goods or in a unfair, unjust or unreasonable manner, even in contractual matters, in such case, it is held that High Court can interfere. In the case of Shrilekha (supra) it has been so held by the Supreme Court.

The requirement of Article 14 should extended even in the sphere of contractual matters for regulating the conduct of the State activity. Applicability of Article 14 to all executive actions of the State being settled and for the same reason its applicability at the threshold to the making of a contract in exercise of the

executive power being beyond dispute, the State cannot thereafter cast off its personality and exercise unbridled power unfettered by the requirements of Article 14 in the sphere of contractual matters and claim to be governed therein only by private law principles applicable to private individuals whose rights flow only from the terms of the contract without anything more. 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 coexist. 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. Therefore total exclusion of Article 14 - non-arbitrariness which is basic to rule of law - from State actions in contractual field is not justified. This is more so when the modern trend is also to examine the unreasonableness of a term in such contracts where the bargaining power is unequal so that these are not negotiated contracts but standard form contracts between unequals.

Unlike the private parties the State while exercising its powers and discharging its functions, acts indubitably, as is expected of it, for public good and in public interest. The impact of every State action is also on public interest. It is really the nature of its personality as State which is significant and must characterize all its actions, in whatever field, and not the nature of function, contractual or otherwise, which is decisive of the nature of scrutiny permitted for examining the validity of its act. The requirement of Article 14 being the duty to act fairly, justly and reasonably, there is nothing which militates against the concept of requiring the State always to so act, even in contractual matters. This factor alone is sufficient to import at least the minimal requirements of public law obligations and impress with this character the contracts made by the State or its instrumentality. It is a different matter that the scope of judicial review in respect of disputes falling within the domain of contractual obligations may be more limited and in doubtful cases the parties may be relegated to adjudication of their rights by resort to remedies provided for adjudication of purely contractual disputes. However, to the extent, challenge is made on the ground of violation of Article 14 by alleging that the impugned act is arbitrary, unfair or unreasonable, the fact that the dispute also falls within the domain of contractual obligations would not relieve the State of its obligation to comply with the basic requirements of Article 14. To this extent, the obligation is of a public character invariably in every case irrespective of there being any other right or obligation in addition thereto. An additional contractual obligation cannot divest the claimant of the guarantee under Article 14 of non-arbitrariness at the hands of the State in any of its actions.

From the above, it is clear that when an instrumentality of the State acts contrary to public good and public interest, unfairly, unjustly and unreasonably, in its contractual, constitutional or statutory obligations, it really acts contrary to

the constitutional (sic) in Article 14 of the Constitution. Thus if we apply the (sic) principle of applicability of Article 14 to the facts of this case. Then we notice that the first respondent being an (sic) ornamentally of the State and a monopoly body had to be (sic) by the appellants by compulsion to cover its export (sic).

(emphasis supplied)

If action of the respondents in the present case is viewed in the backdrop the (sic)esard requirement of law, it would be seen that for the breach as (sic)lated under clause 18 of the contract, action is taken in accordance (sic), the contract is terminated, a amount of Rs. 2,41,097/- recovered (sic) of penalty and the performance security of Rs. 2,20,00,125/- is (sic). In this manner records indicated that respondents have already (sic) more amount than that, which they would have normally received if (sic) was completed/executed. Merely because petitioner has (sic)tted. In each, the amount to be recovered from them should not be (sic) amounts to undue enrichment of the authority In the present case (sic) bank guarantee is directed to be revoked a sum of Rs. 2,20,00,125/-, (sic) be received by the National Highway Authority The entire loss that was suffered by the authority is made good by the action already taken under clause 18 and if the bank guarantee is also directed to be revoked it would result in undue enrichment of the authority and serious loss to the petitioner, if this fact is taken note, then the action of respondents in the (sic) of revoking the guarantee can be termed as unfair and unjustified. Respondents National Highway Authority being a instrumentality of State, (sic)ing statutory function has to act reasonable. Even when it is dealing (sic) contractor who has committed some breach, the contractor is liable to be punished, if the breach is committed, but the punishment should be such (sic) does not indicate arbitrariness or unfair and unreasonable attitude on behalf of the Authority, if the facts and circumstances of the present case the seen in its totality it would be seen that with regard to charging excess fee action as per the contract i.e. Clause 18 is already taken, once this action is taken respondents are not entitled to take any other action. The bank guarantee is in pished only to compensate for the loss and damage, in this case no damage or loss is established or proved, if revocation of the bank guarantee is permitted it would amount to a unfair and unjust treatment on the petitioner and a consequent enrichment of the respondents authority the respondents have already received the following amount, Rs. 7,33,33,750/- (sic) January 2007, Rs. 2,20,00,125/- by forfeiting of the performance security under clause 18 and penalty of Rs. 2,41,097/- that is a total sum of Rs. 9,55,74,970/- which is more than the contract amount of Rs. 8,80,00,500/-, that apart user fee for the remaining period of the contract is already (sic)vered by the respondents and therefore, I am of the considered view that in the matter of issuing order Annexure P/2 for revoking the bank guarantee respondents no. 2 to 5 have acted in a manner which is to be learned as unreasonable and unfair and therefore, hit by Article 14 of the constitution.

As Accordingly in the facts and circumstances of the case and for the (sic)indicated hereinabove this petition is allowed in part, challenge made to the order Annexure P/1 dated 25th March 2007 so far as it relates to termination of the contract, imposing of penalty of Rs. 2,41,097/- and forfeiture of performance security to the tune of Rs. 2,20,00,125/- is upheld and to that extent the petition stands dismissed. However request made to the respondent no. 6 Bank vide Annexure P/2 dated 27-01-07 for revocation of bank guarantee Annexure R/19 is quashed. It is held that the respondents no. 2 to 5 are not entitled to revoke the bank guarantee, to that extent their action is held to be unfair, unjust and unreasonable.

Accordingly this petition is allowed in part and disposed of without any order so as to cost.