

(2014) 05 PAT CK 0036

In the Patna High Court

Case No : LPA No. 2 of 2014 in CWJC No. 4270 of 2006

Nizamuddin

APPELLANT

Vs

The State of Bihar

RESPONDENT

Date of Decision : 15-05-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 122, 35
Constitution of India, 1950 — Article 12, 14, 21, 226, 227

Citation : (2014) 3 PLJR 515

Hon'ble Judges : S.P. Singh, J;I.A. Ansari, J

Bench : Division Bench

Advocate : Nawal Kishore Singh, Binay Kumar and Manoj Madhav, Advocate for the Appellant; Lalit Kishore, Ajay Behari Sinha and Suryakant Kumar, Advocate for the Respondent

Judgement

I.A. Ansari, J.—This Letters Patent Appeal has arisen out of the judgment and order, dated 11.9.2013, passed in C.W.J.C. No. 4270 of 2006, whereby the writ petitioner-appellant's application, made under Article 226 of the Constitution of India, seeking issuance of appropriate writ or writs commanding the respondents to pay the admitted dues/fees of the petitioner-appellant for the work, which the petitioner-appellant had done, in his capacity as the then Government Pleader, Civil Court, Patna, stands rejected. We have heard Mr. Nawal Kishore Singh, learned counsel for the appellant, and Mr. Lalit Kishore, learned Principal Additional Advocate General, appearing for the State.

2. The facts, which have given rise to the present appeal, may, in brief, be set out as under:--

(i) The appellant herein, as petitioner, in CWJC No. 4270 of 2006, was appointed, on 23.8.1996, as a Government Pleader for the Civil Court, Patna, and conducted cases, on behalf of the State Government, in the civil courts accordingly. When the bills, which the petitioner-appellant had raised and submitted, for payment, to the Collector, Patna, were turned down by the respondents, the appellant

came to this Court, as a petitioner, with an application, made under Article 226 of the Constitution of India, seeking, as already indicated above, issuance of writ or writs commanding the respondents to make payment of the appellant's dues/fees.

(ii) The respondents opposed the writ petition. While, however, opposing the writ petition, it was not the case of the respondents that the appellant had not discharged his duties and performed his functions as the Government Pleader in the cases, wherein bills were raised by the appellant. The dispute was, in fact, confined to the question as to what would be the basis for payment of the fees of a Government Pleader at Patna.

(iii) It has been the contention of the appellant that he ought to be paid his fees in terms of the provisions of Rule 426 of the Civil Court Rules of the High Court of Judicature (hereinafter referred to as "the Rules"); whereas the respondents' contention has been that the payment to the Government "Pleader depends on the conditions of appointment of an Advocate, as a Government Pleader, read with the fees, which a Government Pleader is entitled to receive in terms of Rule 118 embodied in the Bihar Practice and Procedure Manual, 1958.

(iv) As the learned Single Judge could not bring the parties concerned to a reconciliation, it was observed in the order, dated 11.9.2013, aforementioned, that since there was a dispute as to what rates would govern the claim of the fees of a Government Pleader, the dispute raised by the writ petitioner involved disputed questions of fact, which required taking of evidence, both oral as well as documentary, and, hence, it would be civil court of competent jurisdiction, which can declare the law applicable to the case and adjudicate upon the disputed questions. With the grounds, as indicated hereinbefore, the writ petition has been dismissed on 11.9.2013. Aggrieved by the dismissal of his writ petition, the petitioner is, in appeal, before us, as the appellant.

3. Resisting the writ petition, at the very threshold, Mr. Lalit Kishore, learned Principal Additional Advocate General, has submitted that this appeal is misconceived inasmuch as the exercise of power by a High Court, under Article 226 of the Constitution of India, is discretionary in nature and if a Single Judge declines to exercise jurisdiction under Article 226 of the Constitution on the ground that the writ petition involves disputed question of facts, a letters patent appeal may not, ordinarily, be entertained inasmuch a writ appeal is really not a statutory appeal preferred against the judgment and order of an inferior to the superior court; such an appeal is, rather, an intra-court appeal and, in such an appeal, a Division Bench would not interfere with an order of Single Bench unless there is a patent error or the judgment is against established or settled principle of law. This apart, points out by the learned Principal Additional Advocate General, in a given case, if two views are possible and a view, which is reasonable and logical, has been taken by a Single Judge, the other view would not be adopted by the Division Bench and it is the view, taken by a Single Judge, which should, normally, be allowed to prevail. It is the contention of the learned

Principal Additional Advocate General that since the writ petition has been dismissed on the ground that the writ petition involves disputed question of facts and, therefore, a writ proceeding is not an appropriate proceeding, this issue may not be overridden in appeal.

4. We are wholly in agreement with the principle governing the ambit of power exercisable in Letters Patent Appeal and reiterate that a writ appeal is really not a statutory appeal preferred against the judgment and order of an inferior to the superior Court. An intra-court appeal in a High Court, from one Court to another, is really an appeal from one Bench to another Bench and it is for this reason that a writ cannot be issued by one Bench of the High Court to another Bench of the High Court.

5. Thus, unlike an appeal, in general, a writ appeal is an appeal on principle and, that is why, unlike an appeal, in an ordinary sense, such as, a criminal appeal, where the whole evidence on record is examined anew by the appellate Court, what is really examined, in a writ appeal, is the legality and validity of the judgment and/or order of the Single Judge and it can be set aside or should be set aside only when there is a patent error or an error on the face of the record or the judgment is against the established or settled principle of law and/or the findings reached are wholly against the materials on record or without considering any relevant material on record. If two views are possible and a view, which is reasonable and logical, has been taken by a Single Judge, the other view--howsoever appealing such a view may be to the Division Bench--would not normally be allowed to supersede the view taken by a Single Bench. In other words, the view, taken, by the Single Judge, should, ordinarily, be allowed to prevail.

6. Hence, the judgment of the learned Single Judge, impugned in the present appeal, cannot be completely ignored and this Court has to consider the judgment and order in the proper perspective and if this Bench, sitting as an appellate Bench, is of the view that the decision has been arrived at by the learned Single Judge without any material error of fact or law, then, the judgment, in question, should be allowed to prevail.

7. In the case at hand, however, we find that the dispute is essentially of interpretation of the law inasmuch as there was no dispute that the appellant had performed the functions of the Government Pleader in the cases, wherein he had raised his bills. The dispute was with regard to the question as to what would be the legal basis for payment of the fees of a Government Pleader, in Civil Courts, including the Civil Court, at Patna.

8. Since the basic question, which arose in the writ petition, was pure question of law, we are of the view that merely because a question has been reached as to what would be the appropriate law in a given set of facts, it cannot be held that such a question shall be regarded as a disputed question of fact; rather, as indicated hereinbefore, what was really in dispute was the correct application of

law to the given set of facts.

9. We may, however, hasten to point out that the question whether a writ petition at all lies if the undisputed bill of a Government Pleader or an Advocate is not paid has been answered in the affirmative in the writ petition.

10. Even the proposition that admitted bills of a Government Pleader must be directed, in a writ petition, made under Article 226 of the Constitution, to be paid, has been seriously resisted by the learned Principal Additional Advocate General by referring to, and relying upon, the decision of the Supreme Court in *Improvement Trust vs. S. Tejinder Singh Gujral* (1995 Supp. (4) SCC 577).

11. Coming to the merit of the present appeal, it is important to bear in mind that Mr. Nawal Kishore Singh, learned counsel, appearing on behalf of the appellant, has submitted that it has been the practice that the fee of the Government Pleader, conducting cases, in the Civil Courts, at Patna, is paid in terms of Rule 426 of the Rules and since, in the past, there had been instances of making of payment of the bills of Government Pleader, in the Civil Court, at Patna, on the basis of Rule 426 of the Rules, the learned single Judge ought not to have dismissed the writ petition; rather, the writ petition ought to have been allowed, with direction to make payment, as had been sought for by the appellant herein, in his writ petition, as writ petitioner, particularly, when the learned Single Judge has taken the view that Government can be directed by High Court, by invoking extraordinary jurisdiction of the High Court, under Article 226 of the Constitution of India, to make payment of the admitted bill of an Advocate.

12. Let us, now, determine the merits of the rival submissions made before us.

13. We notice, as has been pointed out by the learned Principal Additional Advocate General, that the appellant was appointed as a Government Pleader, vide letter, dated 23.8.1996, issued under the signature of the Secretary to the Government of Bihar, Law Department. This appointment letter shows, as has rightly been pointed out by the learned Principal Additional Advocate General, that the letter of appointment stated to the effect that the appointment had been made for a period of 3 (three) years on retainership fees of Rs. 250/- and, apart from retainership fees of Rs. 250/-, the appellant, as Government Pleader, would receive professional fees in terms of Bihar Practice and Procedure Manual, 1958.

14. It is also not in dispute that by various Circulars, issued from time to time, the retainership fee as well as daily fees for appearance of a Government Pleader, in the districts of Bihar, has been enhanced from time to time by the State Government. Some of the fee enhancements, which form part of the record of the writ petition as annexures, may, now, be noticed.

15. By Circular/Letter, dated 1.10.1996, issued under the signature of the Secretary to the Government of Bihar, Law (Judicial) Department, the retainership fee of the Government Pleaders was enhanced to Rs. 300/- from

earlier sum of Rs. 250/- and, accordingly, the daily fee, for appearance, was also raised to Rs. 90/- from Rs. 60/-. This was followed by another Circular/Letter, dated 2.9.2000, whereunder the retainership fee for the Government Pleader was raised to Rs. 500/- and the daily fee, for appearance, was accordingly raised to Rs. 150/-. Thereafter, vide Circular/Letter, dated 14.8.2008, the retainership fee was raised to Rs. 1,500/- and the daily fee, for appearance, was raised to Rs. 300/-. By yet another Circular/Letter, dated 2.3.2010, the retainership fee was enhanced to Rs. 3,000/- and the daily fees, for appearance, was increased to Rs. 500/-.

16. Thus, various Circulars/Letters, which have been issued by the State Government from time to time, indicate increase in the retainership fee and also in the daily fee for appearance of the Government Pleader at the district level. In this regard, no distinction has been made between the Government Pleader, appointed for the Civil Court, at Patna, and a Government Pleader appointed for the Civil Courts in the other districts of the State of Bihar.

17. The terms and conditions of appointment of the present appellant, vide appointment letter, dated 23.8.1996, aforementioned, clearly show that the contract/engagement of the appellant, as Government Pleader, was to be governed by terms of the retainership fee and the daily fee, which may be fixed by the Government, and also by what is incorporated in Bihar Practice and Procedure Manual, 1958. The acceptance of appointment, as a Government Pleader, by an Advocate binds him by the terms of his appointment, which includes his retainership fee as well as his daily fee.

18. The appointment of the appellant, therefore, in the present case, would be governed by the terms and conditions of his appointment as a Government Pleader and the terms and conditions would include application of Bihar Practice and Procedure Manual. Conversely speaking, the appellant cannot claim retainership fee and/or daily fee contrary to, or inconsistent with, the terms and conditions embodied in the letter of appointment, dated 23.8.1996, aforementioned, unless the terms and conditions of his appointment are impugned by the appellant, which the appellant has, admittedly, not impugned. The respondents, therefore, cannot, in the light of the terms and conditions of appointment, be directed to pay to the appellant retainership fee and/or daily fee contrary to the terms and conditions incorporated in the appellant's letter of appointment.

19. The appellant's letter of appointment, dated 23.8.1996, aforementioned clearly shows that his fees would be governed, apart from the terms of appointment, by the provisions of Bihar Practice and Procedure Manual, 1958, and it is Rule 118 of Bihar Practice and Procedure Manual, which, according to the respondents, is applicable to the present case. Rule 118 of Bihar Practice and Procedure Manual is, therefore, reproduced below:--

"118. Scale of fees in Legal Remembrancer's Office.--The following scale of fees

has been adopted in the office of the Legal Remembrancer:--

20. There is no dispute before us that Rule 118 embodies the scale of fee payable to a Government Pleader by the office of the Legal Remembrancer. The payment, which is required to be made in terms of Rule 118, is in addition to the contracted fees, which a Government Pleader is entitled to receive in terms of his letter of appointment.

21. Let us, now, consider Rule 426 of the Rules. This Rule reads as under:--

"426. (i) The advocates" and pleaders" fees shall be in the discretion of the Court.

The following scale of advocates" and pleaders" fees shall ordinarily be allowed to the successful party--

Provided that the minimum fee to be allowed shall be Rs. 10 in contested cases and Rs. 5 in uncontested cases. For the purpose of this proviso, suits tried together may be regarded as one suit, unless the Court otherwise directs."

22. While considering the applicability of Rule 426 of the Rules, it needs to be noted that this Rule has been framed by Patna High Court in exercise of its rule-making power under Section 122 of the Code of Civil Procedure.

23. What is, however, of immense importance to note, while analyzing the intent and import of Rule 426, is that Rule 426 makes it clear that the scale of fees, indicated therein, shall, ordinarily, be allowed to the successful party. The use of expression "shall, ordinarily, be allowed to the successful party" is in tune with Section 35 of the Code of Civil Procedure, which embodies the provisions with regard to payment of cost.

24. It is imperative, therefore, that. Section 35 of the Code of Civil Procedure be, now, taken note of. Section 35 of the Code of Civil Procedure, which embodies the provision of cost, reads as under:--

"35. Costs.--(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incident to all suits shall be in the discretion of the Court, and the Court shall have full power to determine by whom or out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid. The fact that the Court has no jurisdiction to try the suit shall be no bar to the exercise of such powers.

(2) Where the Court directs that any costs shall not follow the event, the Court shall state its reasons in writing."

25. From a bare reading, as a whole, of the provisions, embodied in Section 35 of the Code of Civil Procedure, what clearly transpires is that ordinarily, a Court shall allow cost and if the cost is not allowed, the Court shall assign its reasons in writing. In other words, cost shall be allowed, ordinarily, to the successful party

in a civil court and it is, therefore, imperative that when a civil court does not allow cost, it assigns its reasons, in writing, therefore.

26. In consonance with the provisions of Section 35 of the Code of Civil Procedure, Rule 426 of the Rules, too, lays down that ordinarily, successful party shall be given the decree for the Advocates' fees and the scale of the Advocates' fees shall be what has been mentioned in Rule 426 of the Rules.

27. Logically interpreted, Rule 426 of the Rules conveys that while granting decree, the Court shall, ordinarily, allow to the successful party decree for the Advocate's fees, in the form of cost, on the scale, which has been mentioned in Rule 426.

28. The cost, which is given by a civil court, includes the fees of the Advocate and, therefore, the fee is allowed to be incorporated in the decree. More explicitly speaking, a decree for the Advocates' fee is a part of the cost payable to a decree-holder by the judgment-debtor.

29. Hence, if a suit, filed against the State, is decided in favour of the plaintiff, the plaintiff will receive Advocates' fee in terms of Rule 426. If the Government wins a suit, the court may allow cost including the fee of the Government Advocate. The fee to be included, as a cost of an Advocate, in a decree, will include not only a Government Pleader, but also an Advocate specially engaged. While drawing the decree for the Advocates' fees, the civil court is required to bear in mind the fees, which may have been fixed by the Government for its appointed Advocates as Government Pleaders.

30. There is no dispute before us that the Government Pleaders, all over the State, have been receiving payments in terms of their letters of appointment of the kind, which the petitioner-appellant holds, coupled with the provisions contained in the Bihar Practice and Procedure Manual, 1958. It is only in the Civil Court, at Patna, that the controversy has arisen with regard to the fee of a Government Pleader inasmuch as Government Pleader, in the Civil Courts, at Patna, had, in some cases, in the past, received fees in terms of the provisions of Rule 426 of the Rules.

31. In the light of the discussions, which we have held above, there can be no escape from the conclusion, and we do conclude, that the fee payable to a Government Pleader, in the State of Bihar, shall be governed by the terms of his appointment and also by Rule 118 of the Bihar Practice and Procedure Manual, 1958, and that Rule 426 of the Rules deals with the power of the courts to pay fee of a Government Pleader and empowers the civil courts to include in a decree, while allowing a decree, Government Pleader's fee, as cost, and if question arises as to what would be the fee of a Government Pleader, the civil court is required to bear in mind the terms and conditions of the appointment of the Government Pleader. Merely because a Government Pleader had received, in the past, fee by applying Rule 426 of the Rules, would not, in the light of the discussions held above, permit a Court to issue a direction to make payment to

the Government Pleader, in the Civil Court, at Patna, when such a direction would be palpably against the law governing the rights/obligations of the parties to the writ petition.

32. Coming to the question as to whether a writ petition, in the facts and circumstances of the present case, was entertainable, we may point out that Improvement Trust vs. S. Tejinder Singh Gujral (supra) is case, wherein the High Court had allowed the writ petition filed by an Advocate for recovery of his professional fees from his client. The Supreme Court, in emphatical terms, laid down, in Improvement Trust vs. S. Tejinder Singh Gujral (supra), that no writ petition can lie for recovery of an amount under a contract and the High Court was clearly wrong in allowing the petition. The Supreme Court further pointed out, in Improvement Trust vs. S. Tejinder Singh Gujral (supra), that there is no separate law for Advocates, and when they seek recovery of an amount under a contract.

33. We would come to the question as to whether a contractual amount, if admitted, has to be, in every case, directed to be paid in a writ petition made under Article 226 of the Constitution of India a little later; suffice it, however, to point out that in the case at hand, the dispute was with regard to the application of the appropriate provisions of law. The willingness of the respondents to make payment, in terms of the letter of appointment of the appellant, as a Government Pleader read with Bihar Practice and Procedure Manual has never been in dispute.

34. We are, therefore, clearly of the view that the writ petition, in the present case, was entertainable. What was in dispute was the determination of the appropriate provisions of law applicable to the facts of the present case and we have, therefore, decided per force the question of law with the conclusions as have been reached above.

35. Reverting to the question as to whether a contractual amount, if admitted, has to be, in every case, treated as recoverable by filing a writ petition under Article 226 of the Constitution of India, it may be pointed out that this question brings us to yet another vital question and the question is: whether every breach of governmental obligation to pay its dues, under a contract, falls outside the purview of Article 226?

36. To put a little differently, the question is: Will the constitutional remedy of Article 226 never be available against a State even if the State refuses to carry out its contractual obligations with ulterior motives, mala fide, irrationally, arbitrarily, unreasonably, unfairly, whimsically or when the State, demonstratively discriminates, while making payment of its dues? Shall the writ court withdraw its hand resignedly and helplessly by saying that a writ of mandamus is a public law remedy and no writ of mandamus would be issued to any State directing it not to discriminate or act irrationally, arbitrarily, unreasonably, unfairly, whimsically, mala fide or with ulterior motives, while refusing or omitting to make payment of its dues arising out of contracts? Can a

breach of contract ever give rise to any constitutional obligation of the State to make payment of its dues? Made it clear a Three Judge Bench, in Radhakrishna Agarwal and Others Vs. State of Bihar and Others, , that every breach of contract by the State or by its officers is not a breach of public duty, for, such a proposition would make every breach of contract by the State or its agents subject of interference by the High Court in its extra-ordinary jurisdiction under Article 226 and, hence, remedy of a writ of mandamus cannot be had for every breach of contract. The relevant observations made, in this regard, in Radhakrishna Agarwal (supra) run thus:--

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

37. What is, now, of immense importance to note is that the case of Radhakrishna Agarwal (supra) was a case of "pure and simple" breach of contract. In such cases of breach, remedy of payment of damages is available to the person, who suffers alleged breach of contract. It is in such fact situation that the law with regard to invoking of the High Court's extraordinary jurisdiction, under Article 226 was discussed in Radhakrishna Agarwal (supra). The law, laid down in Radhakrishna Agarwal (supra) cannot, therefore, be extended to cases, which are not cases of mere breach of contract, but much more than that. This is clear from the fact that in paragraph 2 of Radhakrishna Agarwal (supra), the Supreme Court observed:--

"...Primarily, the case of the petitioners is that of a breach of contract for which the State would be liable, ordinarily, to pay damages if it had broken it."

38. What emerges from the above discussion is that the remedy, available under Article 226, is an extraordinary remedy and is not intended for the purpose of declaring private rights of the parties. For the purpose of enforcing contractual rights and obligations, the remedy of filing of a civil suit is available to the aggrieved party and, hence, a High Court will not exercise its prerogative writ jurisdiction to enforce such contractual rights or obligations. A writ or direction in the nature of mandamus would not, therefore, lie to enforce private rights or contractual rights or obligations or even to avoid such obligations or rights. Contracts, which are non-statutory, and the rights, which are purely contractual and governed only by the terms of the contract, cannot be enforced by any writ or order under Article 226 of the Constitution of India. There is formidable array of authorities, which may be referred to in this regard. See Lekhraj Satramdas, Lalvani Vs. Deputy Custodian-cum-managing Officer and Others, ; Radhakrishna

Agarwal vs. State of Bihar (supra); Divisional Forest Officer Vs. Bishwanath Tea Co. Ltd., ; State Bank of Haryana and Others Vs. Jage Ram and Others, ; The Bihar Eastern Gangetic Fishermen Co-operative Society Ltd. Vs. Sipahi Singh and Others, ; Bareilly Development Authority and Another Vs. Ajay Pal Singh and Others, ; Life Insurance Corporation of India Vs. Escorts Ltd. and Others, and Kulchhinder Singh and Others Vs. Hardayal Singh Brar and Others, .

39. Before proceeding further, what may be noted is that a writ of mandamus is a public remedy and this remedy lies, when a public authority fails to perform the duty entrusted to it by law. In other words, a writ of mandamus is issued against a person, who has a legal duty to perform, but has failed or neglected to do so. Distinguishing a case, wherein a public duty of a State is sought to be enforced, and a case, wherein a contractual obligation of a State is sought to be enforced, Professor Wade, in his well-known treatise, "Administrative Law", makes it clear that while a public duty is enforceable by the public law remedy of a writ of mandamus, a contractual duty is enforceable, as a matter of private law, through the avenues of civil courts. The observations made, in this regard, by Professor Wade read thus:--

"..A distinction which needs to be clarified is that between public duties enforceable by mandamus, which are usually statutory and duties arising merely from contract. Contractual duties are enforceable as matters of private laws by the ordinary contractual remedies, such as damages, injunction, specific performance and declaration. They are not enforceable by mandamus, which in the first place is confined to public duties and secondly is not granted where there are other adequate remedies."

40. What, now, needs to be noted is that howsoever thin and subtle may be, there is, indeed, a real and definite line of demarcation not only between a public wrong and a private wrong, but also between a public law remedy and private law remedy. Article 226 is pre-eminently a public law remedy and is not, generally, available as a remedy against private wrongs. Resort to Article 226 can be had to enforce various rights of the public or to compel the public or statutory authorities to discharge their public duties and/or to act, in the realm of their public function, within the bounds of law. The remedy under Article 226 can, no doubt, be availed of even against a private body or person; but the scope of the writ of mandamus is limited to enforcement of public duty. In minimum possible words, but with extreme exactitude, clarified the Supreme Court, in Binny Ltd. and Another Vs. V. Sadasivan and Others, , the position of law, in this regard, in these words:--

"29. Thus, it can be seen that a writ of mandamus or the remedy under Article 226 is pre-eminently a public law remedy and is not generally available as a remedy against private wrongs. It is used for enforcement of various rights of the public or to compel public/statutory authorities to discharge their duties and to act within their bounds. It may be used to do justice when there is wrongful exercise of power or a refusal to perform duties. This writ is admirably equipped

to serve as a judicial control over administrative actions. This writ could also be issued against any private body or person, specially in view of the words used in Article 226 of the Constitution. However, the scope of mandamus is limited to enforcement of public duty. The scope of mandamus is determined by the nature of the duty to be enforced, rather than the identity of the authority against whom it is sought. If the private body is discharging a public function and the denial of any right is in connection with the public duty imposed on such body, the public law remedy can be enforced. The duty cast on the public body may be either statutory or otherwise and the source of such power is immaterial, but, nevertheless, there must be the public law element in such action."

See also Dr. Kamala Kanta Kalita and Another Vs. Assam Cricket Association and Others, .

41. Thus, in the face of succinctly laid down position of law with regard to the issuance of a writ of mandamus under Article 226, what one has to bear in mind is that in a case of private wrong, in order to invoke the writ jurisdiction under Article 226, two conditions must be satisfied, namely--(i) the identity of the person, against whom the writ is sought, as a person or body, which is amenable to writ jurisdiction, and (ii) the nature of duty, which is sought to be enforced, is a public duty or has an element of public interest. In a given case, one may, perhaps, ignore the first prerequisite, namely, the identity of the person or body as a person or body amenable to writ jurisdiction, but the second prerequisite, as indicated hereinbefore, cannot be ignored, for, in the absence of public interest or in the absence of breach of public duty or in the absence of any public wrong having been committed, no recourse to Article 226 is possible.

42. What also needs to be cautiously noted is that a constitutional or statutory duty is a public duty and enforceable by a writ of mandamus. To put it differently, the rights and duties go hand-in-hand. When a right is given to a person by a State, the State casts upon itself a duty to enforce such a right. Logically, therefore, when a person is given fundamental right by the Constitution, a duty rests on the State to ensure that the person realizes his fundamental rights. In a given case, therefore, if a person, aggrieved by a breach of contract, shows that though the breach is in the realm of a contract, the duty, sought to be enforced, is a constitutional or statutory duty, the remedy of a writ of mandamus may not be refused, for, it is the constitutional obligation of the High Court, under Article 226, to enforce the constitutional and statutory duties of the State and its instrumentalities.

43. The writ petition, which has given rise to the present appeal, essentially raises a demand for payment of dues and seeks a writ, in the nature of mandamus, forcing the State to pay its dues. Apart from the fact that whether or not the present petitioner is entitled to receive the dues, as claimed, is in itself in dispute, the question raised is as to whether such a demand can be raised at all in a writ petition and be enforced by a writ to be issued in the nature of mandamus. Is it possible to recover unpaid dues, arising out of a contract, by

invoking writ jurisdiction merely because of the fact that one of the parties to the contract is a State. That a writ petition, under Article 226, will not lie for mere recovery of an amount due and payable, under a contract, by the Government, is clear from the decision, in *Improvement Trust, Roper vs. S. Tejinder Singh Gujral and Ors.* reported in 1995 Suppl.(4) SCC 577, wherein the Supreme Court has held, in no uncertain words, thus:--

No writ petition can lie for recovery of an amount under a contract. The High Court was clearly wrong in allowing and entertaining the writ petition.

44. However, the principle that in an appropriate case, writ jurisdiction can be invoked even to enforce a contractual obligation of the State or its instrumentality was made clear by the Supreme Court, in *K.N. Guruswamy Vs. The State of Mysore and Others*, wherein the Supreme Court held that when a party, interested in a contract, claims that he has not received the same treatment and has not been given a chance as someone else, he is entitled to maintain a petition under Article 226.

45. Close on the heels of the decision of the Supreme Court in *K.N. Guruswamy (supra)* is the decision, in *The D.F.O., South Kheri and Others Vs. Ram Sanehi Singh*, . This was a case in which it was contended, on behalf of the appellant, before the Supreme Court, that since the dispute arose out of the terms of the contract and the DFO, under the terms of the contract, had the authority to modify any action taken by the subordinate forest authority, remedy of the respondent lay in instituting an action in the civil court and that the writ petition was not maintainable. Turning down this plea, the Supreme Court held that the impugned order had been passed by a public authority modifying the order of the subordinate forest officer without giving the respondent any opportunity of having his say in the matter and since, by the order so passed, the respondent had been deprived of a valuable right, it cannot be said that a petition under Article 226 would not be maintainable merely because of the fact that the source of right of the respondent is traceable to a contract, which is not statutory in nature. The relevant observations of the Supreme Court, in *Ram Sanehi Singh (supra)* run thus:--

"We are unable to hold, that merely because the source of the right which the respondent claims was initially in a contract, for obtaining relief against any arbitrary and unlawful action on the part of a public authority he must resort to a suit and not to a petition by way of a writ. In view of the judgment of this Court in *K.N. Guruswamy Vs. The State of Mysore and Others*, there can be no doubt that the petition was maintainable, even if the right to relief arose out of an alleged breach of contract, where the action challenged was of a public authority invested with statutory power."

46. From the decision in *Ram Sanehi Singh (supra)* what clearly surfaces is that even when there is a breach of contract, a writ petition under Article 226 is maintainable if the administrative order passed by a public authority, in breach of

the terms of the contract, is against the principles of natural justice. Clearly, therefore, when a State decides not to pay the dues of a contractor mala fide, with ulterior motives or arbitrarily or when the State avoids payment of the dues of a contractor mala fide, with ulterior motives or arbitrarily or when the State discriminates, while making payment of the dues of the contractors, such a decision of the State not to pay or such an act of the State of not paying its dues cannot be said to be wholly beyond the reach of Article 226, for, what the contractor, in such a case, would be asking the writ court to do is to force the State to act in accordance with its constitutional obligation by adhering to the letter and spirit of Articles 14 and 21.

47. In fact, it was made clear by the Supreme Court, speaking through Krishna Iyer, J. in *Kulchinder Singh and Others Vs. Hardayal Singh Brar and Others*, , that writ jurisdiction cannot be invoked to enforce the terms of a contract merely because the contract involves a State, a statutory body or a public body, but statutory duty or sovereign and public function of a State can, indeed, be enforced by a writ court. The relevant observations made, in *Kulchinder Singh* (supra) proceed thus:--

"... The writ petition, stripped of embroidery and legalistics, stands naked as a simple contract between the State and the society.... At its best, the writ petition seeks enforcement of a binding contract but the neat and necessary repellent is that the remedy of Article 226 is unavailable to enforce a contract qua State.... What is immediately relevant is not whether the respondent is State or public authority but whether what is enforced is a statutory duty or sovereign or public function of a public authority. Private law may involve a State, a statutory body, or a public body in contractual or tortious actions, but they cannot be siphoned off into the writ jurisdiction."

48. I may, now, refer to the case of *Life Insurance Corporation of India vs. Escorts Ltd.* (supra), wherein a Constitution Bench held that though the field of constitutional law, administrative law and public law has forged ahead of the law in England, uninhibited by the technical rules, which have hampered the development of the English Law, and though every action of the State or an instrumentality of the State must be informed by reason and that, in appropriate cases, actions, uninformed by reason, may be questioned as arbitrary in proceedings under Article 226 or Article 32 of the Constitution, Article 14 cannot be construed as a charter for judicial review of all State actions and to call upon the State to account for its actions in its manifold activities by stating reasons for such actions. The Constitution Bench made it clear, in *Escorts Ltd.* (supra), that 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 or concern itself with the intricacies of trade and commerce. If the action of the State is related to contractual obligations or obligations arising out of tort, the court may, not, ordinarily, examine it unless the action has some public law character attached to it. The Constitution Bench further made it clear, in *Escorts Ltd.* (supra), that

broadly speaking, the court will examine actions of the State if they pertain to the public law domain and refrain from examining them if they pertain to the private law field, though the difficulty will lie in demarcating the frontiers between the public law domain and the private law field. Made it, however, explicit the Supreme Court, in *Escorts Ltd. (supra)*, that it is impossible to draw the line, with precision, between the frontiers of the public law domain and the private law field and that 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. Cautioned, however, the Constitution Bench, in *Escorts Ltd.*, that Article 14 cannot be used as a charter for judicial review of all actions of the State. The relevant observations made, in this regard, in *Escorts Ltd. (supra)*, read as follows:--

"101. It was, however, urged by the learned Counsel for the company that the Life Insurance Corporation was an instrumentality of the State and was, therefore, debarred by Article 14 from acting arbitrarily. It was, therefore, under an obligation to state to the court its reasons for the resolution once a rule nisi was issued to it. If it failed to disclose its reasons to the court, the court would presume that it had no valid reasons to give and its action was, therefore, arbitrary. The learned Counsel relied on the decisions of this Court in *Sukhdev Singh*; *Maneka Gandhi*; *International Airport Authority*; and *Ajay Hasia*. The learned Attorney General, on the other hand, contended that actions of the State or an instrumentality of the State which do not properly belong to the field of public law but belong to the field of private law are not liable to be subjected to judicial review. He relied on *O'Reilly vs. Mackman*, (1982) 3 All ER 1124; *Davy vs. Spelthorne*, (1983) 3 All ER 278; (sic) *Congress del Partido*, (1981) 2 All ER 1064; *R. vs. East Berkshire Health Authority*, (1984) 3 All ER 425; and *Radhakrishna Agarwal and Others Vs. State of Bihar and Others*, . While we do find considerable force in the contention of the learned Attorney General it may not be necessary for us to enter into any lengthy discussion of the topic, as we shall presently see. We also desire to warn ourselves against readily referring to English cases on questions of constitutional law, administrative law and public law as the law in India in these branches has forged ahead of the law in England, guided as we are by our Constitution and uninhibited as we are by the technical rules which have hampered the development of the English Law. While we do not, for a moment, doubt that every action of the State or an instrumentality of the State must be informed by reason and that, in appropriate cases, actions uninformed by reason may be questioned as arbitrary in proceedings under Article 226 or Article 32 of the Constitution, we do not construe Article 14 as a charter for judicial review of State actions and to call upon the State to account for its actions in its manifold activities by stating reasons for such actions.

102. For example, 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 or

concern itself with the intricacies of trade and commerce. If the action of the State is related to contractual obligations or obligations arising out of the tort, 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."

49. From the above observations made in *Escorts Ltd.* (supra) it becomes clear that though Article 14 cannot be used as a charter for judicial review of all actions of the State and that every action of the State in contractual field may not, ordinarily, be examined by a writ court, the fact remains that there is no absolute bar to the exercise of writ jurisdiction under Article 226. Whether a High Court will exercise such a jurisdiction or not is a question, which must be decided in each case on the basis of its own facts, though, generally, the High Court will not entertain if the action of the State does not have any element of public interest involved. The question as to whether a High Court would interfere or not would depend, in the light of the decision of the Apex Court, in *Escorts Ltd.* (supra), on the nature of the action, which is impugned in the writ petition; but the exercise of writ jurisdiction is not possible without determining the distinction between public law and private law character of the duty, sought to be enforced, and a host of other relevant circumstances.

50. Closely following the decision of the Constitution Bench, in *Escorts Ltd.* (supra), is the case of *Dwarkadas Marfatia and Sons Vs. Board of Trustees of the Port of Bombay*, . In this case, the appellant, M/s. Dwarkadas & Sons, had been a tenant on a portion of a land of the respondent Corporation, namely, Bombay Port Trust, for over 40 years, Bombay Port Trust having been constituted as a statutory corporation under the Major Ports Act. The structures, standing on the said land, were used as a part of a rice mill. Pursuant to a Town Planning Scheme of 1957, the plots were reconstituted and the port trust framed a policy to let out the reconstituted plot to the person, who was in occupation of the major portion of the plot. In terms of this policy, the trust initiated eviction proceeding against the appellant by giving them one month's notice sometime in October 1977. As the appellant had not vacated the said structures, the trust instituted a suit in

December, 1977, in the small causes court. The appellant pleaded mala fide and favouritism and also that the one month notice was bad in law. The trial court dismissed the suit on the ground of improper notice and did not enter into the question of mala fide. When the appellate court reversed the decision upholding the validity of the notice and also held that the question of mala fide or arbitrariness was not relevant for the eviction proceeding, a writ petition under Article 227 was filed in the High Court. As the High Court concurred with the decision of the appellate court, the matter was carried to the Supreme Court.

51. In its decision, in *Dwarkadas Marfatia and Sons (supra)*, a Three Judge Bench of the Supreme Court, having taken note of *Rampratap Jaidayal Vs. Dominion of India, and Escorts Ltd. (supra)*, held that though the field of letting and eviction of tenants is, normally, governed by the Rent Act and port trust is statutorily exempted from the operation of the Rent Act on the basis of its public/government character, legislative assumption or expectation, as noted in the observations of Chagla, C.J. in *Rampratap Jaydayal*, cannot make such conduct a matter of contract pure and simple and that these corporations must act in accordance with certain constitutional conscience and whether they have so acted, must be discernible from the conduct of such corporations. The Supreme Court clarified, in *Dwarkadas Marfatia and Sons (supra)*, that it is not correct to suggest that in the light of the decision in *Radhakrishna Agarwal (supra)*, a State's contractual dealings do not ever fall under public law domain and is not subject to judicial review. The court, in *Dwarkadas Marfatia and Sons (supra)*, also clarified that even the Constitution Bench decision, in *Escorts Ltd. (supra)*, does not wholly exclude State's all actions, in contractual matters, from the court's power of judicial review.

52. The Apex Court further made it clear, in *Dwarkadas Marfatia (supra)*, that every action/activity of the trust, which is a State within the meaning of Article 12, must be subject to Article 14 and must be reasonable and taken only upon lawful and relevant grounds of public interest and whenever there is arbitrariness in the State's action, Article 14 springs in and judicial review strikes such an action down. Making its views emphatic, the Supreme Court further made it clear, in *Dwarkadas Marfatia (supra)*, that whatever be the activity of the public authority, it should meet the test of Article 14 and that the decision in *Escorts Ltd. (supra)*, if read properly, does not detract from the aforesaid principles.

53. The observations made, in this regard, by the Supreme Court, in *Dwarkadas Marfatia and Sons (supra)*, read as under:--

"22. Our attention was drawn to the observations of this Court in *Radhakrishna Agarwal and Others Vs. State of Bihar and Others*, . Reliance was also placed on the observations of this Court in *Life Insurance Corporation of India Vs. Escorts Ltd. and Others*, in support of the contention that the public corporations" dealing with tenants is a contractual dealing and it is not a matter for public law domain and is not subject to judicial review. However, it is not the correct position. The *Escorts*" decision reiterated that every action of the State or an

instrumentality of the State, must be informed by reason. Indubitably, the respondent is an organ of the State under Article 12 of the Constitution. In appropriate cases, as was observed in the last mentioned decision, actions uninformed by reason may be questioned as arbitrary in proceedings under Article 226 or Article 32 of the Constitution. But it has to be remembered that Article 14 cannot be construed as a charter for judicial review of State action, to call upon the State to account for its actions in its manifold activities by stating reasons for such actions.

23. The contractual privileges are made immune from the protection of the Rent Act for the respondent because of the public position occupied by the respondent authority. Hence, its actions are amenable to judicial review only to the extent that the State must act validly for a discernible reason, not whimsically for any ulterior purpose. Where any special right privilege is granted to any public or statutory body on the presumption that it must act in certain manner, such bodies must make good such presumption while acting by virtue of such privileges. Judicial review to oversee if such bodies are so acting is permissible.

24. The field of letting and eviction of tenants is normally governed by the Rent Act. The port trust is statutorily exempted from the operation of Rent Act on the basis of its public/government character. The legislative assumption or expectation as noted in the observations of Chagla, C.J. in *Rampratap Jaidayal's* case cannot make such conduct a matter of contract "pure and simple". These corporations must act in accordance with certain constitutional conscience and whether they have so acted, must be discernible from the conduct of such corporations. In this connection, reference may be made to the observations of this Court in *S.P. Rekhi vs. Union of India*, reiterated in *M.C. Mehta and another Vs. Union of India and others*, , wherein at p. 148, this Court observed:--

It is dangerous to exonerate corporations from the need to have constitutional conscience; and so, that interpretation, language permitting, which makes governmental agencies, whatever their mien, amenable to constitutional limitations must be adopted by the court as against the alternative of permitting them to flourish as an imperium in imperio.

25. Therefore, Mr. Chinai was right in contending that every action/activity of the Bombay Port Trust which constituted "State" within Article 12 of the Constitution in respect of any right conferred or privilege granted by any statute is subject to Article 14 and must be reasonable and taken only upon lawful and relevant grounds of public interest. Reliance may be placed on the observations of this Court in *E.P. Royappa Vs. State of Tamil Nadu and Another*, ; *Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another*, ; *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, ; *Kasturi Lal Lakshmi Reddy, Represented by its Partner Shri Kasturi Lal, Jammu and Others Vs. State of Jammu and Kashmir and Another*, ; and *Ajay Hasia and Others Vs. Khalid Mujib Sehravardi and Others*, . Where there is arbitrariness in State action, Article 14 springs in and judicial review strikes such an action down. Every action of the

Executive Authority must be subject to rule of law and must be informed by reason. So, whatever be the activity of the public authority, it should meet the test of Article 14. The observations in paras. 101 and 102 of the Escorts" case, read properly, do not detract from the aforesaid principles.

27. We are inclined to accept the submission that every activity of a public authority, especially in the background of the assumption on which such authority enjoys immunity from the rigours of the Rent Act, must be informed by reason and guided by the public interest. All exercise of discretion or power by public authorities as the respondent, 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. See the observations of this Court in *Kasturi Lal Lakshmi Reddy and Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, ."

54. What is also necessary to note, in the case of *Dwarkadas Marfatia* (supra), is that this was a case, where the relationship between the parties to the dispute, being that of landlord and tenant, was essentially contractual in nature, yet the Supreme Court held that such a dispute is not wholly outside the purview of Article 226, for, a State's action, even under contractual relationship, has to withstand the tests of Article 14. Though to evict or not to evict a tenant is a decision governed by contractual relationship of landlord and tenant, the fact remains that while taking the decision to evict a tenant, State or public body, as the landlord, must take the decision in the public interest and while taking such a decision, State or public body cannot act arbitrarily, unreasonably, whimsically, capriciously or with ulterior motives nor can a State or public body, while taking such a decision, discriminate between one tenant and another and must, therefore, act according to "constitutional conscience".

55. If the decision in *Dwarkadas Marfatia* (supra), is carefully read, it becomes more than abundantly clear that though at the first blush, the decision in *Radhakrishna Agarwal* (supra), appears to have laid down that the remedy of every breach of contract lies in civil suits and writ jurisdiction would never be applicable to enforce even constitutional obligations of the State in contractual matters, the later decision of the Apex Court in *Dwarkadas Marfatia* (supra) clearly shows that having considered the decision in *Radhakrishna Agarwal* (supra) and also the Constitution Bench decision in *Escorts Ltd.* (supra), it has clearly held that there is no absolute bar to the exercise of jurisdiction under Article 226 in a contractual matter, particularly, when the act or conduct of the State or its instrumentality is challenged on the anvil of Article 14. It is also clear from *Dwarkadas Marfatia* (supra), that a writ court will enforce even a contractual obligation of the State if the breach of obligation by the State fails to satisfy the test of reasonableness under Article 14, for, in such a case, what the writ court would be enforcing is the constitutional duty of the State, though such

a duty might have arisen in the realm of contractual obligation. It has been further made clear, in *Dwarkadas Marfatia (supra)*, that even in contractual matters, the State's action must be reasonable, lawful and "on relevant ground of public interest".

56. What emerges from the above discussion is that when a writ petition is filed alleging breach of contractual obligation by the State or its instrumentality, the High Court shall determine whether the writ petitioner is merely demanding to enforce his contractual rights or he has raised some important questions of law and/or constitutional issues. If he aims at merely enforcing his contractual rights and raises no important question of law or constitutional issue, writ jurisdiction will not be invoked; but if the writ petitioner raises a constitutional issue, there is no absolute bar to the exercise of jurisdiction under Article 226 even in a contractual matter. This position of law was made clear in *Life Insurance Corporation of India and Others Vs. Smt. Asha Goel and Another*, wherein the court observed as under:--

"10. Article 226 of the Constitution confers extraordinary jurisdiction on the High Court to issue high prerogative writs for enforcement of the fundamental rights or for any other purpose. It is wide and expansive. The Constitution does not place any fetter on exercise of the extraordinary jurisdiction. It is left to the discretion of the High Court. Therefore, it cannot be laid down as a general proposition of law that in no case the High Court can entertain a writ petition under Article 226 of the Constitution to enforce a claim under a life insurance policy. It is neither possible nor proper to enumerate exhaustively the circumstances in which such a claim can or cannot be enforced by filing a writ petition. The determination of the question depends on consideration of several factors like, whether a writ petitioner is merely attempting to enforce his/her contractual rights or the case raises important questions of law and constitutional issues, the nature of the dispute raised; the nature of inquiry necessary for determination of the dispute, etc. The matter is to be considered in the facts and circumstances of each case. While the jurisdiction of the High Court to entertain a writ petition under Article 226 of the Constitution cannot be denied altogether, courts must bear in mind the self-imposed restriction consistently followed by High Courts all these years after the constitutional power came into existence in not entertaining writ petitions filed for enforcement of purely contractual rights and obligations which involve disputed questions of facts. The courts have consistently taken the view that in a case where for determination of the dispute raised, it is necessary to inquire into the facts for determination of which it may become necessary to record oral evidence, a proceeding under Article 226 of the Constitution is not the appropriate forum. The position is also well settled that if the contract entered between the parties provides an alternate forum for resolution of disputes arising from the contract, then the parties should approach the forum agreed by them and the High Court in writ jurisdiction should not permit them to bypass the agreed forum of dispute resolution. At the cost of repetition it may be stated that in the above discussions we have only indicated

some of the circumstances in which the High Courts have declined to entertain petitions filed under Article 228 of the Constitution for enforcement of contractual rights and obligations; the discussions are not intended to be exhaustive. This Court from time to time disapproved of a High Court entertaining a petition under Article 226 of the Constitution in matters of enforcement of contractual rights and obligations particularly where the claim by one party is contested by the other and adjudication of the dispute requires inquiry into facts. We may notice a few such cases Mohammed Hanif Vs. The State of Assam, ; Banchhanidhi Rath Vs. The State of Orissa and Others, ; Smt. Rukmanibai Gupta Vs. Collector Jabalpur and Others, ; Food Corporation of India and others Vs. Jagannath Dutta and others, ; and State of Himachal Pradesh Vs. Raja Mahendra Pal and Others, .

11. The position that emerges from the discussions in the decided cases is that ordinarily the High Court should not entertain a writ petition filed under Article 226 of the Constitution for mere enforcement of a claim under a contract of insurance. Where an insurer has repudiated the claim, in case such a writ petition is filed, the High Court has to consider the facts and circumstances of the case, the nature of the dispute raised and the nature of the inquiry necessary to be made for determination of the questions raised and other relevant factors before taking a decision whether it should entertain the writ petition or reject it as not maintainable. It has also to be kept in mind that in case an insured or nominee of the deceased insured is refused relief merely on the ground that the claim relates to contractual rights and obligations and he/she is driven to a long drawn litigation in the civil court it will cause serious prejudice to the claimant/ other beneficiaries of the policy. The pros and cons of the matter in the context of the fact situation of the case should be carefully weighed and appropriate decision should be taken. In a case where claim by an insured or a nominee is repudiated raising a serious dispute and the court finds the dispute to be a bona fide one which requires oral and documentary evidence for its determination then the appropriate remedy is a civil suit and not a writ petition under Article 226 of the Constitution. Similarly, where a plea of fraud is pleaded by the insurer and on examination is found prima facie to have merit and oral and documentary evidence may become necessary for determination of the issue raised, then a writ petition is not an appropriate remedy."

57. Moreover, when a writ court finds that the refusal to extend constitutional remedy of Article 226 to enforce a contractual right or obligation would drive a person, knocking at the doors of a writ court, to a long drawn litigation in the civil court causing serious prejudice to the person seeking relief against the State, the writ court may not, according to Asha Goel (supra), decline to interfere in such a matter and hence, reminds the Supreme Court, in Asha Goel (supra), thus:--

"The pros and cons of the matter in the context of the fact situation of the case should be carefully weighed and appropriate decision should be taken."

58. From the law, as laid down in *Asha Goel* (supra), it becomes transparent that when non-interference by a writ court would drive a person to a long drawn civil litigation causing serious prejudice to him, the writ court's interference is not only desirable, but even necessary. As a corollary to this proposition of law, one can safely say that when a contractor's dues are admitted by a State and the fact situation of a given case satisfies the writ court that asking the contractor to take recourse to the civil court would cause serious prejudice to the contractor, the writ court should step in. For instance, a contractor, whose dues are admitted but not paid by the State, approaches a writ court with the plea that his son is a terminal case of cancer and the State's breach of its contractual obligation of not paying its dues is not only unfair and unreasonable, but may even threaten his son's survival and existence, the High Court may, in the absence of any plausible explanation offered by the State for nonpayment of the admitted dues, invoke its extraordinary jurisdiction under Article 226 to remedy the wrong, though such a wrong may have arisen out of the State's omission to discharge its contractual obligation, for, the High Court, in such a case, would not be merely enforcing the contractual obligation of the State, but also the State's constitutional obligation to act with reasonableness and fairness as envisaged by Article 14 and not to act in breach of the mandates thereof, which may have the effect of extinguishing the life of one of its citizens, though Article 21 guarantees that the State would act, with greatest of promptitude, in protecting the lives of its citizens against its own unreasonable and unfair actions.

59. From the decision in *Asha Goel* (supra), what emerges is that ordinarily, a High Court should not entertain a writ petition, under Article 226, for mere enforcement of claims under a contract of insurance; however, the Constitution having not placed any fetters on the exercise of extraordinary jurisdiction by the High Court under Article 226, it is in the discretion of the High Court to interfere or not to interfere in a contractual matter. No exercise of discretionary power can be unfettered, unguided, unsettled or arbitrary, and, hence, the position of law, on a given subject, should not be completely unforeseen and legal decisions must have some standards or parameters in order to enable the people at large to know as to what the position of law, on a given subject, is. Considered thus, exercise of jurisdiction under Article 226 cannot be unfettered or arbitrary. However, it is not possible to enumerate exhaustively the circumstances in which a writ application even in contractual matter would lie, for, exercise of jurisdiction would depend upon a considerable number of factors, such as, the question as to whether the writ petitioner is merely attempting to enforce his or her contractual rights or has raised important questions of law or constitutional issues, the nature of the dispute raised and the nature of enquiry necessary for determination of the dispute, etc. In short, exercise of jurisdiction would depend on the facts and circumstances of each given case. While jurisdiction of the High Court to entertain a writ petition, under Article 226, cannot be denied altogether, the courts must bear in mind the self-imposed restrictions constitutionally followed by the High Courts not to, ordinarily, entertain writ petitions for

enforcement of purely contractual rights and obligations, particularly, when determination of such questions necessitates taking of oral evidence or when the parties had agreed to resolve their disputes, arising out of the contract, in the alternative forum selected by them.

60. We, now, turn to the case of Kumari Shrilekha Vidyarthi and Others Vs. State of U.P. and Others, . While considering the case of Kumari Shrilekha Vidyarthi (supra), what may be borne in mind is that it was a case in which the Government of Uttar Pradesh terminated, with the help of a general order, appointments of all the Government Counsel in all the districts of the State of Uttar Pradesh with effect from 28.2.1990 and directed preparation of fresh panel to make appointments in place of existing incumbents irrespective of the fact whether the term of the incumbent had expired or was subsisting. Validity of this action of the State was challenged by way of a number of writ petitions. In the backdrop of these facts, a Two Judge Bench of the Supreme Court, speaking through J.S. Verma, J. (as His Lordship then was), posed the question as to whether guarantee of non-arbitrariness, which is basic to the rule of law under Article 14, stands excluded from the State's action in contractual field. In answer to this momentous question, the court made it clear, in Kumari Shrilekha Vidyarthi (supra), that the Constitution does not envisage or permit unfairness in State actions in any sphere of its activity. Leaving no room open for doubt, the Apex Court held, in Kumari Shrilekha Vidyarthi (supra), that it would be alien to the constitutional scheme to accept the argument of exclusion of Article 14 in contractual matters. The court, however, hastened to add that the scope and grounds on which judicial review would be permissible in contractual matters may be a different matter, but contractual matters cannot be wholly excluded from the purview of judicial review. Drawing the distinction between the contracts to which the State is a party, and the contracts to which the private parties are involved, the court, in Kumari Shrilekha Vidyarthi (supra), pointed out that while private parties are concerned with their personal interest, the State, while exercising its powers and discharging its functions, acts indubitably for public good and in public interest, for, the impact of every State action is also on the public interest and this factor alone is sufficient to import, at least, the minimal requirements of public law obligations even in the actions of the State in contractual matters. The court also pointed out in Kumari Shrilekha Vidyarthi (supra), that though the scope of judicial review in respect of disputes, falling within the domain of contractual obligations, may be limited, the fact remains that to the extent that a challenge is posed on the ground of violation of Article 14 by alleging that the impugned action is arbitrary, unfair or unreasonable, the mere fact that the dispute also falls within the domain of contractual obligations would not relieve the State of its obligation to comply with the basic requirements of Article 14. To this extent, reiterated the court, in Kumari Shrilekha Vidyarthi (supra), the obligation of a State is of a public character and that contractual obligation cannot divest the person aggrieved of the guarantee under Article 14 of non-arbitrariness at the hands of the State in all its actions.

61. Symbolizing the nature of character of the State, when it enters into contractual relationships, the Supreme Court made it clear in *Kumari Shrilekha Vidyarthi* (supra) that the State cannot be attributed the split personality of Dr. Jekyll and Mr. Hyde in the contractual field so as to impress on it all the characteristics of the State at the threshold, while entering into a contract, and, thereafter, casting off its garb of a State and adorn the new robe of a private body during the subsistence of the contract enabling it thereby to act arbitrarily subject only to the contractual obligations and the remedies flowing from it. The requirement of Article 14 being the duty to act fairly, justly and reasonably, there is nothing, observed the court, in *Kumari Shrilekha Vidyarthi* (supra), which militates against the concept of requiring the State always so to act, even in contractual matters. Drawing strength for the conclusion so reached from the decision in *Dwarkadas Marfatia* (supra) the court, in *Kumari Shrilekha Vidyarthi* (supra), further held that if the State is unable to produce materials to justify its action as fair and reasonable, burden on the person, alleging arbitrariness, must be held to have been discharged and the scope of judicial review, howsoever limited in contractual matters, must remain open to ensure that State action is not vitiated by the vice of arbitrariness.

62. In *Kumari Shrilekha Vidyarthi* (supra), the court also took the view that even assuming that it is necessary to import the concept of presence of some public element in a State action, in the realm of contractual obligations, to attract Article 14, the fact remains that the ultimate impact of all actions of the State or a public body being on public interest, requisite public element is also present in contractual matters. Held, therefore, the court, in *Kumari Shrilekha Vidyarthi* (supra), that it finds it difficult and unrealistic to exclude from the purview of judicial review the State actions in contractual matters after the contract has been made, in order to test the validity of the actions of the State on the anvil of Article 14. The relevant observations, made at paras. 21, 22, 23, 24, 28, 29, 30 and 33 in *Kumari Shrilekha Vidyarthi* (supra), are reproduced hereinbelow:--

"21. The Preamble of the Constitution of India resolves to secure, to all its citizens, justice, social, economic and political and equality of status and opportunity. Every State action must be aimed at achieving this goal. Part-IV of the Constitution contains "Directive Principles of State Policy" which are fundamental in the governance of the country and are aimed at securing social and economic freedoms by appropriate State action which is complementary to individual fundamental rights guaranteed in Part-III for protection against excesses of State action, to realise the vision in the Preamble. This being the philosophy of the Constitution, can it be said that it contemplates exclusion of Article 14 non-arbitrariness which is basic to rule of law from State actions in contractual field when all actions of the State are meant for public good and expected to be fair and just? 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 constitutional scheme to accept the argument of exclusion

of Article 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.

22. There is an obvious difference in the contracts between private parties and 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 impress with this character the contracts made by the State or its instrumentality. It is a different matter that the scope of judicial review in respect of disputes falling within the domain of contractual obligations may be more limited and in doubtful cases the parties may be relegated to adjudication of their rights by resort to remedies provided for adjudication of purely contractual disputes. However, to the extent, challenge is made on the ground of violation of Article 14 by alleging that the impugned act is arbitrary, unfair or unreasonable, the fact that the dispute also falls within the domain of contractual obligations would not relieve the State of its obligation to comply with the basic requirements of Article 14. To this extent, the obligation is of a public character invariably in every case irrespective of there being any other right or obligation in addition thereto. An additional contractual obligation cannot divest the claimant of the guarantee under Article 14 of non-arbitrariness at the hands of the State in any of its actions.

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

24. The State cannot be attributed the split personality of Dr. Jekyll and Mr. Hyde in the contractual field so as to impress on it all the characteristics of the State at the threshold while making a contract requiring it to fulfill the obligation of Article 14 of the Constitution and thereafter permitting it to cast off its garb of State to adorn the new robe of a private body during the subsistence of the contract enabling it to act arbitrarily subject only to the contractual obligations and remedies flowing from it. It is really the nature of its personality as State which is significant and must characterize all its actions, in whatever field, and not the nature of function, contractual or otherwise, which is decisive of the nature of scrutiny permitted for examining the validity of its act. The requirement of Article 14 being the duty to act fairly, justly and reasonably, there is nothing which militates against the concept of requiring the State always to so act, even in

contractual matters. There is a basic difference between the acts of the State which must invariably be in public interest and those of a private individual, engaged in similar activities, being primarily for personal gain, which may or may not promote public interest. Viewed in this manner, in which we find no conceptual difficulty or anachronism, we find no reason why the requirement of Article 14 should not extend even in the sphere of contractual matters for regulating the conduct of the State activity.

28. Even assuming that it is necessary to import the concept of presence of some public element in a State action to attract Article 14 and permit judicial review, 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 test its validity on the anvil of Article 14.

29. It can no longer be doubted at this point of time that Article 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*, : *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 emphasized as imperative and implicit in Article 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 Article 14 and the requirement 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.

30. In *Dwarkadas Marfatia and Sons Vs. Board of Trustees of the Port of Bombay*, , the matter was reexamined in relation to an instrumentality of the State for applicability of Article 14 to all its actions. Referring to the earlier decisions of this Court and examining the argument for applicability of Article 14, even in contractual matters, *Sabyasachi Mukharji, J.* (as the learned Chief Justice then was), speaking for himself and *Kania, J.* reiterated that: (SCC p. 304, para. 22) "every action of the State or an instrumentality of the State, must be informed by reason ... actions uninformed by reasons may be questioned as arbitrary in proceedings under Article 226 or Article 32 of the Constitution". *Ranganathan, J.* did not express any opinion on this point but agreed with the

conclusion of the other learned Judges on the facts of the case. It is obvious that the conclusion on the facts of the case could not be reached by Ranganathan, J. without examining them and this could be done only on the basis that it was permissible to make the judicial review. Thus, Ranganathan, J. also applied that principle without saying so. In view of the wide ranging and, in essence, all pervading sphere of State activity in discharge of its welfare functions, the question assumes considerable importance and cannot be shelved. The basic requirement of Article 14 is fairness in action by the State and we find it difficult to accept that the State can be permitted to act otherwise in any field of its activity, irrespective of the nature of its functions when it has the uppermost duty to be governed by the rule of law. Non-arbitrariness, in substance, is only fair play in action. We have no doubt that this obvious requirement must be satisfied by every action of the State or its instrumentality in order to satisfy the test of validity.

33. No doubt, it is true, as indicated by us earlier, that there is a presumption of validity of the State action and the burden is on the person who alleges violation of Article 14 to prove the assertion. However, where no plausible reason or principle is indicated nor is it discernible and the impugned State action, therefore, appears to be *ex facie* arbitrary, the initial burden to prove the arbitrariness is discharged shifting onus on the State to justify its action as fair and reasonable. If the State is unable to produce material to justify its action as fair and reasonable, the burden on the person alleging arbitrariness must be held to be discharged. The scope of judicial review is limited as indicated in *Dwarkadas Marfatia* case to oversee the State action for the purpose of satisfying that it is not vitiated by the vice of arbitrariness and no more. The wisdom of the policy or the lack of it or the desirability of a better alternative is not within the permissible scope of judicial review in such cases. It is not for the courts to recast the policy or to substitute it with another which is considered to be more appropriate, once the attack on the ground of arbitrariness is successfully repelled by showing that the act which was done, was fair and reasonable in the facts and circumstances of the case. As indicated by Diplock, LJ. in *Council for Civil Services Union vs. Minister of Civil Service*, (1984) 3 All ER 935 the power of judicial review is limited to the grounds of illegality, irrationality and procedural impropriety. In the case of arbitrariness, the defect of irrationality is obvious."

63. What emerges from the observations, made in *Kumari Shrilekha Vidyarthi* (*supra*), is that even after having entered into a contract, the State cannot act arbitrarily, unreasonably or unfairly merely because of the fact that its actions are in the realm of a contract.

64. Yet another decision is the case of *ABL International Ltd. and Another Vs. Export Credit Guarantee Corporation of India Ltd. and Others*, . In this case, the fourth respondent entered into a contract with a State owned corporation of Kazakhstan on 26.8.1993. As per the original agreement, payment, for the

product (tea) exported, was to be made by the Kazak Corporation by barter of goods mentioned in the schedule to the said agreement within 120 days of the date of delivery by the exporter. The agreement also provided that such payment to be made by Kazak Corporation shall be guaranteed by the Government of Kazakhstan. By a modified agreement, it was agreed between the parties that if the contract of barter of goods could not be finalized for any reason, then, Kazak Corporation would pay the exporter for the goods received by it, in US dollars, within 120 days from the date of the delivery. After having entered into the contract, the respondent concerned assigned a part of the said contract to ABL Corporation Ltd. on the same terms on which it had received the contract from Kazak Corporation. On a direction issued by the Reserve Bank of India that the risk, arising out of the export of the tea made by the appellant, shall be guaranteed, the appellant approached Export Credit Guarantee Corporation of India Ltd. to insure risk of payment of consideration involved in the said contract of export. Pursuant to the request so made, the Export Credit Guarantee Corporation of India Ltd. issued a comprehensive policy covering the risk. On the failure of the Government of Kazakhstan to fulfill its guarantee, the appellants made a claim on the first contract of payment without first consulting it and it had, therefore, no obligation to compensate the appellants for the loss suffered by it. Having failed to make the first respondent adhere to the contract of insurance, the respondent concerned filed a writ petition. Though the learned Single Judge of Calcutta High Court issued a writ, the Division Bench reversed the order on the ground that the case involved disputed questions of fact, which was not adjudicable in a writ proceeding under Article 226 it was in these factual scenario that the case came up before the Supreme Court, wherein the first respondent's submission, in effect, was thus:--

"7. Ms. Indira Jaising, learned Senior Counsel appearing for the first respondent, submitted that on facts and circumstances of this case, a writ petition was not maintainable nor can it be construed as an appropriate remedy. She pointed out that the subject matter is a dispute arising out of a contract and is not a matter falling under the purview of administrative law. According to her, the doctrine of fairness and reasonableness applies only in the exercise of statutory or administrative actions of a State and not in the exercise of a contractual obligation and issues arising out of contractual matters will have to be decided on the basis of the law of contract and not on the basis of the administrative law. It was her argument that at the most in matters involving statutory contracts where action of the State involves a public duty, a writ may lie but in the instant case, the contract was neither a statutory contract nor the duty of the first respondent under the contract had any public law element involved in it. According to the learned Counsel, this contract was a negotiated contract and not a standard form contract. She also supported the finding of the appellate bench of the High Court that the facts involved in the case are all disputed facts requiring evidence to be led, therefore, the appropriate remedy could only be a suit. Hence, the impugned judgment-did not call for any interference."

65. Having noted the above submissions made on behalf of the respondents, the Supreme Court held that one of the questions that falls for consideration is whether a writ petition under Article 226 of the Constitution of India is maintainable to enforce a contractual obligation of the State or its instrumentality.

66. Responding to the question posed above, the Supreme Court has held in *ABL International Ltd. (supra)*, that the question as to whether a writ petition under Article 226 is maintainable to enforce a contractual obligation of the State is no more *res integra*. Points out the court in *ABL International Ltd. (supra)*, that as early as, in *K.N. Guruswamy (supra)*, the Supreme Court had already held that a person interested in a contract has a right to receive the same treatment and is entitled to be given the same chances as anybody else. Referring to the observations made in *K.N. Guruswamy (supra)*, the court, in *ABL International Ltd. (supra)*, has also pointed out that in *K.N. Guruswamy (supra)*, the court has held that on a given set of facts, if the action of a State is found to be arbitrary even in a matter of contract, a writ court is, depending upon the facts of the case, empowered to grant relief under Article 226.

67. Having taken note of the case of *Ram Sanehi Singh (supra)*, which followed *K.N. Guruswamy (supra)*, and also *Gujarat State Financial Corporation Vs. Lotus Hotels Pvt. Ltd.,* , which followed *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, and, then, having referred to the case of *Escorts Ltd. (supra)*, the court, in *ABL International Ltd. (supra)*, has pointed out that the decision in *Escorts Ltd. (supra)*, does not lay down, as a rule, that in matters of contract, the courts' jurisdiction under Article 226 stands wholly ousted. On the contrary, points out the Supreme Court in *ABL International Ltd. (supra)*, the Constitution Bench's use in *Escorts Ltd.* of the words "court may not, ordinarily, examine it unless the action has some public law character attached to it" indicates that in a given case, on the existence of the required factual matrix, a remedy under Article 226 will be available.

68. Having noted various judicial pronouncements with regard to maintainability of writ petitions aimed at enforcing contractual obligations of the State or its instrumentality and having discussed the law on the subject, the Apex Court, in para. 27 of *ABL International Ltd. (supra)*, culled out the legal principles governing maintainability of such a writ petition in the following words:--

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

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

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

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

maintainable."

69. From what has been culled out above, there remains no manner of doubt that in an appropriate case, the remedy, under Article 226, would be available to enforce contractual obligations of the State, its instrumentality and all public bodies.

70. Having discussed the law on the subject and taking into account the facts in ABL International Ltd. (supra), the Court finally observed, at para. 53, thus:--

"53. From the above, it is clear that when an instrumentality of the State acts contrary to public good and public interest, unfairly, unjustly and unreasonably, in its contractual, constitutional or statutory obligations, it really acts contrary to the constitutional guarantee found in Article 14 of the Constitution. Thus, if we apply the above principle of applicability of Article 14 to the facts of this case, then we notice that the first respondent being an instrumentality of State and a monopoly body had to be approached by the appellants by compulsion to cover its export risk. The policy of insurance covering the risk of the appellants was issued by the first respondent after seeking all required information and after receiving huge sums of money as premium exceeding Rs. 16 lacs. On facts we have found that the terms of the policy do not give room to any ambiguity as to the risk covered by the first respondent. We are also of the considered opinion that the liability of the first respondent under the policy arose when the default of the exporter occurred and thereafter when Kazakhstan Government failed to fulfill its guarantee. There is no allegation that the contracts in question were obtained either by fraud or by misrepresentation. In such factual situation, we are of the opinion, the facts of this case do not and should not inhibit the High Court or this Court from granting the relief sought for by the petitioner."

(Emphasis supplied)

71. From the above observations made in para. 53, what emerges is that when the State or its instrumentality acts contrary to public good, public interest, unfairly, unjustly and unreasonably in the realm of its contractual obligations, arising out of even non-statutory contract, it really acts contrary to the constitutional guarantee given under Article 14 and, in an appropriate case, when this guarantee is found to have been denied, remedy under Article 226 would be available to undo the wrong done by the State and to command the State to pay its unpaid dues, which it is, under its contractual obligation, bound to pay, but has unfairly, unjustly and unreasonably refused to pay.

72. Logically, therefore, so long as the decision, in ABL International Ltd. (supra), holds the field, there can be no manner of doubt that when the State acts contrary to public good and public interest or unfairly and unjustly or unreasonably, even in the realm of its contractual obligations, the constitutional guarantee, given in Article 14, would be attracted. Consequently, therefore, even in the case of contractual obligations, if the action of the State does not withstand the tests of Article 14, the constitutional remedy of Article 226 would

be available to the aggrieved person. Conversely speaking, no writ under Article 226 will lie for mere enforcement of contractual obligations of the State unless State's action is shown to be against public good and public interest or unfair or unjust, unreasonable, arbitrary or discriminatory or in denial of guarantee of equality enshrined under Article 226.

73. Having decided the applicability of the law, we direct that the petitioner-appellant's dues shall be calculated in accordance with law, as has been decided above, and the payment shall be made to the petitioner-appellant by the respondents within a period of three months from today.

74. In the result, and for the reasons discussed above, this appeal partly succeeds and the impugned order, dated 11.9.2013, passed, in C.W.J.C. No. 4270 of 2006, shall, accordingly, stand set aside and modified to the extent as indicated above.

75. With the above observations and directions, this Letters Patent Appeal shall stand disposed of. In the facts and circumstances of the present case, we refrain from granting any cost.