
(1993) 09 KAR CK 0021

In the Karnataka High Court

Case No : W. P. No's. 10895, 13860, 13861, 13862, 13864, 13865, 798, 2331
and 22220 of 1993

Nagappa

APPELLANT

Vs

State of Karnataka and others

RESPONDENT

Date of Decision : 23-09-1993

Acts Referred:

Constitution of India, 1950 — Article 19 (1) (f), 31
Karnataka Housing Board Act, 1962 — Section 14, 15, 3

Citation : AIR 1994 Kar 77 : (1993) ILR (Kar) 3323 : (1993) 4 KarLJ 290

Hon'ble Judges : K. Shivashankar Bhat, J

Bench : Single Bench

Advocate : M.R. Rajagopal, for the Appellant; B.V. Acharya, General, B.J. Somayaji, G.A. and R.S. Hegde, for the Respondent

Judgement

1. Basically, the cancellations of contracts subject to continuing certain works are challenged in these writ petitions. By an executive order government resolved to build 1,75,000 houses in rural areas of the State and 30,000 houses in urban areas; in addition 30,000 houses were to be put up in Bangalore urban area. This scheme is referred to as "Ashraya Scheme", under the order dated 4-11-1991. Houses were also to be constructed under another scheme referred to as "Dr. B. R. Ambedkar Centenary Celebrations Memorial Scheme". The Government entrusted the responsibility of constructing these houses with the Karnataka Housing Board (referred to as "the Board"). These houses were to be allotted to those belonging to economically weaker sections; the houses were to cost Rs. 15,000/- each in rural areas and Rs. 16,000/- in urban areas. In response to the Board's invitation, 265 applicants were received from the contractors; out of them 13 persons were selected. Petitioner in WP No. 10895/93 received a letter of intent dated 7-11-1992 calling upon the petitioner to enter into a contract in Soraba Assembly Constituency. Work order was issued on 21-12-1992 to execute the work for construction of 1098 houses in that constituency; an agreement was entered into between the petitioner and the Board on 21-12-1992. According to

the petitioner, sites were demarcated and delivered to him, who in turn made preparations to execute the works; this petitioner asserts that he had spent about Rs. 6 lakhs to store the sand in several rural areas; size stones were also collected at a cost of Rs. 2,40,000/-. Further, wood worth Rs. 2 lakhs and tiles investing Rs. 2.4 lakhs have been provided for to utilise in the constructions. Labourers have been paid advances investing Rs. 50,000/-Vast amounts have been borrowed by the petitioner to make these preparations. When the stage was set for moving further, government issued the impugned order dated 8-1-1993 modifying the scheme. The responsibility of constructing the houses was shifted to the Deputy Commissioners of the concerned Districts; only a small percentage of the houses was to be built by the Board under this order. The Board was to construct houses against the advances given to the contractors to the tune of Rs. 22 crores and rest to be constructed by the Deputy Commissioners. The total number of houses was reduced as follows :

In each Assembly Constituency 500 houses were to be built, leading to a total of 1,06,000 houses; out of this, Board was to put up only 40,000 houses and the balance of 66,000 houses by the Deputy Commissioners; all these houses were to be completed by the end of June 1993 positively. The unit cost was to be the same as earlier; it is unnecessary to refer to the details of this order.

2. Therefore, in Soraba Constituency the houses to be built are 500 instead of 1098. In this, the Deputy Commissioner has to build 400 houses and the Board through the petitioner has to construct only 100 houses.

3. Petitioner contends that the change of policy is arbitrary and the decision to modify the number of houses to be built under the relevant schemes was arrived at without application of the mind and has been formed consequent upon the change of the Chief Minister of the State. The petitioner having invested large sums of money in the hope of completing them has made to suffer great loss. The right accrued to the petitioner cannot be tampered with by an executive order. The process involved in changing the policy, resulting in the impugned order, ignored to consider the interest of the petitioner and the legitimate expectation nurtured by the petitioner that he will be allowed to complete the works as agreed upon earlier.

4. The Board in its statement of objections has averred that in pursuance of the first order dated 21-9-1991 it released advances, namely mobilization advances and machinery advance to the contractors and that contractors failed to perform their part of the contract in time and that the progress of houses was very poor and several reminders were issued to the contractors to speed up the works. The scheme envisaged putting up of 2.35 lakhs of houses within 9 months from March, 1992 and by 15-12-1992 only 1044 houses have been constructed. Each one of the contractors has even failed to hand over 50 completed houses for the use of the beneficiaries and therefore Government modified the scheme by issuing the orders dated 15-12-1992 and 8-1-1993. The Government opined that the contractors failed to perform their part of the obligations and the works were

unsatisfactorily slow. As to the petitioner in W.P. 10895/93, it is pointed out that he was not one of the 14 contractors selected in pursuance of the Notification dated 11-11-1991 as he was not even an applicant. One Malnad Construction agency was entrusted with the work in Shimoga Dist.; as it failed to proceed with the works, works were handed over to the petitioner on 7-11-1992. The statement of objection inter alia, asserts that "petitioner has not been handed over with any sites and the petitioner has not carried out any work and tackled any one of the sites....."; no work has been done by the petitioner; contends the Board.

5. In W.P. No. 13860 to 13865/93(except W.P. 13863/93 DD 19-7-93) it is pointed out that the works were not being carried out satisfactorily and there was no progress at all and in the circumstances, Government had to change the policy.

6. In a few writ petitions, petitioners allege that sites were not handed over by the respondents, in time and the delay in proceeding with the works was entirely due to the inaction or lapses on the part of the respondents.

7. All the agreements are in identical terms. Apart from specifying for claim of damages and leaves of penalty, there is also a power retained by the Board "to rescind the contract". There is also a clause governing the settlement of disputes between the parties.

8. Two of the petitioners question the validity of invoking the Bank guarantee, consequent upon the alleged illegal termination of the agreements (vide : W.P. 2331 and 798 of 1993).

9. As I am of the view that the questions raised are essentially to be resolved by reference to the ordinary law governing the contractual obligations, and the disputes raised by these petitioners cannot be resolved by recourse to the writ jurisdiction, I have refrained from referring to the facts and the documents in greater detail.

10. One of the petitioners, Nav Vikas Builders Pvt. Ltd., had filed W.P. No. 34027 of 1992, on an earlier occasion questioning the contract -- cancellation order dated 20-10-1992 and seeking a mandamus directing the officers of the Board not to interfere with the work entrusted to the petitioner. Petitioner had asserted that the respondents were responsible for the delay in entrusting the sites and that petitioner was not guilty of any lapse in the matter of discharging its contractual obligations. By an order dated 19-11-1992 the writ petition was dismissed at the preliminary hearing stage pointing out that the remedy for the petitioner "lies in a civil suit and termination of contract cannot be classed as arbitrary, when contractual obligations arise, question of public law would be attracted only when impugned action is arbitrary and not otherwise. In this case each party blames the other as having committed breach of contract."

11. This order was affirmed in Writ Appeal No. 2381 of 1992 (D.D. 3-3-1993).

12. The following contentions were urged in support of these writ petitions.

(1) By virtue of S. 14 of the Karnataka Housing Board's Act, 1962, (the Act) the contracts entered into by the Board are statutory and the benefit of the said contracts cannot be defeated by recourse to an executive order made under Art. 162 of the Constitution of India. There is no breach of contract committed by the Board which is sought to be restrained in the writ petitions but, the executive order prevents the Board and the petitioners from acting under the terms of the contract.

(2) Contracts result in right to trade protected by Art. 19(1)(g) of the Constitution.

(3) In view of the doctrines of promissory estoppel and legitimate expectation the impugned actions are illegal.

(4) Withdrawal of the scheme, earlier announced and acted upon, is arbitrary.

(5) Government had not reserved any right to modify or rescind the contracts entered into by the Board with the petitioners, and the exclusive responsibility entrusted to the Board earlier cannot be interfered with as per the impugned orders.

(6) The Board has not reserved any rights to rescind the contracts; if there is any lapse on the part of the petitioners, Board may levy penalty only.

(7) Having agreed to pay "mobilization advance and "secured advance", the Board cannot turn round to stop those payments.

(8) As the contractors have commenced the works entrusted and arranged to complete them and have also spent large sums in preparation, the respondents are estopped from cancelling the contracts.

(9) Since construction of homes is still envisaged under the modified scheme, the petitioners could have been at least allowed to construct them; a total termination of the contract is therefore arbitrary.

(10) Petitioners were not guilty of any delay in starting the works; sites were not handed over to them in time and the delay is of the respondents. Therefore, termination of contracts on the ground of delay by those petitioners is wholly incorrect.

(11) The invoking of the bank guarantee by the respondents is nothing but a unilateral decision to levy damages which is not permissible as held in State of Karnataka Vs. Shree Rameshwara Rice Mills, Thirthahalli,

13. Above contentions can be reformulated as following propositions :

(A) Whether the contracts in question are statutory?

(B) Whether the impugned actions are unreasonable, arbitrary and violative of

Art. 14 of the Constitution and whether doctrines or promissory estoppel and legitimate expectation have any application while considering this contention?

(C) Whether the executive orders changing the scheme and affecting the contracts are invalid, as right to property or right under Art. 19(1)(g) of the Constitution are affected?

(D) Is there any scope to attract the principle stated in State of Karnataka Vs. Shree Rameshwara Rice Mills, Thirthahalli,

14. Re. Propositions (A) & (B) :

Whether the contracts in question are statutory and their terms of termination are arbitrary etc.?

Section 14 of the Act was relied to contend that the contracts entered into by the Board are statutory in character.

Section 3 of the Act provides for the Constitution of the Board. S. 14 states that the Board may enter into and perform or require the performance of all such contracts as it may consider necessary or expedient for carrying out any of the purposes of the Act; S. 15 provides for the making of the contract by the Housing Commissioner on behalf of the Board subject to certain restrictions. Chapter III provides for the Housing schemes and land development schemes. Under S. 84, State Government may issue directions to the Board to carry out the purposes of the Act. As per S. 87A the State Government shall have general administrative control and supervision over all activities and affairs of the Board.

15. Therefore the Board is created to formulate and implement housing schemes and land development schemes; however, it is under the general control of the State Government. It necessarily have to enter into contracts to implement its schemes and such a power is specifically conferred on it by S. 14. But that does not mean every contract entered into by it is a statutory contract; if so, every contract entered into by the executive Government also would be statutory. It cannot be said that every contract entered into by the State and its instrumentalities is a statutory contract, unless the formation and incidents of such a contract are statutorily guided and controlled. As will be presently seen, the Supreme Court has pointed out on several occasions, the non-availability of writ jurisdiction to enforce the terms of a "pure and simple" contract even though one of the contracting party is the State. There is also a distinction between the exercise of governmental power at the initial stage of awarding a contract and exercise of the said power under the contract, after a non-statutory contract is entered into. In the former case, Art. 14 of the Constitution is available to test the reasonableness; fairness and non-arbitrariness of the exercise of power, such as, in the case of selecting a person for awarding the contract and the procedure followed in making the selection etc. After the contract is entered into, again, Art. 14 is available to test the exercise of the governmental power affecting the contract under certain circumstances. To illustrate, in Kumari Shrilekha Vidyarthi

and Others Vs. State of U.P. and Others, termination of the appointments of all Government counsel by a single order was challenged; State contended that it was a matter of contract and the exercise of the power terminating the appointment was a contractual power. Supreme Court held that the office of a Government counsel has a public element in it and such an appointment of a Government counsel is not a mere "professional engagement". Thereafter, the Court further held, as para 20 :

"Even apart from the premises that the "office" or "post" of D.G.Cs. has a public element which alone is sufficient to attract the power of judicial review for testing the validity of the impugned circular on the anvil of Art. 14, we are also clearly of the view that this power is available even without that element on the premises that after the initial appointment, the matter is purely contractual. Applicability of Art. 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, can it be said that the State can thereafter cast off its personality and exercise unbridled power unfettered by the requirements of Art. 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? We have no hesitation in saying that the personality of the State, requiring regulation of its conduct in all spheres by requirements of Art. 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 Art. 14 and contractual obligations are alien concepts, which cannot co-exist."

Then :

"We have no doubt that the Constitution does not envisage or permit unfairness or unreasonableness in State actions in any sphere of its activity contrary to the professed ideals in the Preamble. In our opinion, it would be alien to the Constitution scheme to accept the argument of exclusion of Art. 14 in contractual matters. The scope and permissible grounds of judicial review in such matters and the relief which may be available "are different matters but that does not justify the view of its total exclusion. This is more so, when the modern trend is also to examine the unreasonableness of a term in such contracts where the bargaining power is unequal so that these are not negotiated contracts but standard form contracts between unequals.

There is an obvious difference in the contracts between private parties and the contracts to which the State is a party. Private parties are concerned only with their personal interest whereas the State while exercising its powers and discharging its functions acts indubitably, as is expected of it, for public good and in public interest. The impact of every State action is also on public interest. This factor alone is sufficient to import at least the minimal requirements of public law obligations and impressed 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 Art. 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 Art. 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 Art. 14 of non-arbitrariness at the hands of the State in any of its actions."

Further in para 26 :

"It is significant to note that emphasis now is on reviewability of every State action because it stems not from the nature of function, but from the public nature of the body exercising that function; and all powers possessed by a public authority, however, conferred, or possessed "solely in order that it may use them for the public good". The only exception limiting the same is to be found in specific cases where such exclusion may be desirable for strong reasons of public policy."

At paras 28 and 29, it was said :

"Even assuming that it is necessary to import the concept of presence of some public element in a State action to attract Art. 14 and permit judicial review, we have no hesitation in saying that the ultimate impact of all actions of the State or a public body being undoubtedly on public interest, the requisite public element for this purpose is present also in contractual matters. We, therefore, find it difficult and unrealistic to exclude the State actions in contractual matters after the contract has been made, from the purview of judicial review to its validity on the anvil of Art. 14.

It can no longer be doubted at this point of time that Art. 14 of the Constitution of India applies also to matters of governmental policy and if the policy or any action of the Government, even in contractual matters, fails to satisfy the test of reasonableness, it would be unconstitutional. (See -- *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, and *Kasturi Lal Lakshmi Reddy, Represented by its Partner Shri Kasturi Lal, Jammu and Others Vs. State of Jammu and Kashmir and Another*, In *Col. A.S. Sangwan Vs. Union of India (UOI) and Others*, while the discretion to change the policy in exercise of the executive power, when not trammelled by the Statute or Rule, was held to be wide it was emphasised as imperative and implicit in Art. 14 of the Constitution that a change in policy must be made fairly and should not give the impression that it was so done arbitrarily or by any ulterior criteria. The wide sweep of Art.

14 and the. require- ment of every State action qualifying for its validity on this touchstone irrespective of the field of activity of the State has long been settled. Later decisions of this Court have reinforced the foundation of this tenet and it would be sufficient to refer only to two recent decisions of this Court for this purpose."

After referring to *Dwarkadas Marfatia and Sons Vs. Board of Trustees of the Port of Bombay*, Court pointed out that "the basic requirement of Art. 14 is fairness in action by the State" and "non-arbitrariness, in substance is only fair play in action." *Dwarkadas Marfatia*'s case was again referred to point out that,--

"The extent of permissible judicial review was indicated by saying that "actions are amenable to judicial review only to the extent that the State must act validly for a dis- cernible reason, not whimsically for any ulterior purpose."

At para 36,--

"The meaning and true import of arbitrariness is more easily visualised than precisely stated or defined. The question, whether an impugned act is arbitrary or not is ultimately to be answered on the facts and in the circumstances of given case. An obvious test to apply is to see whether there is any discernible principles emerging from the impugned act and if so, does it satisfy the test of reasonableness. There a mode is prescribed for doing an act and there is no impediment in following that procedure performance of the act otherwise and in a manner in which does not disclose any discernible principle which is reasonable, may itself attract the vice of arbitrariness. Every State action must be informed by reason and it follows that an act uninformed by reason is arbitrary. Rule of law contemplates governance by laws and not by humour whims or caprices of the men to whom the governance is entrusted for the time being. It is trite that "be you ever so high, the laws or above you". This is what men in power must remember always."

16. Therefore, the scope for judicial review is limited. If governmental action governing the exercise of a contractual power is apparently based upon a discernible reason and it is not whimsically exercised, its judicial review under writ jurisdiction will not be available.

17. A contract may be affected by the exercise of its power under the contract by the State or its instrumentality, for various reasons. In the case of a building contract, the slow progress and unsatisfactory work of the contractor may be an apparently good reason to terminate the contract; or the termination of the contract is incidental to a change in the general policy which is otherwise fair, as in the case of a change of policy to reduce the number of houses to be constructed under a scheme; government may decide to reduce the number of houses to be constructed either because of reasons of economy or of imply mutational difficulties not foreseen earlier and public interest may require such a reduction. In these cases, *prima facie*, court has to presume that the change in the policy is in the public interest. Parties to the contract, if aggrieved by the

abrupt termination of the contract could always seek damages or compensation under the ordinary law of the land governing the contracts, if the termination of individual contract is nothing but an illegal breach committed by the State or its instrumentalities. Here, the "pure and simple" nature of the contractual relationship would come to play.

18. The contracts in question before me cannot be considered as statutory contracts, only because, contracts are awarded by the "Statutory Board". Contracts were awarded by the Board in the exercise of its executive power, at the behest of the State Government. The Board acted as an agent of the government, because, the government resolved earlier to vest the responsibility of putting up of the houses under the Ashraya Scheme, in the Board.

19. The termination of these contracts in view of the changed policy of the government to reduce the number of houses to be built is a matter of governmental policy, which, prima facie, has to be accepted, as in the public interest. Further, in all these cases, it is alleged that as a matter of fact, the contractors were slow in starting and completing the houses agreed upon; this reason is traceable to the "pure and simple" term implied in every contract, enabling every contracting party to terminate a building contract in case the contractor does not complete the work in time and fails to show proper progress. If this is factually incorrect the remedy of the contractor is elsewhere and the forum to be resorted to by the contractor cannot be the High Court under Art. 226 of the Constitution.

20. Since the Board was acting as an agent of the State Government it is always open to the State Government to direct the Board to terminate the contracts, if the State Government either changes its policy for a valid reason, or on finding slow progress in the construction works.

21. It is true that even the exercise of a contractual power by the government is subject to judicial scrutiny under Art. 14 of the Constitution. However, there are certain inherent limitations in applying the touchstone of "illegality, irrationality and procedural impropriety" all of which could be, for the sake of convenience, be termed as "unreasonableness". The caution required of the court while applying Art. 14 was pointed out by the Supreme Court in *G.B. Mahajan and others Vs. The Jalgaon Municipal Council and others*,

"In regard to Courts and policy we might recall the following words of a learned author :

"The courts are kept out of the lush field of administrative policy, except when policy is inconsistent with the express or implied provision of a statute which creates the power to which the policy relates or where a decision made in purported exercise of a power is such that a repository of the power, acting reasonably and in good faith, could not have made it. In the latter case, "something overwhelming" must appear before the Court will intervene. That is, and ought to be, a difficult onus for an applicant to discharge. The courts are not

very good at formulating or evaluating policy. Sometimes when the Courts have intervened on policy grounds, the court's view of the range of policies open under the statute or of what is unreasonable policy has not won public acceptance. On the contrary, curial views of policy have been subjected to stringent, criticism. In the world of politics, the court's opinions on policy are naturally less likely to reflect the popular view than the policies of a democratically elected government or of expert administrators....."

Again at page 1161 :

"While the concern of public law is to discipline the public power by forging legal techniques as both part of the way in which public power is made operational and part of the process through which it is attempted to render such public power legitimate and to think of issues of legal regulation of public power in a way that goes deeper than particular instances and seeks to elaborate issues of general principle". There is, however, as Professor Wade points out, ample room within the legal boundaries for radical differences of opinion in which neither side is unreasonable. In *Tameside* case Lord Denning pointed out the error of confusing differences of opinion, however strong, with unreasonableness on the part of one side or the other. Lord Diplock said that the very concept of administrative discretion involves a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred."

As to the standard of reasonableness court observed at p. 1164 :

"In the arguments there is some general misapprehension of the scope of the "reasonableness" test in administrative law. By whose standards of reasonableness that matter is to be decided?"

Again :

"Yet another area of reasonableness which must be distinguished is the constitutional standards of "reasonableness" of the restrictions on the fundamental rights of which the Court of judicial review is the arbiter."

Further :

"The "reasonableness" in administrative law must, therefore, distinguish between proper use and improper abuse of power. Nor is the test the court's own standard of reasonableness as it might conceive it in a given situation."

At page 1165 the court said :

"Unreasonableness has thus become a generalised rubric covering not only sheer absurdity or caprice, but merging into illegitimate motives and purposes, a wide category of errors commonly described as "irrelevant considerations", and mistakes and misunderstandings which can be classed as self-misdirection, or addressing oneself to the wrong question...."

(See : Administrative Law: H.W.R. Wade : Sixth Edn. p. 408)

The point to note is that a thing is not unreasonable in the legal sense merely because the court thinks it is unwise."

22. To repeat, the respondents have asserted that there has been no satisfactory progress in the works and there is likelihood of further delay if the then existing arrangements were to be continued; further, as a matter of policy, government decided to reduce the number of houses to be built under the scheme. Obviously to reduce the hardship it was decided to ask the contractor to complete the works to the extent of the advances paid.

23. The short question therefore is whether this is unreasonable; I do not think so. Whether there has been considerable delay on the part of the contractors or whether delay was as a result of certain lapses on the part of the respondents, is a matter that cannot be decided in these proceedings. Total number of houses to be built is a matter of policy and if the State Government changes its policy, this court cannot intervene and direct the continuation of the earlier policy.

24. Food Corporation of India Vs. M/s. Kamdhenu Cattle Feed Industries, is a case where the appellant -- Food Corporation of India invited tenders for sale of damaged foodgrains; respondent's tender offered the highest price; however instead of accepting it, Food Corporation invited all tenderers for negotiation in which another tenderer offered a higher price. Acceptance of this tender was challenged. The court held that the right reserved by the Food Corporation to reject the highest tender has to be exercised reasonably and not arbitrarily; however, it was held that, Food Corporation was not unreasonable in inviting all tenders for open negotiation to find out the possibility of getting a still higher price than offered in the tenders. As to the contention that the right of the respondent (writ petitioner) based on the doctrine of legitimate expectation was affected the court observed :

"The mere reasonable or legitimate expectation of a citizen, in such a situation may not by itself be a distinct enforceable right, but failure to consider and give due weight to it may render the decision arbitrary and this is how the requirement of due consideration of a legitimate expectation forms a part of the principle of non-arbitrariness, a necessary concomitant of the rule of law. Every legitimate expectation is a relevant factor requiring due consideration in a fair decision making process. Whether the expectation of the claimant is reasonable or legitimate in the context is a question of fact in each case. Whenever the question arises, it is to be determined not according to the claimant's perception but in larger public interest wherein other more important considerations may outweigh what would otherwise have been the legitimate expectation of the claimant. A bona fide decision of the public authority reached in this manner would satisfy the requirement of non-arbitrariness and withstand judicial scrutiny. The doctrine of legitimate expectation gets assimilated in the rule of law and operates in our legal system in this manner and to this extent."

Thereafter, court pointed out that :

"Procuring the highest price for the commodity is undoubtedly in public interest since the amount so collected goes to the public fund. Accordingly, inadequacy of the price offered in the highest tender would be a cogent ground for negotiating with the tenderers giving them equal opportunity to revise their bids with a view to obtain the highest available price. The inadequacy may be for several reasons known in the commercial field. Inadequacy of the price quoted in the highest tender would be a question of fact in each case. Retaining the option to accept the highest tender, in case the negotiations do not yield a significantly higher offer would be fair to the tenderers besides protecting the public interest."

25. In Union of India and others Vs. Hindustan Development Corpn. and others, the cautious approach required while applying the doctrine of legitimate expectation was pointed out thus at p. 56 :

"On examination of some of these important decisions, it is generally agreed that legitimate expectation gives the applicant sufficient locus standi for judicial review, and that the doctrine of legitimate expectation is to be confined mostly to right of a fair hearing before a decision which results in negating a promise or withdrawing an undertaking is taken. The doctrine does not give scope to claim relief straightway from the administrative authorities as no crystallised right as such is involved. The protection of such legitimate expectation does not require the fulfilment of the expectation where an overriding public interest requires otherwise. In other words, where a person's legitimate expectation is not fulfilled by taking a particular decision, then decision maker should justify the denial of such expectation by showing some overriding public interest. Therefore, even if substantive protection of such expectation is contemplated that does not grant an absolute right to a particular person. It simply ensures the circumstances in which that expectation may be denied or respected. A case of legitimate expectation would arise when a body by representation or by past practice arouse expectation which it would be within its powers to fulfill. The protection is limited to that extent and a judicial review can be within those limits. But as discussed above, a person . who bases his claim on the doctrine of legitimate expectation, in the first instance must satisfy that there is a foundation and thus has a locus standi to make such a claim. In considering the same several factors which give rise to legitimate expectation must be present. The decision taken by the authority must be found to be arbitrary, unreasonable and not taken in public interest. If it is a question of policy, even by way of change of old policy, the courts cannot interfere with a decision. In a given case, whether there are such facts and circumstances giving rise to legitimate expectation, it would primarily be a question of fact. If these tests are satisfied and if the court is satisfied that a case of legitimate expectation is made out, then the next question would be whether failure to give an opportunity of hearing before the decision affecting such legitimate expectation is taken, has resulted in failure of justice and whether on that ground the decision should be quashed. If that be so, then what

should be the relief is again a matter which depends on several factors.

Again at para 38 it is held :

"Legitimate expectation may come in various forms and owe their existence to different kinds of circumstances, and it is not possible to give an exhaustive list in the context of vast and fast expansion of the governmental activities. They shift and change so fast that the start of our list would be obsolete before we reached the middle. By and large they arise in cases of promotions which are in normal course expected, though not guaranteed by way of a statutory right, in cases of contracts, distribution of largesse by the government and in somewhat similar situations. For instance, in cases of discretionary grant of licences, permits or the like, carries with it a reasonable expectation, though not a legal right to renewal or non-revocation, but to summarily disappoint that expectation may be seen as unfair without the expectant person being heard. But there again, the court has to see whether it was done as a policy or in the public interest either by way of G.O. Rule or by way of a legislation. If that be so, a decision denying a legitimate expectation based on such grounds does not qualify for interference unless in a given case, the decision or action taken amounts to an abuse of power. Therefore, the limitation is extremely confined and if the according of natural justice does not condition the exercise of the power, the concept of legitimate expectation can have no role to play and the court must not usurp the discretion of the public authority which is empowered to take decisions under law and the court is expected to apply an objective standard which leaves to the deciding authority the full range of choice which the legislature is presumed to have intended. Even in a case where the decision is left entirely to the discretion of the deciding authority without any such legal bounds and if the decision is taken fairly and objectively, the court will not interfere on the ground of procedural fairness to a person whose interest based on legitimate expectation might be affected. For instance, if an authority who has full discretion to grant a licence and if he prefers an existing licence holder to a new applicant, the decision cannot be interfered with on the ground of legitimate expectation entertained by the new applicant applying the principles of natural justice. It can therefore be seen that legitimate expectation can at the most be one of the grounds which may give rise to judicial review but the granting of relief is very much limited. It would thus appear that there are stronger reasons as to why the legitimate expectation should not be Sub attentively protected than the reasons as to why it should be protected. In other words, such a legal obligation exists whenever the case supporting the same in terms of legal principles of different sorts, is stronger than the case against it. As observed in Attorney General for New Southwale's case "to strike the exercise of administrative power solely on the ground of avoiding the disappointment of the legitimate expectations of an individual would be to set the courts adrift on a featureless sea of pragmatism. Moreover, the negotiation of a legitimate expectation (falling short of a legal right) is too nebulous to form a basis for invalidating the exercise of a power when its exercise otherwise accords with law; "If a denial of legitimate

expectation in a given case amounts to denial of right guaranteed or is arbitrary, discriminatory, unfair or biased gross abuse of power or violation of principles of natural justice, the same can be questioned on the well known grounds attracting Art. 14 but a claim based on mere legitimate expectation without anything more cannot ipso facto give a right to invoke these principles. It can be one of the grounds to consider, but the court must lift the veil and see whether the decision is violative of these principles warranting interference. It depends very much on the facts and the recognised general principles of administrative law applicable to such facts and the concept of legitimate expectation which is the latest recruit to a long list of concepts fashioned by the courts for the review of administrative action must be restricted to the general legal limitations applicable and binding the manner of the future exercise of administrative power in a particular case. It follows that the concept of legitimate expectation is "not the key which unlocks the treasure of natural justice and it ought not to unlock the gates which shuts the court out of review on the merits", particularly when the element of speculation and uncertainty is inherent in that very concept. As cautioned in *Attorney General for New South Wales*" case the court should restrain themselves and respect such claims duly to the legal limitations. It is a well meant caution. Otherwise a resourceful litigant having vested interest in contract, licences, etc., can successfully indulge in getting welfare activities mandated by directing principles thwarted to further his own interest. The caution, particularly in the changing scenario becomes all the more important."

26. In the instant cases, petitioners assert a right to be heard before the contracts were terminated; according to them, they legitimately expected to be allowed to continue the works as entrusted to them under the contract. This expectation has been frustrated by the impugned actions.

27. In every case of termination of a contract, such an argument is available. But the real question is whether the State or its instrumentality acted fairly and reasonably while terminating the contract and whether the nature of the relief sought is such that normally such a relief is not awardable by the court.

28. According to the respondents, the State government took a policy decision to reduce the number of houses to be built under the scheme in question in the background of the delay found in the progress of the works entrusted to the contractors. As a matter of policy, a substantial percentage of the houses to be built are to be done through the Deputy Commissioners and not through the agency of the Housing Board; the existing contractors were allowed to complete the works to the extent of advances paid to them. Two reasons are thus advanced by the respondents :--

(1) a change in the policy and (2) slow progress in the works entrusted. Further, the contractors were told of the delay in the works entrusted to them and they are fully aware of the allegations made against them. The change of policy is thus in the interest of public; similarly, termination of these contracts also was in the public interest. In addition to these, the respondents point out that the real

effect of the quashing of the termination of the contracts, will be, to restore these contracts and enforcing their terms by an order of the court; in other words, the substance of the relief sought, is the specific performance of a "building contract", a relief not awarded by the courts.

29. I find considerable force in the submissions of the respondents, contract to put up a building is not enforced by the courts.

30. Gajria on Building and Engineering Contracts (1967 Edn.) states at page 241 :

"It is now well settled that on account of the great difficulty and often impossibility attending a judicial superintendence and execution of the performance, contracts for the erection or repair of buildings, the construction of works, and the conduct of operations requiring time, special knowledge, skill and personal oversight, will not be specifically enforced."

It is said in Cheshire and Fifoots's Law of Contract (ninth edition) at p. 617 :

"Again the court will not as a rule enforce specific performance of a contract to erect or repair buildings, for not only is it unable to superintend the execution of the work, but also in most cases damages afford an adequate remedy. The one exception to this rule occurs where the defendant has purchased or taken a lease of land from the plaintiff and has agreed to erect a building upon it. In this case the plaintiff will succeed in an action for specific performance if the following conditions are satisfied;

Firstly, the particulars of the work must be so clearly specified that the court can ascertain without difficulty exactly what it is that requires performance.

Secondly, the interest of the plaintiff in the performance of the work must be of such a substantial nature that he will not be adequately compensated for breach of the contract by damages.

Thirdly, the defendant must, under the contract, be in possession of the land on which the work is to be done."

To the same effect is the statement in Indian Contract and Specific Relief Acts by Pollock & Mulla (10th edition) at p. 966.

31. It was contended that under the doctrine of promissory estoppel, the assurances held out are specifically enforced. Doctrine of promissory estoppel has certain special features, It is based on the conduct of the government and its agencies as against the conduct of those who acted upon the assurances held out by the government and its agencies; the alteration of position by the party is the indispensable requirement of the doctrine and it is not necessary to prove, further, any damage, detriment or prejudice to the party asserting the estoppel (vide : Amrit Banaspati Co. Ltd. and another Vs. State of Punjab and another, quoting an earlier decision) -- "The basis of this doctrine is the interposition of equity which has always, true to its form, stepped in to mitigate the rigour of

strict law" (as stated in Union of India (UOI) and Others Vs. Godfrey Philips India Ltd., This doctrine has been applied mostly in the sphere of administrative law to enforce the assurances held out to grant tax concessions and such other benefits; these cases do not involve the difficulties which deter the courts from specifically enforcing the terms of a building contract; in these cases (when doctrine of promissory estoppel are applied), there is no other remedy to the aggrieved person such as obtaining compensation from the government or its agencies.

32. If specific performance of a contract is not enforceable under the provisions of the Specific Relief Act, said disability cannot be overcome by resort to the doctrine of promissory estoppel. Enforceability of a contract depends upon its terms and non-availability of any other remedy; enforcement of an assurance under the doctrine of promissory estoppel is based not on terms of the contract, but the nature of the assurance held out which is acted upon by others to whom assurance is held out and by such action, the assured persons altered their position.

33. Re. Contention (C) :

Vij Resins Pvt. Ltd. and Others Vs. State of Jammu and Kashmir, was cited while contending that contractual right is a property right and it cannot be affected by an adverse executive order. There was an enacted law by which all the existing rights of the petitioners under the contracts granted by the State Government were terminated and monopoly was created. Said law was challenged. The effect of the impugned law and the contentions were referred to by the Supreme Court at page 1632 :

"It is not in dispute that by the provisions of this Act all the existing contracts between parties and the State and existing grants in respect of collection, transport, storage and otherwise dealing with resin have come to forthwith terminate and a monopoly situation has been created qua these operations in resin in favour of the government company. The Act does not provide for any compensation and the petitioners maintain that the existing rights in their favour amounted to property and could not have been expropriated in contravention of the guarantee in Part III of the Constitution. It is the stand of the State that the benefits and privileges conferred on the three petitioners either under contract or under Government orders did not constitute property and by the provisions of the Act no transfer of such property has taken place."

34. In the next paragraph, the Supreme Court pointed out that Articles 19(1)(f) and 31 of the Constitution continued to operate in State of Jammu & Kashmir, since the 44th amendment to the Constitution was inapplicable to the said State. After referring to certain decisions, Supreme Court found that,--

"....the interests which are in dispute before us do constitute property entitled to protection under Art. 19(1)(f) and are covered by Art. 31(2) of the Constitution."

35. The impugned Act did not provide for payment of any compensation (vide para 21 at page 1635). Further, a few of the petitioners were entitled to invoke the doctrine of promissory estoppel (para 25). After referring to this doctrine, the court said :

"Where inclined to agree with the submissions made on behalf of the petitioners that the circumstances gave rise to a fact situation of estoppel. It is true that there is no estoppel against the legislature and the vires of the Act cannot be tested by invoking the plea but so far as the State government is concerned the rule of estoppel does apply and the precedents of this Court are clear. It is unnecessary to go into that aspect of the matter as in our considered opinion the impugned Act suffers from the vice of taking away rights to property without providing for compensation at all and is hit by Art. 31(2) of the Constitution".

36. Therefore, the basic flaw in the impugned Act was the failure to provide for compensation and consequently the fundamental rights under Arts. 19(1)(f) and 31 were affected.

37. The ratio is sought to be extended to the present cases, by pointing out that if the contracts awarded earlier created property rights, said rights cannot be taken away, except by an enacted law, in view of Art. 300-A of the Constitution. Art. 300-A reads :

"No person shall be deprived of his property save by authority of law."

The term "law" in the above Article has to be understood as enacted law, is the contention.

38. This contention overlooks that the source of the contracts relied upon by the petitioners is an executive order and the scheme formulated by such an executive order. Further, the very contracts relied upon by the petitioners provide for the termination of the contracts. The rights and liabilities of the parties are governed by the terms of the contracts. Law governing the contracts would operate on the enforceability of these contracts.

39. If the contracts are terminated without providing for compensation, petitioners may sue for compensation and therefore, the ratio of VIJ Resins Pvt. Ltd., case Vij Resins Pvt. Ltd. and Others Vs. State of Jammu and Kashmir, is not attracted. As to the requirement of an enacted "law" under Art. 300-A of the Constitution it has to be noted that provisions of the Indian Contract Act and Specific Relief Act, are enacted laws. If the contention of the petitioners is accepted, the result would be in effect compelling specific performance of the alleged contracts, which is not otherwise permitted in law.

40. Therefore, the principles enunciated by the Supreme Court in Bishambhar Dayal Chandra Mohan and Others Vs. State of Uttar Pradesh and Others, also is inapplicable to the fact situation before me.

41. P.N. Verma and Others Vs. Union of India (UOI) and Others, requires to be

referred. The Delhi Development Authority refixed the price of flats on a criterion different from the one earlier announced when flats were allotted. Basis of fixing the prices were totally altered thereafter. It is in this context the doctrine of promissory estoppel and arbitrariness were applied; there, the arbitrariness was in altering the principle applicable to the fixation of the prices and not the actual working out the details of any scheme or contract.

42. Some of the principles enunciated in the said decision are :

"It is open to the DDA to fix such price for the flats as it may deem fit. In doing so, it can keep a margin of profit for itself take into consideration its overall working, consider the picture of town planning as a whole and of set deficits in one scheme while completing another and so on. In short, it is as free in fixing the price of flats as any private contractor will be, except only for the limitations of fair play and the need to avoid arbitrariness and discrimination that fetter the hands of a public authority which is amenable to Art. 226. So long as it conforms to these regulations, its actions cannot be challenged. But once some regulation is infringed or any arbitrariness or invidious discrimination creeps in, its action is liable to challenge under Art. 226."

At page 434 :

"But it is argued for the DDA, this is also, at worst, only a breach of contract by the DDA. All that be said is that the DDA agreed originally to give the flats at cost but now they refuse to do so and demand a higher price. For this it is open to the petitioners to sue the DDA for specific performance of the contract on the original terms or for damages for breach of contract or for other appropriate relief. A writ will not be maintainable. This argument, we think, is untenable; it attaches undue importance to the form and ignores the substance of the stand taken by the DDA; In all these matters, the court should look at the real effect of what has been done. The decided cases referred to above show that, if what is done is really an enforcement of the contractual terms, the affected party cannot be allowed to camouflage its grievances in the garb of fundamental rights or by attributing to the action of the authority a statutory flavour and seek redress by means of a writ petition. It should equally follow, we think per contra, that where what the authority has done is in effect a variation of the incidents of the pre contractual stage, it cannot be rendered immune from proceedings under Article 226 merely because it can be dressed up or described as a mere breach of contract. So, in our opinion, where the DDA revises the earlier policy of price fixation and substitutes a new one, it is truly interfering with a step in the statutory stage amenable to writ jurisdiction and a writ petition cannot be dismissed as not maintainable merely on the ground that the result of the action also results in a breach of the original contract for which remedy is available in the ordinary civil courts. Looked at in the proper perspective, this is a case where the grievance of the petitioners falls under the second category of cases referred to Radhakrishna Agarwal and Others Vs. State of Bihar and Others, Blockquote> The real basis of the decision is found at page 449 :

"Our jurisdiction in this case is very limited. As we have explained earlier, at the time of the promulgation of the scheme, the DDA had committed itself that the flats would be allotted at the actual cost. That actual cost was tentatively fixed at a figure "which was announced subject, however, to variations in cost factors. It is not open to the DDA to alter this basis for the determination of the disposal cost. So long as the DDA adheres to this basis in fixing the disposal cost, court will not interfere. It will not interfere even if there should be some mistakes or exaggerations in the calculation of the components of the figure arrived at, as that would be a matter for determination after evidence and investigation in a suit. Even if an item should be included in the cost of components, about the inclusion of which as one of the cost factors there could be some doubt, the writ court may not interfere and may leave the parties to fight out their battle in a regular suit. But where the disposal cost is fixed on a basis totally different from that announced earlier or where the components taken into account cannot be described by any stretch of imagination as cost factors or where a component of the cost is shown to have been fixed arbitrarily and without any basis whatsoever, the Court has no option but to quash the determination of the disposal cost so fixed and direct the DDA to undertake afresh a proper determination thereof in accordance with the terms of the original contract or after excluding the items unwarrantedly included therein or after re-determining the value of any component on a proper and reasoned basis."

43. I am of the view that the above decision has no bearing on the instant cases before me to bind the State to adhere to the number of houses to be built under the schemes and the persons through whom the houses should be constructed.

44. In this context, Radhakrishna Agarwal and Others Vs. State of Bihar and Others, requires to be referred.

45. The revision of royalty payable by the petitioners under a lease and termination of the said lease were under challenge; the challenge failed in the High Court and the decision of the High Court was affirmed by the Supreme Court. At page 1500 the Court held :

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

which powers under Art. 226 of the Constitution could be invoked."

"The Patna High Court had very rightly, divided the types of cases in which breaches of alleged obligation by the State or its agencies can be set up into three types. These were stated as follows:--

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

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

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

46. The Supreme Court pointed out that normally the doctrine of promissory estoppel governed the first type of cases; the cases before the Supreme Court were of third type. To such cases writ jurisdiction is not attracted. After referring to a few cases, Court held at page 1502 :

"We do not think that any of these cases could assist the appellants or is at all relevant. None of these cases lays down that, when the State or its officers purport to operate within the contractual field and the only grievance of the citizen could be that the contract between the parties is broken by the action complained of, the appropriate remedy is by way of a petition under Art. 226 of the Constitution and not an ordinary suit. There is a formidable array of authority against any such a proposition."

Court said, further at p. 1508 :

"Moreover it was the contract and not the executive power, regulated by the Constitution which govern the relations of the parties on facts apparent in the cases before us."

47. In Life Insurance Corporation of India Vs. Escorts Ltd. and Others, after referring to Radhakrishna Agarwai's case, the same principle was reiterated. At p. 1424, Court said :

".....if the action of the State is political or sovereign in character, the Court will keep away from it. The court will not debate academic matters of concern itself with the intricacies of trade and commerce. If the action of the State is related to contractual obligation or obligations arising out of the Court, the Court may not ordinarily examine it unless the action has some public law character attached to it. Broadly speaking, the court will examine actions of State if they pertain to the public law domain and refrain from examining them if they pertain to the private

law field. The difficulty will lie in demarcating the frontier between the public law domain and the private law field. It is impossible to draw the line with precision and we do not want to attempt it. The question must be decided in each case with reference to the particular action, the activity in which the State or the instrumentality of the State is engaged when performing the action, the public law or private law character of the action and a host of other relevant circumstances. When the State or an instrumentality of the State ventures into the corporate world and purchases the shares of a company, it assumes to itself the ordinary role of a shareholder, and dons the robes of a shareholder, with all the rights available to such a shareholder. There is no reason why the State as a shareholder should be expected to state its reasons when it seeks to change the management, by a resolution of the Company, like any other shareholder."

again, in *State of Uttar Pradesh and Others Vs. Maharaja Dharmander Prasad Singh and Others*, court held that whether the purported forfeiture and cancellation of the lease of land to develop the land, were valid or not could not be allowed to be agitated in writ proceedings; however, taking forcible possession by recourse to the right of re-entry was held as "illegal and the State was prohibited from doing so."

48. In *Bareilly Development Authority and Another Vs. Ajay Pal Singh and Others*, increasing the price of houses by the Bareilly Development Authority was challenged by the allottees. The power of revising the price was reserved by the B.D.A. before inviting the applications for allotment of the houses; therefore, court held it was part of the contract under which houses were allotted to the allottees and received by them. At page 1082, court held :

"Thus the factual position in this case clearly and unambiguously reveals that the respondents after voluntarily accepting the conditions imposed by the BDA have entered into the realm of concluded contract pure and simple with the BDA and hence the respondents can only claim the right conferred upon them by the said contract and are bound by the terms of the contract unless some statute steps in and confers some special statutory obligations on the part of the BDA in the contractual field."

Again, at page 1033 :

"There is a line of decisions where the contract entered into between the State and the persons aggrieved is non-statutory and purely contractual and the rights are governed only by the terms of the contract, no writ or order can be issued under Art. 226 of the Constitution of India so as to compel the authorities to remedy a breach of contract pure and simple."

Thus it is clear that where the relationship between the State and the petitioners is founded on a non-statutory contract and the terms of the said contract is sought to be enforced, jurisdiction under Art. 226 cannot be invoked. The exercise of the contractual power has to be tested, if at all, by invoking the ordinary jurisdiction of the Courts. There is no scope to invoke the doctrine of

promissory estoppel or of legitimate expectation, dehors the terms of the contract. If the terms of such a contract are not specifically enforceable (as in the case of building contracts), it is not possible to apply Art. 14 of the Constitution so as to in effect, compel specific performance of the terms of contract. While reading the terms of the contracts and their scope, the scheme under which contracts are awarded may be relevant, but the scheme itself would be read as forming a part of the contract; therefore, at the most, a change in the scheme by the Government shall have to be considered as an unilateral change of the terms of the contract. Whether it is permissible or not cannot be examined to enable the beneficiaries of the contracts to have the contracts specifically enforced by resort to the writ jurisdiction.

49. Re Contention "D".

Whether this is a case of levying and collecting damages suo motu falling within the vice referred to in State of Karnataka Vs. Shree Rameshwara Rice Mills, Thirthahalli,

50. This question is raised in W.P. No. 798 of 1993. State Government is not a party to the writ petition and the attack is against the Board cancelling the contract by an order dated 22-12-1992. The delay in the construction work is the main reason stated for the cancellation. If the Board had no power to cancel the agreement, the remedy for the breach committed by the Board would be to seek damages from it. In fact petitioner's writ petition concerning the contracts entrusted in a few other areas, was rejected by this Court and dismissal was affirmed in Writ Appeal as already referred earlier.

51. Bank guarantee was furnished in lieu of the advances paid to the contractor. On termination of the contract, the Board is entitled to seek the unutilised amounts. Invoking the Bank guarantee was in the exercise of the express contractual power. It is not done by way of recovering damages. The decision relied upon by the petitioner has no application to the facts of the case. This contention also is unacceptable.

52. For the reasons stated above, these writ petitions fail and are dismissed without any order as to costs.

53. Rule discharged.

54. Petitions dismissed.