
(1993) 09 CAL CK 0012
In the Calcutta High Court
Case No : Matter No. 3106 of 1992

Niranjan Pipalia

APPELLANT

Vs

Hindusthan Steel Works Construction Ltd. and others

RESPONDENT

Date of Decision : 08-09-1993

Acts Referred:

Constitution of India, 1950 — Article 12, 14, 19(1), 226, 229

Citation : AIR 1994 Cal 232

Hon'ble Judges : Baboolall Jain, J

Bench : Single Bench

Judgement

1. The instant writ petition has been made by Niranjan Pipalia as sole proprietor of his firm as referred to in the petition praying for issue of writ in the nature of mandamus commanding and directing the respondents to withdraw, recall and/or cancel purported order dated 26th November, 1992, whereby the respondent No. 1 intimated the petitioner that the order dated 19th November, 1992 is thereby cancelled.

2. Respondent No. 1 M/s. Hindusthan Steel Works Construction Limited, which is a Government of India undertaking, placed an order bearing No. SP/HSCL, 656/DSP/ SPI/ Instruments (F)/92/S-1858 dated 19th November, 1992 for supply of different instruments, at erection sites of Centre Plant No. 1, combined package, at TSB Durgapur" and for supervision during erection testing and commissioning. By the said order dated 19th November, 1992 the respondent No. 1 intimated to the petitioner that the respondent No. 1 was pleased to award the work of supply of different instruments at erection site of Centre Plant No. 1 at a total costs of Rs. 4,14,09,495.55 P., including West Bengal Sales Tax packing, forwarding, insurance as per the petitioner's offer and subsequent confirmations. The detailed schedule of items, price and term and conditions were enclosed as Annexures to the said order. The petitioner was requested to acknowledge receipt of the order and sign on all the pages as token of acceptance. The detailed description of items with price, the detailed price schedule for spares,

the commercial terms and conditions, the original offer dated 27th November, 1991 and the further correspondence and minutes of meeting were attached as Annexures to the said order. It is not in dispute that the petitioner signed on all the pages of the order as token of his acceptance.

3. Earlier to that, by letter dated 22nd November, 1991 the respondent No. 1 Hindusthan Steel Construction Limited (hereinafter also referred to as HSCL) issued an invitation to tender containing the detailed technical specifications and commercial terms for supply of different instruments. The offers were to be submitted by 6-12-1991 in a sealed cover. The petitioner submitted his offer by letter dated 27th November, 1991. By letter dated 15th January, 1992 the petitioner was invited to attend a meeting to be held on 24th January, 1992 for techno commercial discussions. It appears that a meeting was in fact held on 7th February, 1992 where several parties were present. The parties present included representatives of different parties making offers as also the representatives of the respondent No. 1 and/or its purchasers. No particulars of the offers received from other parties have been disclosed to this court, by the respondent No. 1, in these proceedings. In the said meeting various technical matters were discussed and clarified and confirmed between the parties. The respondent No. 1 also wrote to some of the petitioners principals and two of the principals of the petitioner replied to the respondent No. 1 asking the respondent No. 1 to contract the petitioner. The respondent No. 1 required the petitioner to extend the validity of the period of offer from time to time and the petitioner did so from time to time. The case of the petitioner is that negotiations were going on in the meantime as between the parties. The correspondence annexed to the order shows that the petitioner attended a meeting with the members of the Tender Committee on 1st July, 1992 and thereafter by letter dated 2nd July, 1992 he confirmed various matters as discussed in the meeting with the members of the Tender Committee. It appears from another letter dated 7th July, 1992 that there was another meeting with the Tender Committee members prior to the said letter dated 7th July, 1992 and said letter of confirmation of matters discussed with the Tender Committee was issued by the petitioner.

4. It is apparent that negotiations and/or deliberations took place during a period extending to about 11 months after the offer was submitted by the petitioner and thereafter by letter dated November 16, 1992 it was intimated by the respondent No. 1 to the petitioner that the tender submitted by the petitioner had been accepted subject to the petitioner confirming the extension of the validity of the offer and on confirmation that the petitioner was agreeable to accept the order for five types of instruments against the petitioner's offer of six items i.e. excluding Radiation Pyrometer. The petitioner was requested to confirm the same immediately to enable the respondent No. 1 to issue the Letter of Intent. By letter dated 17th November, 1992 the petitioner acknowledged the letter dated November, 16, 1992 and confirmed the extension of the validity of the offer as also that the petitioner was agreeable to accept the order of five types of instruments instead of six items as required. On 19th November, 1992 the

respondent No. 1 placed the order aforesaid upon the petitioner. By letter dated 20th November, 1992 the petitioner confirmed the order. By another letter dated November 24, 1992 the petitioner further confirmed that the petitioner had already accepted the order by signing on all the pages of the said letter dated 19th November, 1992 as requested by HSCL. The petitioner also conveyed its formal acceptance of the said order. The petitioner also assured that the petitioner will execute the order in time and that he had already taken necessary actions for procurement of the ordered instruments. By letter dated 25th November, 1992 the petitioner submitted his pro forma invoices and asked HSCL to see that the letter of Credit is opened at an early date.

5. Thereafter HSCL wrote the impugned letter dated 26th November, 1992 communicating its unilateral decision with reference to the said contract and/or order as follows:

"The subject order under reference is hereby cancelled."

The petitioner after receipt of the letter under challenge, inter alia, stated vide its letter dated November 27, 1992 as follows :--

"It is indeed surprising that an order which was placed on 19th November, 1992 after prolonged negotiations and deliberations spared over a period of one year has been suddenly cancelled within a week without any reason whatsoever. As already informed to you we have already taken necessary action for procurement of the imported equipments and also submitted our pro forma invoice,

The order has been cancelled without any reason and indeed there could be no reason whatsoever. The cancellation is absolutely arbitrary, motivated and perverse and will cause us immense loss and prejudice besides loss of goodwill and prestige in the market specially with our foreign principals.

In the circumstances we call upon you to rescind the cancellation forthwith failing which we shall be constrained to take such steps as we may be advised in this regard without any further reference to you".

The instant writ petition was filed on 9th December, 1992, and an order was made in terms of prayer "G" of the petition which reads as follows:-

"Injunction restraining the respondents and each of them, their servants and/or agents from awarding the said contract to any other person and/ or to re-tender for the same till the disposal of this application."

It was also ordered that no importation of the items mentioned in Annexure "E" i.e. the order dated 19th November, 1992 was to made.

6. It is submitted on behalf of the writ petitioner that the said letter dated 26th November, 1992, which was issued within seven days after the issuance of the order and/or the letter of intent, was arbitrary and without any reasons and was mala fide and in violation of the petitioner's right under Articles 14 and 19(1)(g) of the Constitution of India.

7. It is clear that no reasons were given in the said letter of cancellation. However, the reasons are sought to be given in the affidavit filed on behalf of the respondent No. 1 being the affidavit affirmed by Mr. Dipak Kr. Ray Chowdhury Deputy Chief Engineer (Materials) dated January 18, 1993, the reasons given for the action taken by the said letter dated 26-11-1992 are summarised and considered here-in-below :--

(i) It has been alleged that after issuance of the order on the petitioner on 19-11-1992, the respondents were receiving communication that the price as finalised with the petitioner was more than double, the price at which, the supplies could be obtained directly from the foreign principles. No written communications dated prior to the issuance of the letter dated 26-11-1992, have been disclosed nor have any particulars of such communications have been given. It is, however, further alleged in paragraphs 15 and 15(c) of the said affidavit that during the visit of the respondents Executive Director (Technical) and Group General Manager (Durgapur) to Germany on 20-11-1992 they made an enquiry regarding the prices of the instruments as is prevalent in Germany (since two major instruments as offered by the petitioner were of German origin) and thereafter the respondents discovered that the petitioners price was nearly double the price compared to those offered by the German Suppliers, .

(ii) Neither names of the officers are given nor is there any affidavit by any of such officers. So far as the deponent is concerned the allegation is nothing but here say evidence. It cannot, therefore, be said that any alleged communications or alleged enquiry prior to 26-11-1992 is proved by any cogent evidence has disclosed letter dated between 4th December, 1992 to 21st December, 1992. The respondent HSCL containing quotations from the three principals of the petitioner which are annexed to the affidavit in opposition. According to the affidavit-in-opposition on evaluation of the offers received for the five instruments, the expenditure of the respondent will be about Rs. 207.30 lakhs. These letters which are dated subsequent to 26-11-1992, could not possibly be the reasons for the issuance of the letter dated 26-11-1992. The submission, however, is that if it is decided HSCL should import, the materials then it could be imported at a much lower price than the contracted rate. This sort of decision could be taken before issuance of the order and not after issuance of the order. There were offers from other Indian Suppliers, the prices quoted by them are not disclosed, It is common knowledge that if you import directly then it has to be cheaper than the price that you have to pay to another importer. The said importer will add his own profit margin.

(iii) The next point urged on behalf of the HSCL is that they had entered into a turnkey contract with the Steel Authority of India Ltd., Durgapur Steel Plant. As per the said contract the respondent was to receive the payment from the Steel Authority of India Ltd. (hereinafter referred to as SAIL) in foreign currency for ocean freight and insurance for customs duty in Indian rupees. If HSCL obtains the instruments from the petitioner, HSCL will be deprived of the benefit of the

currency fluctuation which is about 200% and also towards reimbursement of the customs duty as the petitioner has refused to indicate the break up of the original price paid to the foreign suppliers, customs duty. If the break up information was so useful to the respondent HSCL, it could insist for these particulars before placing the order. There is nothing on record to show that these particulars were asked for or insisted. It is also submitted that in case HSCL buys the materials from the petitioner, HSCL will be burdened with the additional Sales Tax of 9.2%. It has been sought to be alleged that against of Rs. 44.30 lakhs from SAIL for the five instruments, HSCL will have to incur Rs. 414.09 lakhs for these instruments bringing about a direct loss to the respondent of about 369.79 lakhs. These are matters to be considered prior to the placing of the order and there was nothing to prevent the respondent from not placing the order if it was disadvantageous to do so, Even the contract will sail (sic) has not been disclosed.

(iv) It has also been sought to be alleged that HSCL has now proposed to directly order the said instruments from the foreign suppliers in an attempt to avoid the loss which is likely to suffer by obtaining the goods from the petitioner and also keeping in view of the office memorandum No. F23 (1) -- E2(A)/ 89 dated 31st January, 1989 of Ministry of finance, Department of Expenditure, Government of India. I shall consider the said memorandum at a later stage.

8. The more important ground of justification for issuing the letter dated 26th November, 1992 which has been argued with great stress, is, that on 20th November, 1992, HSCL came to know that the price at which the goods could be imported were very low. It is to be seen that the invitation to tender was for supply of goods of foreign manufacture by India Suppliers, on principal to principal basis and against rupee payment. Several tenderers participated in the tender which appears from the minutes of one of the meetings. The Indian Supplier will have to pay Sales Tax. It also appears that if HSCL would have imported the goods directly, it could do so by paying less customs duty than the Indian suppliers, because the respondent could get the benefit of lower rate of customs duty for import against a project. HSCL in case of direct import had to pay customs duty @ 35% under project import benefit whereas the Indian suppliers who offered the materials to HSCL under the invitation offender had to pay customs duty @ 55%. This item alone that is the difference in customs duty increase the offer by about Rs. 30 lakhs. According to HSCL's calculations the customs duty at 35% under project import benefit would amount to 50.98 lakhs and according to the calculations of the writ petitioner the customs duty on landed cost @ 55% would come to about Rs. 82,41,046.58 paise. There is also the question of Sales Tax @ 9.2%. Furthermore, there is also the question of packing, Inland Freight and Insurance making difference of more than Rs. 7 lakhs. Furthermore, a supplier could not also be expected to supply without any margin of profit. The supplier also runs the risk in entering into a contract at firm rate, because various items of expenditure may increase between the period when the order is placed and the goods are supplied.

9. The contract in question also provides for supervision during erection, testing and commissioning, etc. It is quite possible that HSCL wanted to purchase the materials from Indian suppliers as is evident from their invitation to tender and the negotiations and the ultimate order. It is also quite clear that HSCL did not get any offer from any Indian supplier at a rate of lower than the rate offered by the petitioner. After the contract is placed it becomes a legally binding document and it is no ground in law that that if the purchaser could have purchased from the foreign supplier directly, or in the foreign market he could get the goods at a cheaper rate. The respondent No. 1 before placing the order was at liberty to make whatever enquiries it wanted to make either from the local market or from the foreign market or foreign suppliers. If the order was kept pending for more than 11 months there was no reason why they could not wait for further 5 or 7 days if at all their representative was there in Germany for making enquiries or if at all it was intended to make enquiries through a representative. No name of the representative has been disclosed. As a matter of fact, there is no document to support the alleged enquiry on 20th November, 1992. I should have thought that even at the time of placing the order HSCL or its Purchase Committee members must have known that a direct import could save a lot of money for them in the form of lower rate of Customs Duty. No Sales Tax, no inland packing and forwarding charges, no suppliers' margin of profits and that if they imported directly from the foreign suppliers then they could get the goods at a much cheaper rate. The grounds as to lesser costs or other benefits in case of direct import must have been known prior to the placing of the order. The enquiry that is alleged to have been done on 20th November, i.e. a day after the placing of the order could easily be done prior to 19th November, i.e. before placing the order or alternatively they could wait for a day or two. When they placed the order they must have known that the materials could be obtained at a lower price if they imported the same directly.

10. The next ground urged was that if HSCL obtained the goods from the Indian suppliers at a firm rate basis then HSCL will get less reimbursement from their purchaser i.e. Steel Authority of India Limited. HSCL has not disclosed the contract which they had with SAIL/ DSP. It has also been stated that the contract between HSCL and its purchaser was on a turnkey basis. If it was on a turnkey basis then the price of the goods must have been included in the contract itself. All the facts with regard to the contract of HSCL with SAIL/DSP were must have been within the knowledge of HSCL. Prior to placement of order on the petitioner. Furthermore, the contract with HSCL has not been disclosed before this Court. If HSCL knowing all the facts decided to place the order on the petitioner then they cannot turn round and say that they did not consider all aspects before placement of order or that they want to become wiser after placing the order. The consideration if any should have been made before the placing of the order and after the placing of the order the consequences have to follow. That they will suffer disadvantage by procuring goods from an Indian supplier or that they will be in advantageous position by procuring goods directly from the foreign

suppliers were matters to be considered before placing of the order and the facts relating thus to were also within the knowledge of HSCL. The calculations which are annexed at pages 41 and 42 of the affidavit-in-opposition seem to be vague and are not supported by any evidence and cannot be relied on. The alleged calculations do not contain all the particulars therein. In the calculation at page 41, they have converted Deutsche mark into rupees at the exchange rate of 7.9. That was not the exchange rate prevailing at the relevant time. This is proved even by their next calculation at pages 42 and 43 where they have mentioned that the conversion rate of 1 DM was equal to Rs. 17.05. If it was 17.05 then how they could convert in the calculation at page 41 as 1 DM equal to Rs. 7.90. This shows that the motive was to reduce the figure to a lower amount in the calculation at page 41. Be that as it may, these calculations or particulars which are sought to be given, relate to facts which were or should have been well within the knowledge of HSCL at or before the date of placing of the order and that is not the reason for which HSCL should be allowed, after the order, to allege that they did not consider something which they should have considered before placing the order.

11. One of the justifications which has been mentioned on behalf of HSCL is that the cancellation was in accordance with the Government policy contained in office memorandum dated 31st January, 1989. The said memorandum says that until law is made for compulsory registration of agents, compulsory registration should be made in the tender enquiry/contract. In the instant tender enquiry/contract no such condition was made. Furthermore, there is no law for compulsory registration of agents yet, and no such law has been pointed out to this Court. Even apart from that this was a contract on principal to principal basis and it cannot be said that the petitioner while making an offer was making on behalf of any foreign principal. The offer was on principal to principal basis and in making the offer the petitioner does not say that it was acting as agent to a foreign principal.

12. It was also submitted that since the goods can be obtained at a lower price if imported directly, that act of cancellation of the contract was in public interest. It will be rather too much to say that if a particular commodity can be acquired at a lower price then the contract at a higher price can be cancelled on that grounds. If that is so, it will cause havoc in every case whenever a purchase is made there will always be someone to offer at a lower price. In law also this is not permissible. Public interest also demands that firm commitments made by the Government should be honoured particularly when the Government and/or the Government companies are parties to innumerable transactions with private citizens. Public interest certainly does not demand that a firm commitment already made by the Government or its agencies can or should be cancelled simply on the ground that the commodity can be purchased through other channels at lower price.

13. The learned counsel on behalf of the petitioner relied on the judgment

reported in *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, In the said case the Supreme Court held as follows at Page 1636 :--

"It is a rule of administrative law which has been judicially evolved as a check against exercise of arbitrary power by the executive authority. If we turn to the judgment of Mr. Justice Frankfurter and examine it, we find that he has not sought to draw support for the rule from the equality clause of the United States Constitution but evolved it purely as a rule of administrative law. Even in England, the recent trend in administrative law is in that direction as is evident from what is stated at pages 540-41 in Prof. Wade's *Administrative Law* 4th Edition. There is no reason why we should hesitate to adopt this rule as part of our continually expanding administrative law. Today with tremendous expansion of welfare and social service functions increasing control of material and economic resources and legal scale assumption of industrial and commercial activities by the State, the power of the executive Government to affect the lives of the people is steadily growing. The attainment of socio-economic justice being a conscious end of State policy, there is a vast and inevitable increase in the frequency with which ordinary citizens come into relationship of direct encounter with State power-holders. This renders it necessary to structure and restrict the power of the executive Government so as to prevent its arbitrary application or exercise. Whatever be the concept of the rule of law, whether it be the meaning given by Dicey in his *"The Law of the Constitution"* or the definition given by Hayek in his *"Road to Serfdom"* and *"Constitution of Liberty"* or the exposition set forth by Henry Jones in his *"The Rule of Law and the Welfare State"*; there is as pointed out by Mathew J. in his article on *"The Welfare State, Rule of Law and Natural Justice"* in *Democracy Equality and Freedom* "Substantial agreement in juristic thought that the great purpose of the rule of law notion is the protection of the individual against arbitrary exercise of power, wherever it is found". It is indeed unthinkable that in a democracy governed by the rule of law the executive Government or any of its officers should possess arbitrary power over the interests of the individual. Every action of the executive Government must be informed with reason and should be free from arbitrariness. That is the very essence of the rule of law and its bare minimal requirement. And to the application of this principle it makes no difference whether the exercise of the power involves affectation of some right or denial of some privilege."

"The discretion of the Government has been held to be not unlimited in that the Government cannot give or withhold largess in its arbitrary discretion or at its sweet will. It is insisted, as pointed out by Professor Reich in an especially stimulating article on *"The New Property"* in 73 *Yale Law Journal* 733, "that Government action be based on standards that are not arbitrary or unauthorised." The Government cannot be permitted to say that it will give jobs or enter into contracts or issue quotas or licences only in favour of those having grey hair or belonging to a particular political party or professing a particular religious faith. The Government is still the Government when it acts in the matter of granting largess and it cannot act arbitrarily. It does not stand in the same

position as a private individual."

"We agree with the observations of Mathew, J. in *V. V. Punnen Thomas Vs. State of Kerala*, that: "The Government, is not and should not be as free as an individual in selecting the recipients for its largess. Whatever its activity, the Government is still the government and will be subject to restraints, inherent in its position in a democratic society. A democratic Government cannot lay down arbitrary and capricious standards for the choice of persons with whom alone it will deal". The same point was made by this court in *Erusian Equipment and Chemicals Ltd. Vs. State of West Bengal and Another*, where the question was whether black-listing of a person without giving him an opportunity to be heard was bad, Ray, C.J. speaking on behalf of himself and his colleagues on the Bench pointed out that black-listing of a person not only affects his reputation which is in Pundian terms an interest both of personality and substance, but also denies him equality in the matter of entering contract with the Government and it cannot, therefore, be supported without fair hearing. It was argued for the Government that no person has a right to enter into contractual relationship with the Government and the Government, like any other private individual, has the absolute right to enter into contract with any one it pleases. But the Court, speaking through the learned Chief Justice, responded that the Government is not like a private individual who can pick and choose the person with whom it will deal, but the Government is still a Government when it enters into contract or when it is administering largess and it cannot, without adequate reason, exclude any person from dealing with it or take away largess arbitrarily. The learned Chief Justice said that when the Government is trading with the public, "the democratic form of Government demands equality and absence of arbitrariness and discrimination in such transactions The activities of the Government have to public element and, therefore, there should be fairness and equality. The State need not enter into any contract with anyone, but if it does so, it must do so fairly without discrimination and without discrimination and without unfair procedure". This proposition would hold good in all cases of dealing by the Government with the public, where the interest sought to be protected is a privilege. It must, therefore, be taken to be the law that where the Government is dealing with the public, whether by way of giving jobs or entering into contracts or issuing quotas or licences or granting other forms of largess, the Government cannot act arbitrarily at its sweet will and, like a private individual, deal with any person it pleases, but its action must be in conformity with standard or norm which is not arbitrary, irrational or irrelevant. The power of discretion of the Government in the matter of grant or largess including award of jobs, contracts quotas, licences etc, must be confined and structured by rational, relevant and non-discriminatory standard or norm and if the Government departs from such standard or norm in any particular case or cases, the action of the Government would be liable to be struck down, unless it can be shown by the Government that the departure was not arbitrary, but was based on some valid principle which in itself was not irrational, unreasonable or discriminatory".

"The corporations acting as instrumentality or agency of Government would obviously be subject to the same limitations in the field of constitutional and administrative law as Government itself, though in the eye of the law, they would be distinct and independent legal entities."

14. The petitioner also relied on the judgment of the Division Bench of this Court reported in *Jute Corporation of India Ltd. Vs. Nellimaria Jute Mills Co. Ltd. and Another*, In the said case the Division Bench of this court after considering the various Supreme Court judgment on the subject held as follows :-

Every action taken by the Government must be "in Public interest" and it cannot act arbitrarily without reasons and if does so, its action would be liable to be invalidated. If the Government awards a contract or lease out or otherwise deals with its property or grants any largesse, it is liable to be tested for its validity on the touch-stone of reasonableness and public interest and in case either of the tests are not satisfied, the action would be unconstitutional and invalid."

"If the cancellation of the contract by the appellant Corporation was arbitrary and unreasonable and against the rule of fairplay of its action, even from administrative point of view was arbitrary and unreasonable, the Writ Court can interfere."

"The absolute proposition that no writ petition can be entertained when the action challenged pertains to the domain of a concluded contract. If the arbitrariness on the part of the authority concerned is writ large and the matter may be decided on the basis of the documents on record it is open to the aggrieved party to challenge such arbitrary and illegal action by filing appropriate writ petition under Article 226 of the Constitution of India. Each case has to be decided on its facts and circumstances and there cannot be said to be an absolute bar as regards the maintainability of the writ petition."

15. The petitioner also relied on the judgment reported in *Kumari Shrilekha Vidyarthi and Others Vs. State of U.P. and Others*, . In the said case the Supreme Court held that it cannot be said that the appointment of District Government Counsel by the State Government is only a professional engagement like that between a private client and his lawyer or that it is purely contractual with no public element attaching to it, which may be terminated at any time at the sweet will of the Government excluding judicial review.

"The presence of public element attached to the "office" or "post" of District Government Counsel is sufficient to attract Article 14 of the Constitution and bring the question of validity of the impugned circular terminating appointment of all District Govt. Counsel in State of U.P. within the scope of judicial review. Para 7.06 of Legal Remembrancer has to be read not in isolation, but in the context in which it appears and along with the connected provisions. The expression "professional engagement" is used therein to distinguish it from "appointment to a post under the Government" in the strict sense. This, however, does not necessarily mean that a person who is not a Government

servant holding a post under the Government does not hold any public office and the engagement is purely private with no public element attaching to it. This part of Cl. 3 of para 7.06 means only this and no more. The other part of Cl. 3 enables the Government to terminate the appointment "at any time without assigning any cause". The expression "at any time" merely means that the termination may be made even during the subsistence of the term of appointment and "without assigning any cause" means without communicating any cause to the appointee whose appointment is terminated. However, "without assigning any cause" is not to be equated with "without existence of any case". It merely means that the reason for which the termination is made need not be assigned or communicated to the appointee. The non-assigning of reasons or the non-communication thereof may be based on public policy, but termination of an appointment without the existence of any cogent reason in furtherance of the object for which the power is given would be arbitrary and, therefore, against public policy. Cl. 3 of para 7.06 must, therefore, be understood to mean that the appointment of a District Government Counsel is not to be equated with appointment to a post under the Government in the strict sense, which does not necessarily mean that it results in denuding the office of its public character; and that the appointment may be terminated even during currency of the term by only communicating the decision of termination without communicating the reasons which led to the termination. It does not mean that the appointment is at the sweet will of the Government which can be terminated at any time, even without the existence of any cogent reason during the subsistence of the term. In the case of Public Prosecutors, the additional public element flowing from statutory provisions in the Code of Criminal Procedure, undoubtedly, invest the Public Prosecutor with the attribute of holder of public office which cannot be whittled down by the assertion that their engagement is purely professional between a client and his lawyer with no public element attaching to it."

16. The next case relied on behalf of the writ petitioner is the case reported in *Mahabir Auto Stores and others Vs. Indian Oil Corporation and others*, as follows at page 1036:--

"It is well settled that every action of the State or an instrumentality of the State in exercise of its executive power, must be informed by reason. In appropriate cases, actions uninformed by reason may be questioned as arbitrary in proceedings under Article 226 or Article 32 of the Constitution. Reliance in this connection may be placed on the observations of this Court in *Radha Krishna Agarwal v. State of Bihar*. It appears to us, at the outset, that in the facts and circumstances of the case, the respondent company IOC is an organ of the State or an instrumentality of the State as contemplated under Article 12 of the Constitution. The State acts in its executive power under Article 298 of the Constitution in entering or not entering in contracts with individual parties. Article 14 of the Constitution would be applicable to those exercises of power. Therefore, the action of State organ under Article 14 can be checked. See *Radha Krishna Agarwal v. State of Bihar* at page 462. but Article 14 of the Constitution

cannot and has not been construed as a charter for judicial review of State action after the contract has been entered into, to call upon the State to account for its actions in its manifold activities by stating reasons for such actions. In a situation of this nature certain activities of the respondent company which constituted State under Article 12 of the Constitution may be in certain circumstances subject to Article 14 of the Constitution in entering or not entering into contracts and must be reasonable and taken only upon lawful and relevant consideration; it depends upon facts and circumstances of a particular transaction whether hearing is necessary and reasons have to be stated. In case any right conferred on the citizens which is sought to be interfered, such action is subject to Article 14 of the Constitution, and must be reasonable and can be taken only upon lawful and relevant grounds of public interest. Where there is arbitrariness in State action of this type of entering or not entering into contracts, Art. 14 springs up and judicial review strikes such an action down. Every action of the State executive authority must be subject to rule of law and must be informed by reason. So, whatever be the activity of the public authority, in such monopoly or semi-monopoly dealings, it should meet the test of Art. 14 of the Constitution. If a governmental action even in the matters of entering into contracts, fails to satisfy the test of reasonableness the same would be unreasonable. In this connection reference may be made to *E. P. Koyappa v. State of Tamil Nadu*, *Maneka Gandhi v. Union of India*, *Ajay Hasia v. Khalid Mujib Sehravardi*, *R. D. Shetty v. International Airport Authority of India* and also *Dwarkadas Marfatia and Sons v. Board of Trustees of the Port of Bombay*. It appears to us that rule of reason and rule against arbitrariness and discrimination, rules of fair play and natural justice are part of the rule of law applicable in situation or action by State instrumentality in dealing with citizens in a situation like the present one. Even though the rights of the citizens are in the nature contractual rights, the manner, the method and motive of a decision of entering or not entering into a contract, are subject to judicial review on the touchstone of relevance and reasonableness, fair play, natural justice, equality and non-discrimination in the type of the transactions and nature of the dealing in the present case."

Having considered the facts and circumstances of the case and the nature of the contentions and the dealing between the parties and in view of the present State of law, we are of the opinion that decision of the State/ public authority under Art. 298 of the Constitution, is an administrative decision and can be impeached on the ground that the decision is arbitrary or violative of Art. 14 of the Constitution of India on any of the grounds available in public law field. It appears to us that in respect of Corporation like IOC when without informing the parties concerned, as in the case of the appellant-firm herein on alleged change of policy and on that basis action to seek to bring to an end the course of transaction over 18 years involving large amounts of money is not fair action, especially in view of the monopolistic nature of the power of the respondent in this field. Therefore, it is necessary to reiterate that even in the field of public law, the relevant persons concerned or to be affected, should be taken into

confidence. Whether and in what circumstances that confidence should be taken into consideration cannot be laid down on any strait-jacket basis. It depends on the nature of the right involved and nature of the power sought to be exercised in a particular situation. It is true that there is discrimination between power and right but whether the State or the instrumentality of a State has the right to function in public field or private field as a matter which, in our opinion, depends upon the facts and circumstances of the situation, but such exercise of power cannot be dealt with by the State or the instrumentality of the State without informing and taking into confidence, the party whose rights and powers are affected or sought to be affected, into confidence. In such situations most often people feel aggrieved by exclusion of knowledge if not taken into confidence,"

Having regard to the nature of the transaction, we are of the opinion that it would be appropriate to State that in cases where the instrumentality of the State enters the contractual field, it should be governed by the incidence of the contract. It is true that it may not be necessary to give reasons but, in our opinion, in the field of this nature fairness must be there to the parties concerned, and having regard to the large number of the long period and the nature of the dealings between the parties, the appellant should have been taken into confidence. Equality and-fairness at least demands this much from an instrumentality of the State dealing with a right of the State not to treat the contract as subsisting. We must, however, evolve such process which will work."

18. The learned counsel for the respondent relied on the case reported in *Kulchinder Singh and Others Vs. Hardayal Singh Brar and Others*,

In the said case the question of violation of any Fundamental Rights was not raised. It was held that remedy of Art. 226 is unavailable to enforce a right qua contract. Here the issue is whether the State action in cancelling the contract is void on the ground of arbitrariness violating Art 14 of the Constitution. There the Supreme Court in paragraph 12 held as follows:

"The controversy before us in substance will turn on the construction and scope of the agreement when the claim to a quota as founded cannot be decided in writ jurisdiction without going back on well settled guidelines and even subverting the normal procedural law -- except perhaps in extreme cases which shock the conscience of the Court or other extraordinary situation, an aspect we are not called upon to explore here."

19. Next case relied on behalf of the respondents is the case reported in *Divisional Forest Officer Vs. Bishwanath Tea Co. Ltd.*, In the said case the only fundamental right which was alleged to have been violated was Art. 19(1)(b). In para 7 at page 1372 the Supreme Court pointed out that the writ petition having been filed by a Company, Art. (1)(g) could not be invoked because the Company was not citizen. In the very same paragraph the Supreme Court noted that although the shareholders of a company could complain of infringement of their fundamental rights but such is not the case in the pleading. Furthermore, in the

said case there is no issue as to the arbitrary exercise of powers violating Art. 14 of the Constitution of India. In fact in paragraph 8 of the Supreme Court has observed that a writ can be issued if there is a denial of equality before law or equal protection of law i.e. Art. 14. The Supreme Court also noted that the respondent-company claimed exemption from the obligation to pay royalty in view of Cl. 2 of the Indenture of Lease. In other words, the respondent-company in the case was inviting the Supreme Court to decide a dispute which had arisen in course of the operation of the lease. The Supreme Court in the said case held that the dangerous course adopted by the High Court in examining rights and obligations claimed under the contract without proper or adequate material or evidence to reach a conclusion, more so when the petition raised disputed questions of facts which needed investigation.

20. The next case relied on behalf of the respondent is the case reported in Bareilly Development Authority and Another Vs. Ajay Pal Singh and Others, The complaint of the petitioners in that case was that the revision of the terms and conditions of allotment of flats by Bareilly Development Authority was bad on the ground that BDA was estopped from changing the conditions subject to which the applicants had applied for registration and deposited initial payment of money. The Supreme Court in the said case found that the enhancement of price was not arbitrary. In paragraph 16, it was inter alia, observed as follows:

"In such circumstances the respondent cannot be heard to say that the BDA has arbitrarily and unreasonably changed the terms and conditions of the brochures to the prejudice of the respondents."

"There the question was of the enforcement of a contract or the depute arising under the contract. BDA was claiming that it had power to revise the terms and conditions and once the Court held that it cannot be heard to say that BDA has acted arbitrarily or unreasonably, there was no question of any violation of An. 14 of the Constitution, and the only question was as to what right a party had under or in accordance with the contract.

21. It should further be noted that in the judgment reported in Dwarkadas Marfatia and Sons Vs. Board of Trustees of the Port of Bombay, a larger Bench of the Supreme Court held as follows:

"When the State, the local bodies and public authorities which are "State" within the meaning of Art. 12 are exempted from purview of Rent Control Legislation, the basis of exemption is that such bodies would not be actuated by any profit making motive so as to unduly enhance the rents or eject the tenants from their respective properties as private landlords are or likely to be. They would not act for their own purchase as private landlords do, but must act for public purpose. It, therefore, follows that the public authorities which enjoy this benefit without being hidebound by the requirement of the Rent Act must act for public benefit."

"Being a public body even in respect of its dealing with its tenant, it must act in public interest, and an infraction of that duty is amenable to examination either

in civil suit or in writ jurisdiction."

"Where there is arbitrariness in State action Art. 14 springs in and judicial review strikes such an action down. Every action of the executive authority must be subject to rule of law and must be informed by reason. So, whatever be the activity of the public authority, it should meet the test of Art. 14.

"Every activity of a public authority especially in the background of the assumption on which such authority enjoys immunity from the rigors of the Rent Act, must be informed by reason and guided by the public interest. All exercise of discretion or power by public authorities (like Bombay Port Trust), in respect of dealing with tenants in respect of which they have been treated separately and distinctly from other landlords on the assumption that they would not act as private landlords must be judged by that standard. If a governmental policy or action even in contractual matters fails to satisfy the test of reasonableness, it would be unconstitutional."

"There is always a presumption that a governmental action is reasonable and in public interest. It is for the party challenging its validity to show that the action is unreasonable, arbitrary or contrary to the professed norms or not informed by the public interest, and the burden is a heavy one. The onus is entirely on the tenant and the burden lies on him to establish that the tenancy is terminated or the proceedings in eviction are taken not in public interest but for a collateral purpose or mala fide or that it had acted in a manner contrary to the provisions of Art. 14 of the Constitution."

"It is not within the purview of a Court to substitute a decision taken by a constituted authority simply because the decision sought to be substituted is a better one. In the instant case the Bombay Port Trust came to the conclusion that the only possible way to develop the properties of the Bombay Port Trust in compliance with the Town Planning Scheme is by allotting plots to holders of major portions thereon. Accordingly, it took the policy decision to allot a plot to the tenant holding major portion thereon and to evict other tenants from the plot. It could not be held that such policy decision was not in public interest."

22. The respondents also relied on the case reported in (1991) 2 CHN 451 (Anupam Ghosh v. Union of India) and (1988) 2 CHN 233 (Hindustan Petroleum v. Shyam Sundar Ganeriwala) and Orient Longman Ltd. Vs. Jayati Laila Kabir and Others, in support of the proposition that if a flow from a private contract between the parties and the conditions of service are not governed or controlled by any statutory provisions and the impugned action of the instrumentality or agency in the matter of employment of its employee has no public law character, there will be no occasion for interference in the writ jurisdiction. A State action relating to contractual obligation will not be examined unless the action has some public law character for exercising constitutional writ jurisdiction. In such a case the employee may avail of other alternative remedies in a different forum. In the said cases there were no question of any arbitrariness or violation of Art. 14 of

the Constitution of India. If there is a violation of Art. 14 of the Constitution of India then the Court has the power of judicial review.

23. Coming to the facts of this case it is to be seen that an order was placed on the petitioner on 19th November, 1992. Even before there was or could be any question of any breach of contract or any apprehended breach of contract, the respondents within seven days purported to issue the impugned letter dated 26th November, 1992.

24. The said letter is only a one line letter. It does not give any reason whatsoever. The justifications sought to be given in the affidavit, filed on behalf of the respondent No. 1, is inter alia, to the effect that the goods could be procured at a far lower price if the respondents make a direct purchase from a foreign market or foreign supplier or that the respondents did not examine the financial disadvantages which it suffered by placing an order to an Indian supplier in stead of making an import directly, etc. are not really grounds which have any backing of law or reason. A State or its agencies cannot, in my opinion, act arbitrarily or unreasonably.

25. Where there is an arbitrariness in State action Art. 14 springs in and judicial review strikes such an action. Every action of the Executive Committee must be subject to rule of law and must be informed by reason. So whatever be the activity of the public authority, it should meet the test of Art. 14 i.e. what the Supreme Court has said in the case of *Dwarkadas Madatia & Sons*.

26. It was also sought to be argued that the contract provides for maximum liquidated damages in case of breach provisions, for such liquidated damages it is found on scrutiny, is in relation to delay in performance of the contract and the same has been stated in the contract to be subject to maximum of 5%. The letter of the writ petitioner which is annexed and forms part of the contract clearly shows that and that is what was provided in the contract.

27. From whatever angle the matter is looked at I find that this most unusual action of the respondent No. 1 within seven days after entering into the contract is patently arbitrary and without any reasons. The alleged reasons given in the affidavit-in-opposition apart from the reasons which I have already discussed above are mostly vague and without any substance or reasons. If the respondents issued the order or entered into contract after deliberation for more than 11 months it could not after having entered j into the contract, within seven days say that respondents cancels the contract unilaterally because it was not wise enough to see the financial implications involved or that it entered into the contract at a higher rate or that if the respondent imports the goods from the manufacturer, it could get it at a cheaper rate. I must mention here that during the course of hearing there were various negotiations between the parties. However, they could not reach to any concluded agreement and the same were without prejudice to the rights and contentions of the parties.

28. However, towards the conclusion of his arguments the learned counsel Mr. S.

Pal appearing on behalf of the writ petitioner submitted that in view of the various facts that have come to his knowledge during the course of (sic) including the fact that it would be possible for his client to import the goods at a lower rate of customs duty under project import benefits scheme, the down price to Rs. 3.50 crores without prejudice to the contentions that the quoted price was fair price and binding on the parties in the facts of this case. It was also, inter alia, submitted that it is possible for the petitioner to obtain, benefit or reduction in the customs duty and other expenses and/or costs in view of the facts which have come to the knowledge of the petitioner, in case appropriate certificates and /or documents are issued to the petitioner by the respondent No. 1. Mr. Pal also submitted that if the contract in question was a firm price contract and if at all the costs of procuring the goods, during the pendency of the contract would have increased, then the petitioner would have suffered on account of that and he could not claim higher prices. Be that as it may, considering the circumstances Mr. Pal on behalf of his client offered to supply the goods at a price of Rs. 3.50 crores instead of the original offer which was about 4.14 crores.

29. In the premises I am of the view that the said purported letter dated 26th November, 1992 issued by the respondent No. 1 is liable to be and is hereby cancelled and quashed. The respondents are restrained from giving effect to the said letter dated 26 November, 1992. Learned counsel for the writ petitioner towards the end of his arguments offered to supply the goods at the reduced total price of Rs. 3.50 crores in view of some subsequent facts and also in view of the benefit that the writ petitioner thinks that it can obtain under the project import benefits scheme, if the requisite documents and/or certificates are issued by the respondent No. 1. The respondent No.1 will issue necessary documents and/or certificates, as may be required by the writ petitioner inter alia stating that the goods concerned are required and/or are imported and/or are intended to be imported for the particular project of SAIL./DSP. So as to enable the petitioner to avail itself of the benefit of the reduction in customs duty under the project import benefits scheme, if the writ petitioner is so entitled under the law. However, the goods are to be supplied at the reduced, total price of Rs. 3.50 crores as offered by Mr. Pal during the course of his arguments. The period which has been taken from the issuance of the said letter dated 26th November, 1992 up to the date of this order will be excluded from the period available under the contract for the purpose of delivering the goods which are the subject matter of the contract.

30. Each party will pay and bear its own costs.

31. The parties to act on a signed copy of the operative portion of this judgment and order.

32. The respondents pray for stay of the operation of this judgment and order. The prayer for stay is declined.

33. Order accordingly.