

(2001) 02 CAL CK 0004

In the Calcutta High Court

Case No : Writ Petition No's. 2742/2743/2744 of 2000

Rainbow Production Pvt. Ltd.

APPELLANT

Vs

Programme Executive (Sponsored Section), Prasar Bharati
(Broadcasting Corporation of India)

RESPONDENT

Date of Decision : 14-02-2001

Acts Referred:

Constitution of India, 1950 — Article 14

Prasar Bharati (Broadcasting Corporation of India) Act, 1990 — Section 3(1)

Citation : (2001) 1 ILR (Cal) 360

Hon'ble Judges : Asok Kumar Ganguly, J

Bench : Single Bench

Advocate : ; S. Pal and Sukhla Hazari for W.P. No. 2742 of 2000, D.P. Gupta and Pallab Banerjee for W.P. No. 2743 of 2000, Jayanta Mitra and Sukhla Hazari for W.P. No. 2744 of 2000 and P.K. Roy, S.P. Sarkar and Vijaya Bhatia, for the Respondent

Final Decision : Allowed

Judgement

Asok Kumar Ganguly, J.—All these writ petitions were analogously heard in view of the commonness of the issues in each one of them. There are certain factual differences which have also been noticed herein below.

2. The basic question agitated in this batch of writ petitions is whether a writ court can entertain a petition from a person who is aggrieved by certain actions of "State" in a field where the instrument controlling the relationship of the parties is a contract, the terms of which have been either reduced in a standard form or are to be culled from correspondence between the parties. The further question is even if a writ Court can interfere, what would be the scope and degree of its interference in the facts of this batch of writ petitions. The question may, having regard to the evolving mosaic of administrative and constitutional law in our country, appear trite. But on a closer scrutiny and with very competent assistance from the bar, this Court finds that there are very many nuances to this issue which are worth considering.

3. The salient facts, which are not much in dispute, in each of these cases, are noted separately.

W.P. No. 2744 of 2000 (Janmabhoomi)

4. The facts of this case are that on August 19, 1996, the Petitioners submitted a proposal to the Respondent concerned for production of a Maga Serial entitled "Ashray" and for completion of the same within 260 weeks. The title of the said programme was subsequently changed to "Janmabhoomi".

5. The Petitioner submitted a pilot cassette in respect of the proposed programme and the Petitioner was thereafter informed by the Respondent No. 1 that the programme of "Janmaghoomi" (hereinafter called JB) has been approved by the preview committee for a period of 260 weeks. However, the formal permission was to be communicated for a telecast of 52/104 episodes at the relevant time. Initially the telecast in respect of above programme was approved for 52 episodes from January 1, 1997, and thereafter by the communication dated April 2, 1997, the approval was extended for telecasting of the said programme for another 52 episodes.

6. In the meantime, some letters were exchanged between the parties about the change of time slots but they are not very material for his case.

7. The Petitioners case is that on completion of 26 weeks, the said programme gained a lot of popularity and the Petitioners applied for extension of the period of the said programme up to 260 weeks. On such request of the Petitioners, Respondents by their communication dated August 4, 1997, gave formal approval to the extension of the said programme for being telecast of DD-1 and DD-7 up to 260 weeks as was proposed by the Petitioners on the following two conditions as set out below:

(i) M.G. equivalent to at least one unit of "ASB" would be continued to be offered by you on the programme, which will continue till the entire duration of the programme is completed;

(ii) The popularity of your programme should not fall beyond desirable level and the serial should remain within the top-ten programmes of DDK-Calcutta as per the reports of DART.

8. By a letter dated August 7, 1997, the Petitioners promptly accepted the said extension along with the conditions.

9. Subsequently, by a communication dated February 4, 1998, the Respondents increased the duration of the period of telecast from 30 minutes to 45 minutes everyday along with the enhancement of the telecast fees. Then suddenly comes the impugned communication dated September 29, 2000, issued by the Respondents unilaterally reducing the programme to 260 days of telecast ending on October 15, 2001, and the Petitioners were asked to collect the revised memorandum of agreement to be made effective from October 16, 2001.

10. Therefore, the complain of the Petitioners is that by the impugned order the Respondents are shortening the period of telecast of the aforesaid JB programme from 260 weeks to 260 days and as a result of the aforesaid shortening of programme, the serial will come to an end on October 15, 2001. This the Respondents have done, inter alia, on the ground of "Doordarshan's transmission priority".

11. It is an admitted position that in the instant case there is no contact between the parties in a standard form but the right of the parties are governed by the correspondences which have been referred to in the pleadings between the parties.

W.P. No. 2743 of 2000 (Suprobhat and Mukhomukhi)

12. On an about July 7, 1999, the Petitioners submitted a prososal to the Respondents for two programmes on DD-7 and the names of the programmes are "Suprobhat" (hereinafter called SB). The same is a morning breakfast news from 6-55 a.m. to 7-15 a.m. and the other is "Mukhomukhi" (hereinafter called MM), a daily talk-show from 9-25 p.m. to 10-20 p.m.

13. On October 22, 1999, formal approval was received by the Petitioners from the Respondents and the approval of the proposal was given almost on conditions proposed by the Petitioners. Thereafter certain correspondence followed between the parties. Ultimately, a contract was entered into between the Petitioners and the Respondents for telecasting the said programme initially for a period of three years. Both these agreements relating to two programmes entitled S.B. dated January 29, 2000 and MM dated January 30, 2000, have been disclosed in the writ petition and it appears clearly from those agreements that the said programmes will be telecast initially for a period of three years from the date of the agreement. The same is subject to monitoring of payment behaviour etc. as per the DCS's instruction. It is not in dispute that pursuant to the said agreement, the Petitioner has completed all the formalities of furnishing bank guarantees and so on for a period of three years. In this case, also an impugned order has been passed by the Director, Prasar Bharati to the effect that decisions have been taken to discontinue the telecast of programme entitled MM with effect from October 16, 2000, and the said communication was directed to be treated as notice of termination of agreement dated January 30, 2000. and reason for termination was the same namely "Doordarshan's transmission priority". Another notice was also give in respect of the;programme entitled S.B. purporting to shorten the telecasting of the said programme for 260 days only ending on October 15, 2001, and the Petitioner was requested to collect the revised memorandum of agreement with effect from October 16, 2000. The reason for issuing the said notice of abridgment of programme was the same namely "Doordarshan's transmission priority".

W.P. No. 2742 of 2000 (Khas-Khabar)

14. In this case also approval was granted by the Deputy Director General,

Eastern Region of Prasar Bharati to the programme of news item based on current affairs entitled "Khash Khabor" (hereinafter called KK) on July 25, 1998. In view of certain adverse newspaper reports which led to the uncertainty of the programme, the Petitioners filed a writ petition being W.P. No. 2166 of 1998 before this Court whereby a learned Judge passed an order dated September 22, 1998, by directing the telecast of the programme as per schedule. Pursuant thereto the telecast of KK commenced on October 5, 1998, at 6-00 p.m. on DD-1 and 9-30 p.m. on DD-7. The Petitioners' case is that the said order of the learned Trial Judge was upheld by Appellate Courts. Thereafter, according to the Petitioner, another attempt was made for curtailment of the said programme KK. The said attempt, made towards the end of October, was also challenged in Court and ultimately by judgment dated January 1, 1999, a Division Bench of this Court quashed the decision of the Respondents to curtail the aforesaid news item entitled KK. The Petitioners' case is that SLP filed in the Supreme Court against the Division Bench judgment also failed. Thereafter on March 13, 1999, another decision was taken by the Respondents to the effect that there should be no production of news bulletin by private agencies and the same was made applicable to KK and pursuant thereto a fresh notice dated January 27, 1999, of discontinuation of KK was served on the Petitioners. The said notice was also challenged by filing a writ petition being W.P. No. 845 of 1999 and the Hon'ble Court intervened by an issuing order of status quo. The said order of status quo was continued with certain modifications.

15. During the pendency of the writ petitions being W.P. No. 845 and 782 of 1999, Prasar Bharati issued a letter agreeing to increase the duration of telecast of KK on DD-1 and DD-7 along with its repeat telecast on DD-7. On the basis of such proposal a memorandum of agreement was also signed between the writ Petitioners and Prasar Bharati for transmission of KK initially for a period of three years with effect from January 1, 2000. The said agreement was signed in respect of transmission of KK everyday on 8-15 a.m. and 2-00 p.m. On the basis of the said agreement, the writ petition was withdrawn. Thereafter memorandum of agreement was also entered into on March, 10, 2000, for transmission of KK in DD-1 at 9-30 p.m. and DD-7 for three years initially with effect from March 11, 2000. Then comes the impugned order purporting to abridge the daily telecast of KK for 260 days at 6-00 p.m. on DD-1. As a result of which the said programme will be discontinued from October 15, 2001, and in respect of KK which is telecast between 8-15 a.m. and 8-35 a.m. and 2-00 p.m. to 2-20 p.m. on DD-7 will be discontinued with effect from October 16, 2000, and the said impugned letter dated September 29, 2000, was issued by way of termination of the programme. Similarly in respect of KK which is telecast of at 8-30 p.m. on DD-7 it was decided to abridge the same and the same will come to an end on October 15, 2001. The reason for either termination or abridgment of the programme in all the three notices is the same namely "Doordarshan's transmission priority".

16. On behalf of the Respondents, affidavits-in-opposition have been filed in all these three writ petitions. The common stand taken in the affidavit in all these

cases is that the writ petition is not maintainable in as much as disputes have "arisen out of purely commercial contracts as opposed to statutory contract". It has been contended by the Respondents that "rights and obligations of the parties are to be adjudicated strictly in accordance with the contractual provisions". The specific stand taken is that the impugned notices in all the cases were issued by the Respondents in exercise of their power under the contract in a standard form or where such contract has to be "gleaned" from correspondence. As such no question of violation of rights under Arts. 14 and 19 or under Prasar Bharati Act, 1990 can arise in this case.

17. It has also been stated that the very nature of the function of Doordarshan (henceforth, D.D.) is such that it calls for a large area of discretion in the exercise of its power.

18. It has also been stated that the authorities of the DD are the best judges to ensure balanced development of telecasting. So in arranging the programmes the authorities are guided by various factors such as the need for change from the viewers point of view, balanced mix of all programmes and so on. It has also been stated that a programme which was well conceived at the beginning may, with the passage of time, degenerate into a monotonous affair. In such situation, the DD authorities can take steps. So there cannot be any hard and fast rule in these matters and the Respondent must be allowed a sufficient degree of flexibility in arranging its affairs. That is why it has been argued by the Respondents, that every contract contains express provision for review and termination.

19. It has also been stated in the counter affidavit if the Petitioners have suffered any pecuniary damage as a result of the impugned action taken by the Respondents, the Petitioners can initiate proceedings in Civil Court for recovery of damages. But a writ petition is not maintainable nor a prayer for injunction can be made in such petition.

20. It has also been stated that there is an arbitration clause in the agreement and before filing the writ petition, the Petitioner should have invoked that clause. This writ petition should not be entertained for non-exhaustion of that alternative remedy.

21. It has also been sought to be urged by the Counsel for the Respondent that the dispute in this batch of cases is in the private law area and not in the public law field. As such a writ petition, which is a remedy in public law, is not the proper forum. It has been stated that the alleged prejudice and the alleged loss of the Petitioner is nothing but a financial or business loss of a trader.

22. Counsel for the Petitioner has on the other hand urged that under the Constitution of India right to carry on trade or business is a fundamental right under Article 19(1)(g) of the Constitution. Any invasion of that right by an authority which is also a "State" under Article 12 will bring the matter squarely within the province of Constitutional Law, so the Petitioners' access to a writ

court cannot be denied. The learned Counsel also submits that the division between public and private law is not relevant in the context of a written constitution which guarantees certain basic rights to citizens and persons. It has been further urged that the facet of judicial review being a basic feature of the constitution, the said divide in the context of part III rights is more feigned than real and has also reached a vanishing point.

23. Reference in this connection may be made to the decision of the Supreme Court in the case of U.P. State Cooperative Land Development Bank Ltd. Vs. Chandra Bhan Dubey and Others, . After referring to the decision of the Supreme Court in Air India Statutory Corporation, etc. Vs. United Labour Union and others [overruled], wherein it has been held "the distinction between public law and private law remedy by judicial adjudication gradually marginalized and become obliterated", the learned Judges in Uttar Pradesh State Co-operative Land Development Bank v. Chandra Bhan Dubey(supra) held in para. 27 page 758 as follows:

The Appellant being an authority or even instrumentality of the State would be amenable to writ jurisdiction of the High Court under Article 226 of the Constitution, it may not be necessary to examine any further the question if Article 226 makes a divide between public law and private law. Prima facie from the language of Article 226, there does not appear to exist such a divide. To understand the explicit language of the article, it is not necessary for us to rely on the decision of the English Courts as rightly cautioned by the earlier Benches of this Court. It does appear to us that Article 226 while empowering the High Court for issue of orders of directions to any authority or person, does not make any such difference between public functions and private function.

24. Since a decision on this issue has a direct bearing on the preliminary objection of maintainability of the writ petition, this Court has to deal with this aspect of the matter in some detail.

25. Today there has been a vast expansion of State functions in every walk of our life. Gone are those days when one would hardly notice the existence of the State "beyond the post office and the police man". There have been also profound changes in the conception of the "state" and "State functions" in view of the Apex Court's judgment right from its decision in Ajay Hasia and Others Vs. Khalid Mujib Sehravardi and Others, . This development is consistent with the liberal interpretation of a person's or a citizen's fundamental right by the Apex Court coupled with the advent of a "Welfare State" which has to care for its Citizens from the cradle to the grave.

26. Along with the emergency of a "Welfare State", the Government today has emerged as a major source of wealth. It realizes taxes, revenues and cess from various fields and at the same time pours forth "wealth, money, benefits, services contracts and franchises" in the form of governmental largess.

27. Tracing this development of governmental function Professor Charles A. Reich

of Yale University in his article "New Property" (1964) stated that "Government is a gigantic syphon". This Article has substantially influenced judicial thinking in our country on the nature of state functions and Justice P.N. Bhagwati (as His Lordship then was) in the landmark decision in *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, held:

It is insisted, as pointed out by Professor Reich in an especially stimulating article on "The Government action be based on standards that are not arbitrary or unauthorized and again "The Government is still the Government when it acts in the matter of granting largess and it cannot act arbitrarily. It does not stand in the same position as a private individual"

28. As Government largess is a vital factor in the present day society affecting the rights of a large number of people, the courts have evolved procedures for the protection of individual interest of those who are the recipients of such largess. The Court has invested the recipients of such largess with right and title over the grant to enable the recipients to enjoy certain legal protection against arbitrary interference or curtailment or revocation of such grant. The development of this aspect of law in the contractual field is a vital facet of our administrative law woven around Article 14. This has started with the decision of the Supreme Court in *Ramana's* case.

29. Initially some forms of largess were treated as rights and some of them were treated as privileges. But in *Ramana's* case, Justice Bhagwati (as His Lordship then was) has held that both rights and privileges must have the same protection and State largess cannot be treated as just gratuity furnished by the State so that State can withhold or revoke it at its pleasure. These new forms of property have emerged as the "new wealth" which controls today the life a large number of citizens is a welfare State.

30. It is because of this governmental grant of largess, the transactions acquire a character which is different from mere commercial transactions with private, individuals.

31. Prior to the Supreme Court, Justice K.K. Matthew of Kerala High Court (as His Lordship then was) expressed his minority view on the same in the Full Bench decision of *V. Punnen Thomas Vs. State of Kerala*,

32. It will appear from para. 12 of the judgment in *Ramana's* case, that the minority view of Justice Matthew, in *Punnan* (supra) Was quoted and expressly approved. The views of Justice Matthew is quoted below:

The Government, is not and should not be as free as an individual in selecting the recipients for its largess. Whatever its activity, the Government is still the Government and will be subject to restraints, inherent in its position in a democratic society. A democratic Government cannot lay down arbitrary and capricious standards for the choice of persons with whom alone it will deal.

33. The aforesaid proposition may suggest that the obligation of the Government

of act in a non-arbitrary manner is only confined at the stage of making a choice of person with whom it will deal. But in Ramana, Justice Bhagawati (as His Lordship then was) while approving the minority view of justice Matthew in Punnan's case developed the proposition further by laying down in the same para. 12 that Government is still a Government when it enters into contract or when it is administering largess and it cannot, without adequate reason (i) exclude any person from dealing with it or (ii) take away largess arbitrarily. So the restrictions on the government operate in both the situations at (i) and (ii).

34. This was also stated in Para. 11, the relevant excerpts from which are extracted below.

All these mean, growth in the Government largess and with the increasing magnitude and range of governmental functions as we move closer to a welfare State, more and more of our wealth consists of these new forms. Some of these forms of wealth may be in the nature of legal rights but the large majority of them are in the nature of privileges. But on that account, can it be said that they do not enjoy any legal protection? Can they be regarded as gratuity furnished by the State so that the State may withhold, grant or revoke it at its pleasure? Is the position of the Government in this respect the same as that of a private giver? We do not think so.

35. So the restrictions operate at all the stages namely (i) granting (ii) withholding or (iii) revoking of largess.

36. The distinction between a governmental transaction and non-governmental transaction in the contractual field has been further emphasised in Ramana in the following words:

It must, therefore, be taken to be the law that where the Government is dealing with the public, whether by way of giving jobs or entering into contracts or issuing quotas or licenses or granting other forms of largess, the Government cannot act arbitrarily at its sweet will and, like a private individual, deal with any person it pleases, but its action must be in conformity with standard or norm which is not arbitrary, irrational or irrelevant.

37. The aforesaid proposition of law declared by the Hon'ble Supreme Court under Article 141 of the Constitution is binding on all courts and has been repeatedly followed in a large number of cases and has not been, doubted or questioned by any larger bench till date.

38. In the instant case, the grantor of the largess is the Broadcasting Corporation of India which certainly is a State and functions as a governmental agency. When the Petitioners carry on their job of telecasting programmes they are virtually acting as the agents of the said corporation. The functions of the said corporation as depicted in Section 12, Sub-section (1) of Prasar Bharati (Broadcasting Corporation of India) Act, 1990 (hereinafter called the said Act) are to inform, educate and entertain the public. Such functions obviously bring about a

breaking down of distinction between public law and private law field. In fact, in the ever expanding horizon of the governmental function, many of governmental functions are today carried on by private agents of the State. Such functions are mostly regulated by statute or statutory regulations framed by the Government from time to time.

39. It is obvious that the functions of the said Corporation are controlled by the said Act. u/s 3(1) of the said Act, the said corporation has been established and u/s 3(2) of the said Act such corporation is described as a body corporate with the power to acquire, hold and dispose of property both movable and immovable and to enter into contract.

40. Furthermore, u/s 12(3) of the said Act, the corporation has been further empowered to take certain steps as it thinks fit for doing certain things enumerated below:

(a) to ensure that broadcasting is conducted as a public service to provide and produce programmes;

(b) to establish a system for the gathering of news for radio and television;

(c) to negotiate for purchase of, or otherwise acquire, programmes and rights or privileges in respect of sports and other events, films, serials occasions, meetings, functions or incidents of public interest, for broadcasting and to establish procedures for the allocation of such programmes, rights or privileges to the services;

(d) to establish and maintain a library or libraries of radio, television and other materials;

(e) to conduct or commission, from time to time, programmes, audience research, market or technical service, which may be released to such persons and in such manner and subject to such terms and conditions as the Corporation may think fit;

(f) to provide such other services as may be specified by regulations.

41. From a perusal of the aforesaid provisions it is clear that all these actions have a predominantly public character and Clause 3(a) makes it clear that broadcasting is to be conducted as a public service.

42. Therefore, in view of the aforesaid clear provisions if it cannot be said that the relationship between the Petitioners on the one hand and the corporation on the other is merely the relationship in the domain of private commercial law without any trappings of public law.

43. This Court, therefore, is of the view that all the elements of public law are present in the instant case and if in the course of transaction the Petitioners complain of unfair treatment in such transaction, such grievances before a Writ court are maintainable. So the preliminary objection taken by the Respondent on

this aspect of the matter is over ruled.

44. This Court finds that at least in three instances the Apex Court has interfered in a dispute between the said corporation and private parties in Writ Jurisdiction even when the relationship is contractual. First of such instances is in the case of Life Insurance Corporation of India and Union of India and another Vs. Prof. Manubhai D. Shah and Cinemart Foundation, . In that case D.D. was refusing to telecast a documentary film produced by the Respondent on the Bhopal Gas Disaster entitled "Beyond Genocide". Even though the said film won "golden lotus" award as the best non-feature film of 1987. D.D. refused to telecast the film on television. So a writ petition was filed before the Delhi High Court. Delhi High Court directed D.D. to accord permission for telecasting of the film. The said decision of the Delhi High Court was challenged before the Hon'ble Supreme Court and the Apex Court affirmed the decision of the Delhi High Court inter alia holding that D.D. being a State controlled agency and being funded by public funds could not have refused to screen the said film produced by the Respondent except on "valid grounds" (see para. 24 at page 665 of the report). This judgment is, therefore, an authority for the proposition that (i) actions of the D.D. are amenable to judicial scrutiny before a Writ Court and (ii) the D.D. has to justify its action before a writ court about the existence of "valid grounds".

45. The next decision was in the case of Secretary, Ministry of Information and Broadcasting, Govt. of India and others Vs. Cricket Association of Bengal and others, . Various questions were considered in the said judgment and the learned Judges of the Supreme Court came to the conclusion that an electronic media like television is different from the other media. In that, the electronic media has both audio and visual facilities and has a more pervasive presence. In that judgment the learned Judges of the Supreme Court have held that electronic media is operated on the basis of air waves which are public property and are to be used in public interest or the best interest of the society. Therefore, they are owned and controlled by the Government or any Central National Authority. So a public element in the functioning of D.D. or the broadcasting corporation is inherent. It is clear from those judgments that a larger question of public interest is involved in the functioning of D.D.

46. This Court is of the opinion that as the basic function of the said corporation is to "inform, educate and entertain" and these functions form the core of a democratic society. So judging from this angle, the functions of the said corporation have a human rights perspective also. One of the goal of a human right activist is to infuse transparency in governmental functioning. This is quite possible by proper broadcasting of news and information on current affairs. Thus, one of the main functions of channels providing news and information on current affairs is to translate human ideas into constructive and practical plans. Therefore, the public Character of broadcasting is an aspect which can hardly be over emphasized.

47. This Court also finds that recently the Hon'ble Supreme Court interfered with

the functioning of the D.D. in the contractual field in another case. It appears that D.D.-1 cancelled a contract in connection with the serial called "Chandrakanta". It was challenged before the Delhi High Court and ultimately the matter reached the Supreme Court and the Hon"ble Supreme Court after hearing the learned Counsel for the parties set aside the decision of D.D. relating to cancellation of contract in connection with the telecasting of the said serial on certain terms. The certified copy of the said decision has been annexed to, the affidavit in reply in W.P. No. 2744 of 2000.

48. This Court is of the opinion that the controversy in this case cannot be viewed through the prism of the esoteric divide between private law and public law. That would amount to taking a very narrow view. So the preliminary objection is not sustainable. The impugned actions of the Respondent can be challenged in this batch of writ petitions.

49. Having thus held the writ Petitioners are maintainable this Court proceeds to deal with the rival contention of the parties.

50. There is not much of a factual dispute. It is not in dispute that in" two of these cases, there is an agreement entered into by the parties and such agreement contains a clause for termination of contract and also contains a clause for review. The relevant clause namely the clause for review and the clause for termination in the said contract are set out below:

19. D.D. will retain the right to periodically review this agreement in terms of but not limited to, the popularity of the serial/programme, generation of commercial revenue and adherence to the terms and conditions of this agreement by the producer;

22. This agreement is terminable by either party by giving 15 days notice in writing to the other party. However, Doordarshan may terminate the agreement by giving fortnight"s notice in view of its other transmission priorities.

51. Relying on those two clauses, the learned Counsel for the Respondent urged that while issuing the impugned notices the Respondents have acted in terms of the said clauses. Therefore, there is no illegality in their action. The learned Counsel further urged that since the Petitioners have entered into an agreement with the aforesaid clauses on mutual basis it cannot be said that the terms of the clauses are unreasonable and arbitrary. The learned Counsel further pointed out that there is no challenge to the clauses in the contract. The learned Counsel also submitted that if the Petitioners are aggrieved by any action of the Respondent they can go to a Civil Court and ask for damages for wrongful termination of contract. It is further contended by the learned Counsel that very nature of D.D."s functions are such that it must exercise its discretion and "without being answerable to any court of law, save to the extent their conduct in relation to a particular contract with producer of a programme amounts to breach of the agreement between the parties" (see para. 14 in the affidavit in opposition filed by Respondent in W.P. No. 2742 of 2000). This Court cannot accept the said

contention for the reasons indicated below.

52. It is not in dispute that D.D. is an authority under Article 12 and is amenable like any other Article 12 authority to judicial review by a writ court. It is obviously true that in the exercise of its power, the D.D. can legitimately claim some discretion but that does not and cannot mean and if the exercise of such discretion is questioned before a writ court, the authorities are not answerable. The submission that in case of wrongful exercise of its power, D.D. is only answerable before a Civil Court to the extent of paying damages is also a proposition which is not acceptable to this Court.

53. As an authority being created under the statute, D.D. or Prasar Bharati Corporation are authorities created under the law. An authority which is created under the law must always act, even in the exercise of its discretion within, the four corners of the statutory provisions. In these cases where there is no statutory provision governing the action of such authorities, the authorities can only act in exercise of discretion according to justice and fair play and it cannot indulge in a wanton display of its discretionary power.

54. As early as in 19th century, this was made clear in the celebrated decision of *Sharpe v. Wakefield* 1891 Appeal Cases 173. At page 179 of the report Lord Halsbury made certain pertinent observations which hold good till today. The learned Lord said "when it is said that something is to be done within the discretion of the authorities..... that something is to be done according to the rules of reasons and justice, not according to private opinion..... according to law and not humour. It is to be not arbitrary, vague, fanciful but legal and regular.

55. Our Supreme Court while expressly approving the aforesaid passage in *Khudiram Das Vs. The State of West Bengal and Others*, has further quoted Justice Douglas. The learned Judge said "Law has reached its finest moments, when it has freed man from the, unlimited discretion of some ruler,..... some official, some bureaucrat..... Absolute discretion is a ruthless master. It is more destructive of freedom than any of man's other inventions" *Khudiram Das Vs. The State of West Bengal and Others*, . Supreme Court in *Khudiram Das* also held that in a government under law there can be no such things as "unreviewable discretion".

56. The Constitution Bench of 11 judges in the case of *Madhav Rao Scindhia and Ors. v. Union of India* AIR 1971 S.C. 538 were pleased to observe in para. 132 of the report that "to accede to the claim that the jurisdiction of the court is barred in respect of whatever the executive asserts is valid is plainly to subvert the rule of law".

57. In view of these clear authorities, this Court cannot uphold the claim of the Respondent that in exercise of its discretion, it is not answerable to a writ court. In a Government of laws unfettered discretion is a contradiction in terms In re: In Re: The Special Courts Bill, 1978, wherein *Khudiram Das*(supra) has been approved.

58. In other words if the claim of the Respondent authority is accepted then it will become an "Imperium" in "imperio".

59. While dealing with the limits of the power of Election Commission, the learned Judges of the Supreme, Court in the case of Digvijay Mote Vs. Union of India (UOI) and Others, was pleased to quote the observation of Justice Matthew in Indira Gandhi's 1975 Sup. S.C.C. 1 case as follows:

In the opinion of some of the judges constituting the majority in Bharati case Rule of Law is a basis structure of the Constitution apart from democracy.

The rule of law postulates the pervasiveness of the spirit of law throughout the whole range of government in the sense of excluding arbitrary official action in any sphere.

After quoting justice Matthew as above, the learned judges made the observation at page 180 that "no one is an imperium in imperio in our constitutional order". The said finding was reiterated by the Apex Court again in the case of Election Commissioner of India v. State Bank of India 1975 S.C. 1078. In para. 21 of the judgment the learned judges, after referring to the decision in Mote(supra), laid down that no one under our constitutional order can become an imperium in imperio.

60. In view of the aforesaid legal position it is not possible for this Court to hold that D.D. is not answerable to a writ court for the exercise of its discretion. To say the least, the aforesaid stand of D.D. is totally misconceived.

61. The learned Counsel for the Respondent further submitted that in the instant case the Petitioners have entered into contract with their eyes wide open and no pressure was brought upon them compelling them to enter into the contract. Having entered into the contract on their own volition they cannot now turn round and complain of an arbitrary action taken by the Respondents under the contract.

62. This Court has already held that even after entering into contract if any action is taken by the Respondent in a manner which is unreasonable or inconsistent with fairness and justice, the person aggrieved can make a grievance inasmuch as the obligation of the Government or a Governmental agency to act reasonably and in a non-arbitrary manner remains throughout and even after the parties have entered into the contract. This Court has already held this and this aspect has been made clear by the Supreme Court in Ramana's case.

63. Apart from Ramana's case this is also the law as laid down by the Hon'ble Supreme Court in Delhi Transport Corporation v. D.T.C. Moojdoor Congress(16). In the said constitution bench judgment while delivering his opinion with the majority, Justice B.C. Ray (as His Lordship then was) was pleased to observe that Union of India or State whether acting in the field of trade or business or in any other field "is always subject to constitutional limitation" flowing from

fundamental rights in part III. His Lordship further held that while carrying on trade or business activity neither Union of India nor the State can convert themselves into "a merchant buying or selling goods or carrying on either trading or business activity". So the "distinction between a private trader and State or instrumentality of the State as pointed out in *Ramana*, has been affirmed by the Constitution Bench in *Delhi Transport Corporation Vs. D.T.C. Mazdoor Congress and Others*, .

64. Again in another decision in the case of *Kumari Shrilekha Vidyarthi and Others Vs. State of U.P. and Others*, , the learned Judges of the Supreme Court after relying on the judgment in *Ramana*'s case held in para. 22 at page 549/50 of the judgment as follows:

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 their 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.

65. The observations of the learned Judge in para. 24 in *Srilekha* (supra) are further emphatic and are in the following terms:

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 fulfil the obligation of Article 14 of the Constitution and thereafter permitting it to cast off its grab 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.

66. The learned Counsel for the Petitioner has urged that the only ground assigned in support of the impugned order of the Respondent is the "transmission priority" of D.D. The same is the ground in all the impugned orders challenged in these three writ petitions.

67. Some controversies have been raised about what is meant by "priorities" in this context. The learned Counsel for the Petitioner suggested, relying on New Shorter Oxford Dictionary that it means "the fact or condition of being earlier in time or of proceeding something else". Therefore, it is a concept suggesting a comparison. In other words, it means that on a comparison D.D. may choose one programmed in preference to another. Whereas the learned Counsel for the Respondents suggested "priority" can also mean "concern" or "consideration". So the contention of the Respondent is that D.D. can also out of its concern for proper or better transmission pass the impugned order.

68. It is obviously true that both the shades of meaning suggested by the learned Counsel of the rival parties may be reasonable as the word "priority" is capable of indicating both. On this aspect, the learned Counsel for the Respondent urged that in order to settle this controversy an interpretation of the commercial contract is called for and this the Court cannot do.

69. The court is unable to accept this. Even if the Court assumes that "transmission priority" may indicate either of the two shades of meaning pointed out above, the Court can without any interpretation of the contract, insist that if the factual existence of such priority is challenged, the authorities of D.D. must prove its existence, at least prima facie.

70. Here in all the three writ petitions the factual existence of transmission priority has been challenged. It was, therefore, incumbent upon the authorities of D.D. to demonstrate before the Court, at least prima facie, its factual existence, since that is the only basis for taking the impugned actions against the Petitioners in all the three writ petitions.

71. Reference in this connection can be made to the Constitution Bench decision of the Supreme Court in the case of *The Barium Chemicals Ltd. and Another Vs. The Company Law Board and Others*, . It was observed in *Barium*(supra) that where the existence of circumstances of the condition fundamental to the making of an order is questioned, it "has to be proved at least prima facie".

72. The learned Judges further held "it is not sufficient to assert that the circumstances exist and give no clue to what they are because the circumstances must be such as to lead to conclusions of certain definiteness" (page 309 of the report).

73. To the same effect is the judgment of three Judges Bench of the Supreme Court in the case of Swadeshi Cotton Mills Vs. Union of India (UOI),

74. In Swadeshi(19) speaking for the majority, Justice Sarkaria, (as His Lordship then was) pointed out in para. 57 while it may be true that an element of subjectivity is involved in the formation of an opinion, but if the existence of circumstances on the basis of which an opinion is to be formed is questioned, its existence must be monstrable and proved at least prima face.

75. In coming to the said finding the learned Judges in Swadeshi (supra) relied on the dictum in Barium Chemicals(supra).

76. This Court is of the opinion that it cannot be urged by the Respondents that the writ court cannot subject the orders passed by the authorities of D.D. to judicial scrutiny to find out whether there exists any factual basis of the ground on which action was taken by the Respondent. This Court is of the view that in order to come to this finding it does not have to interpret the contract as no factual dispute is involved.

77. In the affidavit filed by the Respondents the D.D. has taken a very general stand about the nature of its function, the intention of the contracting parties the interest of the viewers. There is also some discussion about the right of D.D. of constantly monitoring the programmes telecast by the Petitioners on consideration of viewers point of view and so on. These are all general topics of discussion. But in none of the affidavits the authorities of D.D. have disclosed how the programmes telecast by the Petitioners have factually jeopardized the transmission priorities of D.D.

78. Apart from that some of the notice issued on September 29, 2000, have been made effective from the middle of October, 2001. Since "transmission priority" has a factual content, such priorities cannot be decided one year in advance. Any "State" authority which is acting fairly cannot take such a stand which is in defiance of all logic and reason.

79. In the peculiar facts of this batch of cases, it is improper and incorrect for the authorities of the D.D. to contend that the writ court will act in transgression of its powers if it comes to a finding that in instant case there is no factual basis of the reasons on which the impugned orders rest.

80. The learned Counsel for the Respondents has also urged that under Clause 22 of the terms of contract, the Respondent has a right to terminate the contract without disclosing any reason. In the instant case they have terminated the contract and by the way they have indicated some grounds. The submission is since the authorities of D.D. could have terminated the contract without

disclosing any reason it could not be worse off just because some grounds have been indicated. The learned Counsel went to the extent of saying that Clause 22 has two parts. Under the first part the agreement is terminable by either party by giving 15 days notice in writing to the other party. The second part only authorized the D.D. to terminate the agreement by giving a fortnight's notice in view of its "other transmission priorities". Therefore, the learned Counsel submitted that the 2nd part of Clause 22 of the contract is otiose and redundant.

81. This reading of Clause 22 by the learned Counsel does not appear acceptable to this Court. This Court finds on a careful perusal of Clause 22 that the clause has two parts for catering to two different situations. The first part gives equal right to both the parties to the contract to terminate the same by giving 15 days notice to the other party. But the second part has given right only to D.D. to terminate the contract on certain grounds and here D.D. has invoked the second part which is, as pointed out above, distinct from the first part. The argument of the learned Counsel that the second part is otiose is thus self-defeating.

82. Now that the D.D., has invoked the second part in passing the impugned order it cannot, after finding it difficult to prove its case on that part, abandon it like a hot potato and rely on the first part. It is well settled that there must be some predictability about executive functioning and citizens must know where they stand. This predictability of executive functioning is a very important facet of the rule of law. When a citizen has come to this Court challenging the basis of an executive action, he cannot be told by the authorities that since they have the power to take action on a different basis, the action taken must be treated to have been taken on a basis different from the one indicated in the order. An executive action, taken to the detriment of a citizen, cannot be equated to a game of chess where players may change and choose their move to counter act the opponent. It must not be lost sight of even for a moment that fairness is an inbuilt content of all State actions even in the field of contract.

83. In this connection this Court is reminded of the famous dictum of Justice Frankfurter in *Vitrelli v. Seaton* (1959) 359 U.S. 535. The learned Judge said "an executive agency must be rigorously held to the standards by which it professes its action to be judged..... This judicially evolved rule of administrative law is now firmly established and if I may add, rightly so, he that takes the procedural sword shall perish with the sword".

84. The aforesaid passage has been quoted with approval in India in a number of cases *Dr. Amarjit Singh Ahluwalia Vs. The State of Punjab and Others*, .

85. Commenting on the aforesaid dictum, Justice Bhagwati (as His Lordship then was) in *Ramana*'s observed that the said rule not only emanates from Article 14 but is a principle of administrative law as a check against exercise of arbitrary power by executive authorities.

86. Learned Counsel for the Respondents further submitted that in any event 15 days notice has been given in the termination order so the Court may not go into

the question of factual existence of transmission priorities. In support of this submission, the learned Counsel has relied on two decisions noted below:

(a) *Vitol v. Compagnie Europeane Des Pelroles* reported in (1988) 1 Lloyd's Law Reports volume 1574 and

(b) *Glynn and Co. and Ahothers v. Margeston and Ors.* reported in (1891-4) All England Reports 693 (reprint).

87. The decision of the Queen's Bench Division in *Vital* was given on an appeal from an award of an arbitrator. The dispute in that case arose of a contract for the sale of certain quantity of crude oil by Vital B.U. to Compagnie Europeane Das Petrolis. The dispute was over the official price of the crude. In the context of the said dispute the Court, while allowing the appeal against the award held that on a question of a true construction of commercial contract, the Court has to objectively ascertain the intention of the parties from the words which they have chosen to use. It was further held that where words admit of no ambiguity "but one meaning" then that has to be accepted, But in a case where words admit of an ambiguity, then the dispute may be resolved by looking at the aim and genesis of the agreement.

88. The aforesaid controversy about interpretation of meaning of words in the contract is not relevant in this case. Whatever may be the interpretation given to the words "transmission priority" its factual existence, when questioned in Court, must be proved at least prima facie. The Respondent having taken the aforesaid ground of transmission priority as the basis of the impugned order cannot, finding difficulty in sustaining the said ground, wriggle out of the same and seek to rely on the first part of the clause relating to termination of contract.

89. Therefore, the ratio in *Vital* is of no assistance here.

90. The next decision of the House of Lords of *Glynn and Co.* was in respect of interpretation of a bill of lading which contains certain directions to a ship carrying perishable goods from a port South of Spain to Liverpool. It appears that the ship, after being loaded with cargo, did not proceed West ward towards Liverpool but went towards a port North East of Spain and for the delay so caused the cargo was damaged when it arrived at Liverpool. In an action by the consignees against the ship owners for damages, clauses in the bill of lading came up for construction. The House of Lords, construing the clauses in the bill, held that the main intent and object of the bill must be kept in mind and general words must be given a limited construction as not to be in conflict with the object and intent of the bill.

91. As pointed out above the aforesaid questions do not fall for consideration in this case. So the decision of the House of Lords, which is entitled to the highest respect, has no application here.

92. On the question of passing the order for curtailing the tenure of the programme, the same reason of transmission priority has been assigned. The

relevant clause in the contract for curtailing the tenure by way of review is Clause 19 in which said power of review is confined to the following considerations:

- 1) Popularity of the serial.
- 2) Generation of commercial revenue.
- 3) Adherence to terms and agreement by the producer.

93. All these issues have a factual content. But nothing has been stated factually either in the impugned order or in the affidavit how the power of review on those lines has been exercised by the authorities of Doordarshan while purporting to curtail the tenure of the programme by the impugned order. So There is no factual basis for passing the impugned order for curtailing the tenure of the programme.

94. The learned Counsel for the Respondent has further submitted that every contract like the present one has two functions namely the primary and the subsidiary functions. The primary function is the entering into contract between the two contracting parties, subsidiary function is to indicate the specific terms of the contract. The writ court cannot interfere with the subsidiary function of the contract namely with the terms of the contract. The learned Counsel submitted that here an action has been taken in terms of the contract namely Clause 19 and 22 of the contract and the writ court cannot interfere.

95. The Court has not been able to appreciate this bifurcation of the contractual field. If the authorities act in an arbitrary manner either in the matter of entering into contract with individual or if there is any arbitrary action in the matter of working out the terms of the contract, in both the cases, if offends Article 14 if one of the contracting parties is either the government or an instrumentality of the government. As has been pointed out above, this has been clearly laid down in Ramana.

96. Various decisions have been cited by the learned Counsel for the Respondent trying of contend that just because one of the contracting parties is an instrumentality of the State, provisions of Article 14 are not automatically attracted, specially in the area where actual terms of the contract have been worked out. Learned Counsel further submitted that a writ court cannot, by an exercise of interpretative process import a concept of fairness on the terms of contract when parties have entered into the same without protest.

97. This approach of the learned Counsel suffers from a fallacy in the Sense while following the accretions to the constitutional and administrative law on Article 14 in the contractual field, the Court has to keep in mind the delicate balance which has emerged between the rights of citizens and the rights of huge, gigantic corporation exercising State functions with whom the citizens have entered into a contract. Development of this law has started with the landmark decision of Supreme Court in Ramana's case in 1978 and has stood the test of

time for all these years. The learned Counsel for the Respondent has tried to seek refuge in one earlier decision in Radhakrishna and in some subsequent decisions of the Supreme Court in trying to point out that an opinion different from the one propounded in Ramana has appeared on the scene.

98. The Respondent very much relied on the decision in the case of Radhakrishna Agarwal and Others Vs. State of Bihar and Others, in order to contend that the question of violation of Article 14 is not applicable in a case where there has been a termination of the contract or any action has been after the contract has been entered into. It has been contended that in view of the decision in Radhakrishna (supra) the aggrieved person can take recourse to a remedy before the Civil Court and cannot challenge the impugned action by filing a writ petition. Relying on the ratio of Radhakrishna (supra) it has been urged by the learned Counsel that it is only at the stage of entering into contract that a Government or its agencies are guided by the provisions under Article 14.

99. In support of the aforesaid contention, the learned Counsel for the Respondent relied on para. 12 at page 1500 of Radhakrishna (supra) where the following propositions laid down by Patna High Court have been affirmed by the Supreme Court.

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

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

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

100. Relying on the aforesaid formulations, the learned Counsel submitted that the present case falls under the third category and as such the writ petition is not maintainable. In support of this, the learned Counsel has further relied on para. 10 of the said judgment in which it has been said that if the State and its agencies have entered into the field of ordinary contract, the relations are no longer governed by the constitutional provisions but by the terms of contract which determines rights and obligations inter se and there is no question of violation of Article 14.

101. However, this Court is of the opinion that the decision in the case of Radhakrishna (supra) may not be accepted as a declaration of law on Article 14 in the contractual field in view of certain facts pointed out herein below.

(a) It appears from paras. 22 and 25 of Radhakrishna (supra) that at relevant

time when the said judgment was delivered, by virtue of a presidential proclamation under Article 359 of the Constitution enforcement of rights falling under Article 14 were suspended.

(b) The effect of presidential proclamation under Article 359 of the Constitution has been considered by the Constitution Bench of Supreme Court in the case of *Makhan Singh Tarsikka v. State of Punjab* 1964 S.C.C. 381. It appears from a conjoint reading of paras. 9 and 11 of *Makhan Singh Tarsikka* (supra) that Article 359 does not expressly suspend any fundamental right but it authorizes the President to issue an order declaring that the right to move any Court for enforcement of such rights mentioned in the proclamation shall remain suspended and all proceedings in any court for the enforcement of the right in question shall remain suspended as long as the proclamation is in force or for such shorter period as mentioned in the order.

(c) It appears that when the judgment was delivered in *Radhakrishna* (supra), the aforesaid proclamation was in operation as it appears, specially from para. 25 of the judgment. This is further clear from the Division Bench judgment of Patna High Court, at that case. From para. 14 of the judgment of the Division Bench of Patna High Court, it appears as follows:

The grievances of the Petitioners in the present writ applications are not primarily for or against infringement of their rights under Article 14 of the Constitution but they are challenging the legality of the impugned orders and decisions on the ground that they are arbitrary and in contravention of the terms of the agreement. To me it appears that this argument on the basis of the Presidential Orders has been raised on behalf of the Petitioners to avail of the orders of stay passed by this Court which authorize them to collect and exploit sal seeds during the pendency of the writ application in spite of their lease having been terminated by the Government.

(d) Virtually in the same vein is the observation of the Apex Court in *Radhakrishna* (supra) in para, 22 as follows:

The real object of the Appellants seems to be to hold up any adjudication on the cases before us by taking shelter behind Article 14 so that the stay orders obtained by them, presumably on representations made to this Court that no aspect of enforcement of Article 14 of the Constitution was involved. We think that to accede to the prayer on behalf of the Appellants to adjourn the hearing of these cases until after the Emergency is lifted and yet to continue the stay orders is to permit a circumvention of the Constitutional mandate contained in Article 359 and to countenance a gross abuse of the processes of the Court.

(e) From a combined reading of para. 14 of the Division Bench judgment of Patna High Court and para. 22 of the Supreme Court judgment in *Radhakrishna* (supra) it appears that provisions of Article 14 were urged in order to keep the proceeding suspended and take advantage of some stay order. But rights under Article 14 were not urged, as it could not be urged in view of Article 359 of the

Constitution. The right to move the Court for enforcement of right under Article 14 was suspended and it remained so during the period the judgment in Radhakrishna (supra) was delivered. So the judgment in that case may not be treated as one declaring law under Article 14 to bind all courts. In other words, when in view of the constitutional mandate enforcement of rights under Article 14 remains suspended in any proceeding, can a judgment delivered in the very same proceeding be treated as one deciding the law on the suspended rights under that Article and further can that judgment be treated as one declaring the law under the Article 14 of the Constitution. The answer is possibly in the negative.

(f) However, the judgment of the Apex Court in Radhakrishna (supra) was noted subsequently in large a number of cases namely in

(i) Motilal Padampat Sugar Mills Co. Ltd. Vs. State of Uttar Pradesh and Others, .

(ii) Premji Bhai Parmar and Others Vs. Delhi Development Authority and Others,

(iii) Life Insurance Corporation of India Vs. Escorts Ltd. and Others,

(iv) Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another, .

(v) Bareilly Development Authority and Another Vs. Ajay Pal Singh and Others, .

(vi) Dwarkadas Marfatia and Sons Vs. Board of Trustees of the Port of Bombay, 1642.

(vii) Mahabir Auto Stores v. Indian Oil Corporation 1990 S.C. 1031.

(viii) Steel Authority of India Limited v. Shri Ambica Mills Ltd. and Ors. AIR 1998 S.C. 418

(ix) Dr. Ashok Kumar Maheshwari Vs. State of U.P. and Another,

(x) J.K. Industries Ltd. and Others Vs. Chief Inspector of Factories and Boilers and Others, .

(xi) Common Cause, A Registered Society Vs. Union of India and Others,

But unfortunately this aspect relating to Presidential proclamation and suspension of right under Article 14 was not brought to the notice of the Court.

(g) Apart from that this Court finds that after the lifting of the said presidential proclamation, Article 14 has been, given a very vibrant and dynamic interpretation in the case of Maneka Gandhi v. Union of India(36). In the said landmark decision in Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another, the interpretation of Article 14, as given by the constitution Bench, is binding on all courts in India under Article 141, as the declaration of law. The perception of Article 14 as given in Maneka Gandhi(36) is set out below:

Now, the question immediately arises as to what is the requirement of Article 14:

what is the content and reach of the great equalizing principle enunciated in this article? There can be no doubt that it is a founding faith of the Constitution. It is indeed the pillar on which rests securely the foundation of our democratic republic. And, therefore, it must not be subjected to a narrow, pedantic or lexicographic approach. No attempt should be made to truncate its all-embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be imprisoned within traditional and doctrinaire limits. We must reiterate here what was pointed out by the majority in *E.P. Royappa Vs. State of Tamil Nadu* and Another, namely, that "from a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic, while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14". Article 14 strikes at arbitrariness in State action and ensure fairness and equality of treatment. The principle of reasonableness which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence. This ratio of *Maneka* (supra) on Article 14 was followed in *Ramana* in the contractual field. Therefore, this Court is of the view that the judgment in *Ramana* is the declaration of law dealing with the relationship of citizens with the State in the contractual field and this Court respectfully follows the same. It may be noted here that in *Common Cause (Supra)*, it has been held that the judicial opinion in *Radhakrishna* (supra) has been "changed" by Supreme Court in subsequent decisions and an arbitrary action of the authorities which acting in pursuance of a contract "would also be amenable to writ jurisdiction" (see page 702, para. 44).

(h) So the decision in *Radhakrishna* (supra) is no longer a binding authority on Article 14 in the field of contractual relations between the citizens and the State.

102. Apart from relying on *Radhakrishna* (supra) the learned Counsel has placed reliance on various other judgments of the Supreme Court. But while considering the subsequent decisions of Supreme Court this Court cannot, if I may say so, merely concentrate on the trees and lose sight of the horizon and landscape in which they grow.

103. Reliance has been placed on the decision in the case of *Assistant Excise Commissioner and Others Vs. Issac Peter and Others*, a three-judge Bench of the Apex Court. A careful perusal of the judgment would show that the question which had fallen for consideration in *Issac Peter* (supra) is completely different from the question with which the Court is concerned in this batch of cases. The question in *Issac Peter* (37) has been stated in para. 2 of the said judgment is as follows:

The question is whether there was a failure on the part of the State in supplying the arrack undertaken by it to supply and whether the licensees are entitled to any rebate/remission in the amounts payable by them under the contract on

account of such failure.

104. In para. 8 of the said judgment it has been clarified that there is no complain about the supply of monthly quota of arrack by the State. The said quota was regularly supplied but the complaint is only about the non-supply of additional quantities applied for by the Respondents. About such additional quota of supply the learned Judges remarked in para. 9, that correct picture in respect thereof was not available. The learned Judges also held that the contract between the parties was governed by statutory provisions and such provisions are binding both upon the government and the licensee and nobody can make a departure from them the question whether there was any assurance to supply additional quantities of arrack was a disputed factual question and was not governed by the statutory terms of the contract. In the background of these facts, the Apex Court held that the fact of additional supply being disputed, it is doubtful whether any official was competent enough to make such a statement of additional supply and matter should be considered strictly on the basis of statutory provisions. The learned Judges also noted in para. 17 that there is no grievance of any licensee that State did not supply arrack to them even when it was available nor is there any complaint about inequitable distribution. So the Court held that not only monthly quota was supplied in full for the whole year but additional quantities were also supplied to a substantial extent. As such the licensees were obliged to observe the Rule 6(14). The learned Judges also held that there is no legal right of the licensees to claim additional quota and the Court found that the Respondent in order to create a case and to create evidence in support of the case artificially hiked up the demand". The Court found that the government supplied "whatever it could". In the background of these facts the question was "whether the licensees are entitled to any remission or abatement in the license fees or other amounts payable under the contract". The Court held that in the facts of the case the answer must be in the negative.

105. It is, therefore, obvious that the facts in Issac Peter (supra) case are fundamentally different from the fact of the cases in hand. Therefore, the observation made by the Hon"ble Supreme Court in para. 26 must be understood in that context. In other words the learned Judges held that in a case where the terms of contract are clear and governed by statute, the contractual obligation incurred by one party could not be avoided on the alleged ground of fairness just because the other contracting party is the State. The learned Judges said that it cannot appreciate the argument that there should be modification of expressed terms of the contract in the name of fairness. But otherwise the learned Judges have reiterated the principle that "every contract" must be construed reasonable having regard to its language. In the instant case there is no iota of allegation against the Petitioners that they are seeking to wriggle out of any contractual obligation relating to payment of any amount under the contract. It may be noted further that Issac Peter(37) does at all dilute the ratio in Ramana. So the observation in Issac Peter(37) must be understood in the background of the facts of. that case and the ratio does not advance the case of the Respondents.

106. The other three-judge Bench judgment referred to is in the case of *State of Haryana v. Jogeram and Ors.* AIR 1980 S.C. 2018. That was a case in which a bidder offered a bid with full knowledge of terms and conditions attached with auction. The bids were accepted by the State authorities. The Court held that after such acceptance, the bidders cannot be permitted to walk out of the obligation voluntarily incurred by them by invoking writ jurisdiction. The facts of the present case are totally different. So the principles of *Jageram* (supra) are not attracted.

107. Counsel for the Respondent also relied on the case of *Berilley Development Authority v. Ajay Pal Singh* (supra). The same is a two-judge Bench judgment of the Hon'ble Supreme Court. In the case of *Berilley* (supra) the judgment in *Ramana* was considered. But the issues in both the cases are totally different. The issue in *Berilley Development* (supra) was the fixation of the cost of flats and the rates of installments payable by the Appellant after hearing their grievances. In *Berilley Development* (supra) the Court noted that the writ Petitioners registered themselves as applicants for flats after fully understanding the terms and conditions mentioned in the brochure including relevant clauses 12 and 13 along with the notes. From the notes it is clear that the cost of flat shown in the table are estimated costs and such cost may increase or decrease according to the rise or fall of the price at the time of completion of the property. In view of the aforesaid facts, the Court observed "one should not loose the sight of the fact that the BDA did not compel any of the applicants to purchase the flats at the rate subsequently fixed by it and pay the increased monthly installments" (para. 18).

108. Considering these facts the Court held that the writ Petitioners voluntarily entered into contracts with BDA and in such cases of pure contract no statute can step in. It was held in *Ramana* there was no concluded contract as in the case of *Berilley Development Authority* (supra). In the instant case, also the Petitioners are not trying to seek any relief from the Court about their obligation to pay any levy or fees or charges, in fact the Respondents have no grievance on that score against Petitioner. Therefore, the decision in *Berilley Development* (supra), being completely on a different footing cannot be applied to the facts of this case.

109. The other decision relied by the Respondent was in the case of *State of U.P. and others Vs. Bridge and Roof Co. (India) Ltd.,* . This is also a two-Judges Bench decision of the Hon'ble Supreme Court. In *Bridge and Roof* (supra) the contract in question was a works contract for improvement of roads and there was a stipulation in the contract for deduction of sales tax at the time of payment and for price adjustment in the event of a change in tax. The government deducted certain amounts on the ground that tax has been reduced by a composite order passed by the Tax Commissioner. The said deduction by the government was sought to be challenged in the writ petition. It may be stated that the said contract contained an arbitration clause. The learned Judges held that whether

there has been a reduction in the liability on account of change in law within the meaning of the relevant clause in the contract dispute which should be agitated either before the arbitrator or before a Civil Court. It is obvious that such a question would involve a thicket of factual disputes and for an appropriate decision of that dispute Writ Court is not the proper forum. In the instant case, the nature of the dispute does not involve any fiscal question nor does it involve any decision on any disputed question of fact under the terms of contract. Therefore, these writ petitions are maintainable where the main question is whether the authorities of D.D. acted in a reasonable and fair manner.

110. of course, in *Bridge and Roof* (supra) the Supreme Court has held that where there is a provision for arbitration in the contract, the dispute should be decided by the arbitrator and not by the High Court. In the instant case, in the contract there is an arbitration clause. This Court has dealt with that aspect of the matter namely why the remedy of arbitration is not suitable in the facts of this case. But on other counts the decision in *Bridge and Roof*(39) having been given on a totally different factual matrix is not applicable to the facts of the present case.

111. Reliance was also placed on the decision in the case of *India Thermal Power Ltd. Vs. State of M.P. and Others*, . The learned Counsel relied on the said judgment in order to contend what is a statutory contract. From the facts of this case, it is clear that the contract in question in that case was entered into by the Electricity Board for purchasing of electricity on such terms as may be agreed. Section 43A(1) enabled a generating company to enter into a contract for sale of electricity generated by the Electricity Board. that is a mere enabling provision. But the tariff which has to be determined must be on such terms as may be agreed by the parties with the condition that such tariff should be determined keeping in view Section 42A(2) in mind. The Court while construing this aspect held that merely, because a contract is entered into in exercise of enabling power under a statute that by itself does not make the contract a statutory one. But the Court held that if for entering into a contract certain prescribed terms and conditions are laid down in the statute are followed, in that case, it is a statutory contract. Here we are not concerned with these questions at all. Here the provisions of the said act has been referred only for the purpose of showing that by entering into such a contract the authorities are discharging their functions under the act. Therefore, it is not a pure commercial contract but a contract which has a public law aspect and it has been entered into by the corporation in order to discharge of public function.

112. The other judgment relied on by the learned Counsel of the Respondent is in the case of *Kerala State Electricity Board and Another Vs. Kurien E. Kalathil and Others*, . It appears from a reading, of the said judgment that an appeal was taken to Supreme Court from a judgment delivered dealing with two writ petitions namely O.P. No. 283 of 1995 and O.P. No. 10759 of 1997. of these two writ petitions O.P. No. 283 of 1995 was concerned with the question of payment

of amount of labour escalation to the contractor with interest. The High Court of Kerala allowed the said writ petition. The other writ petition namely O.P. No. 10759 of 1997 challenged the termination of contract as arbitrary, this was also allowed by the Kerala High Court. Both the writ petitions were allowed by a common judgment. On appeal the Hon'ble Supreme Court passed a judgment modifying the Kerala High Court judgment in O.P. No. 283 of 1995. While doing so the learned Judges of the Supreme Court were pleased to observe that in contractual matters, questions of payment ordinarily is not the subject matter of the writ petition. The precise observation of the Supreme Court is: "Whether any amount is due and if so, how much and refusal of the Appellant to pay it is justified or not, are not the matters which could have been agitated and decided in a writ petition" (para. 11, page 299).

113. Insofar as the other writ petition being O.P. No. 10759 of 1997 is concerned the Supreme Court did not set aside the Kerala High Court judgment quashing the termination of contract. Therefore, the said judgment is an authority for the proposition that High Court can set aside in writ jurisdiction an order of termination of contract.

114. Therefore, it is clear that the points which are in issue in the present case are not covered by any one of the decisions cited by the learned Counsel for the Respondents.

115. The learned Counsel for the Respondent has cited certain decisions for the purpose of contending that the Division Bench judgment in the case of M/s. Soft Line Multi-media in A.P.O. No. 354. of 2000 is per incuriam and should not be followed by me sitting singly. Since this Court has dealt with the points urged in this batch of writ petitions, without relying on the said Division Bench judgment, those cases cited by the Counsel for the Respondents on the question whether the said Division Bench is binding on me as a precedent or not need not be considered by me.

116. In Support of the contention that the arbitration clause contained in contract provides for an alternative remedy, certain decisions have been cited by Mr. Roy, the learned Senior Counsel who urged for the Respondents, Before examining those decisions the Court proposes to look into the arbitration clause namely Clause 23 in the agreement. The said clause runs thus "in the event of any dispute or difference between parties hereto, such dispute or difference shall be resolved by mutual consultation. If such resolution is not possible, then the same shall be referred to the Chief Executive of Prasara Bharati whose decision shall be final".

117. Here it is not the case of the Respondent that there has been any attempt to resolve the dispute or difference by mutual consultation. Even in the course of argument, it has not been urged by either of the parties that the dispute between them can be resolved by mutual consultation. In fact appears from the stand taken by Respondent in their affidavit and also in their argument that the

decision in the impugned order is final. They have also urged even if the decision is wrongful, it is open to the Petitioners to assail same before a civil court to recover damages.

118. Having taken that stand that the dispute between the parties can be decided by a Civil Court, assuming that the stand is correct, it is not open to the Respondents to urge that the suggested mode of resolution of the dispute by the Chief Executive of Prashar Bharati under Clause 23 is an effective and alternative remedy to the aggrieved party.

119. It is well settled that the mere existence of an alternative remedy does not oust the jurisdiction of a writ court. Its existence merely operates as some kind of a restraint on the discretion of the writ court while exercising its power. But this principle is subject to well known exceptions the most important of which is that the writ court, before declining its jurisdiction, must be satisfied that the remedy is equally efficacious and effective compared to the one which the writ court can give to the aggrieved party.

120. Here the Court's conscience is not satisfied that the aggrieved party can be non-suited on the mere existence of remedy under Clause 23.

121. Now turning to the cases cited on this aspect, this Court finds that the decision was in the case of *Girdharilal Bansal v. The Chairman of Bhakra Beas Management Board* AIR 1985 Pun. and Har. 219. Reliance was placed on para. 7 of the said judgment. In that paragraph the learned Single Judge was pleased to hold that if the named arbitrator is satisfied that he is the arbitrator in the agreement he is duty bound to call upon the opposite parties to file the counter claim and proceed with the arbitration. If the arbitrator fails to do so and allows time to pass that may be a case for his removal. This Court fails to appreciate the relevance of this principle in the facts of the present case.

122. In the case of *State of West Bengal and others Vs. Haripada Santra*, , the Division Bench was deciding the question whether the relevant clause in the contract is an arbitration clause in the absence of the expression "award of arbitration" not appearing in the clause. After considering various case laws on the point, the learned Judges held that the clause in question is an arbitration clause. Here it is not disputed that Clause 23 is an arbitration clause. But the question is whether or not such clause ousts the jurisdiction of the writ court. So the aforesaid Calcutta decision does not throw any light on this question as it was not in issue before it.

123. To the same effect is the judgment of a Single Judge of Delhi High Court in the case of *Vttam Wires and Machines v. The State of Rajasthan* AIR 1990 Del. 72. In that judgment, the learned Judge of Delhi High Court held that in determining whether a clause in the contract is an arbitration clause or not, the substance and not the form has to be seen. Therefore, the ratio in that decision has no application here.

124. So this Court is of the opinion that Clause 23 in the contract does not oust the jurisdiction of this Court.

125. Apart from that this Court finds that in this batch of cases various constitutional issues have been debated. Very many decisions of Supreme Court on questions of administrative law and the application of principle of Article 14 in the contractual field have come up for consideration. As early as in 1969, it was observed by the Supreme Court in Hanif's (1969) 2 S.C.C. 782 at 786 case that where the jurisdiction of the writ court has been invoked by the aggrieved party not merely for enforcing contractual right but to decide "important constitutional issues" a writ petition would lie. It may be noted that those observations fell from Supreme Court even though the dispute in Hanif's (supra) case arose out of lease deed and on the government's right of resumption under clause v. of the lease and Article 14 was not even urged in that case. So this Court is of the view that the remedy under Clause 23 of the contract is not an alternative remedy in the facts of this case.

126. The learned Counsel for the Petitioner has urged a point of the question following the principles of natural justice and cited certain decisions to show that noncompliance with principles of natural justice renders void the resultant decision. There can hardly be any dispute on that score. But the factual aspect here is quite different.

127. The clause empowering termination itself speaks of notice either of 15 days or of fortnight. Notice would obviously imply that immediate action without notice is not contemplated under the contract. Therefore, the Court does not have to read into the contract the obligation to give notice. It appears prior notices have been given in respect of all the impugned actions taken by the Respondents. It the Petitioners, immediately on getting the notice file any representation this Court expects that the Respondents will dispose of the same before the date from which the notice takes effect. But here nothing of that sort has happened in as much as immediately on getting the notices the Petitioners challenged them before this Court.

128. So the Court holds, that in given situation, if pursuant to such a notice any representation is promptly made that should be considered and disposed of by the Respondents before the material date. The Court, however, does not think that any oral hearing is a must. This is left to the discretion of the authorities. If they feel that any oral hearing is required to clarify any aspect of the dispute, they are at liberty to do so.

129. But this Court does not hold that any hearing or chance of making a representation is called for even before a notice is issued. Such a finding would alter the terms of the agreement freely entered into by parties. This the Court cannot do.

130. So this Court is of the opinion that principles of natural justice have not been violated in this case.

131. For the reasons and discussion aforesaid, the impugned notices all dated September 29, 2000, (Annex. L) in W.P. No. 2744 of 2000 (Janmabhoomi), being Annexs. "J" and "K" in W.P. No. 2743 of 2000 (Mukhomukhi) and (Suprobhat) and in W.P. No. 2742 of 2000 (Khas-Khabor) are quashed and should not be given effect to.

132. But this will not prevent the Respondents from acting strictly in terms of the contract between the parties in a given situation. These writ petitions are thus allowed to the extent indicated above. There will be no order as to costs.