
(2015) 11 JH CK 0003
In the Jharkhand High Court
Case No : W.P. (S) No. 6542 of 2014

Ranchi Power Distribution Company Ltd. and Others	APPELLANT
Vs	
Jharkhand Bijli Vitran Nigam Ltd. and Others	RESPONDENT

Date of Decision : 19-11-2015

Acts Referred:

Constitution of India, 1950 — Article 14, 226, 32
Criminal Procedure Code, 1973 (CrPC) — Section 133
Electricity (Supply) Act, 1948 — Section 5
Electricity Act, 2003 — Section 12, 13, 131, 133, 14
Land Acquisition Act, 1894 — Section 17
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13(4), 17

Citation : (2015) 11 JH CK 0003

Hon'ble Judges : Rongon Mukhopadhyay, J.

Bench : Single Bench

Advocate : S. Pal, Senior Advocate, Vineeta Meharia, Rishav Dutt and Ananda Sen, Advocate, for the Appellant; Ajit Kumar Advocate, for the Respondent

Final Decision : Allowed

Judgement

Rongon Mukhopadhyay, J.—Heard Mr. S. Pal, learned senior counsel appearing for the petitioners, Mr. Ajit Kumar, learned senior counsel appearing on behalf of respondent No. 1 and 2 and Mr. Sumeet Gadodia, learned counsel appearing for the proforma respondent.

2. In this writ application, the petitioners had initially prayed for the following reliefs:

"a. "A declaration that the purported decision of JBVNL (as will be evident from its affidavit filed on 17th November, 2014 in LPA No. 247 of 2014 and its board meeting dated 5th August 2014) that there had been gross irregularities and loss of revenue to the tune of Rs. 15,000 crores in the appointment of the petitioners as the distribution franchisee for Ranchi Circle and the consequent threat held

out is unfair, unreasonable, arbitrary, malafide, illegal and bad;

b. A writ of and/or in the nature of Mandamus do issue directing the respondent authorities and their men, agents and subordinates to forthwith forbear from acting on the basis of the purported decision of JBVNL (as will be evident from its affidavit filed on 17th November, 2014 in LPA No. 247 of 2014 and its board meeting dated 5th August, 2014) that there had been gross irregularities and loss of revenue to the tune of Rs. 15,000 crores in the appointment of the petitioners as the distribution franchisee for Ranchi Circle;

c. A writ of and/or in the nature of Mandamus do issue directing the respondent authorities and their men, agents and subordinates to (i) forthwith complete the conditions precedent prescribed in the DFA dated 5th December, 2012 and physically handover the existing site along with the distribution network for Ranchi Circle to the petitioners in accordance with the commitment made by the state respondents in public interest; (ii) forthwith complete the condition precedent regarding completion of audit of various parameters as represented in the RFP dated 30th April 2012 (as Modified) and DFA dated 5th December, 2012; (iii) forthwith complete the condition precedent regarding calibration of meters as contemplated under Article 2.1.4 of the DFA dated 5th December, 2012; and (iv) forthwith complete all other conditions precedent contemplated;

d. A writ of and/or in the nature of Certiorari do issue directing the respondents to produce the records pertaining to the purported decision of JBVNL that there had been gross irregularities and loss of revenue to the tune of Rs. 15,000 crores in the appointment of the petitioners as the distribution franchisee for Ranchi Circle, so that conscionable justice may be done by quashing the same;

e. Appropriate Writs and/or orders and/or direction do issue as would afford complete relief to the petitioners;

f. Rule Nisi in terms of the prayers above;

g. Stay of the purported decision of JBVNL (as will be evident from its affidavit filed on 17th November, 2014 in LPA No. 247 of 2014 and its board meeting dated 5th August 2014) that there had been gross irregularities and loss of revenue to the tune of Rs. 15,000 crores in the appointment of the petitioners as the distribution franchisee for Ranchi Circle;

h. Direction upon the respondents and their men, agents and subordinates to complete the conditions precedent contemplated under the DFA dated 5th December, 2012 and physically handover the existing site along with the distribution network for Ranchi Circle to the petitioners;

i. Restrain the respondents from taking any coercive action against the petitioners;

j. Ad-interim orders in terms of the prayers (a) to (i) above;

k. Such further or other order or orders be made and/or directions be given as

this Hon"ble Court may deem fit and proper."

3. During the pendency of the writ application by virtue of letter dated 06.05.2015, the agreement entered into for distribution of power for Ranchi Circle between the Jharkhand State Electricity Board and Ranchi Power Distribution Company Pvt. Ltd. (Distribution Franchisee) and M/s. ESCL (confirming party) was terminated.

4. An amendment application was preferred by the petitioner No. 1 seeking to amend the writ application by making a challenge to the letter of termination dated 06.05.2015 and the same was allowed by this Court vide order dated 22.05.2015. The amended prayer incorporated in the prayer portion reads as follows:

"1(l) "A further declaration that the letter dated 6th May, 2015 issued by respondent JVBNL purporting to terminate the DFA dated 5th December, 2012 and the purported re-tendering process initiated by issuance of the expression of interest dated 8th May, 2015 in respect of Ranchi Circle is unfair, arbitrary, malafide, illegal and bad.

1(m) A further writ of and/or in the nature of Mandamus do issue directing the respondent authorities and their men, agents and subordinates to forthwith forbear from acting on the basis of and/or in furtherance of the purported termination letter dated 6th May, 2015 and the purported re-tendering process initiated by issuance of the expression of interest dated 8th May, 2015 in respect of Ranchi Circle;

1(n) A further writ of and/or in the nature of certiorari do issue directing the respondent authorities to produce the records pertaining to the purported termination letter dated 6th May, 2015 and the purported re-tendering process initiated by issuance of the expression of interest dated 8th May, 2015 in respect of Ranchi Circle, so that conscionable justice may be done by quashing the same;

1(o) Stay of operation of the purported termination letter dated 6th May, 2015 and the purported re-tendering process initiated by issuance of the expression of interest dated 8th May, 2015 in respect of Ranchi Circle."

5. The petitioner No. 2, C.E.S.C. Limited, is engaged in the business of generation, transmission and distribution of electricity since 1899. It is the sole distributor of electricity over an area of 567 square kilometer of Kolkata and Howrah in the State of West Bengal. The averments made in the writ application further denote that C.E.S.C. Limited owns and operates transmission and distribution system, which comprises 800 MVA of 220/132/33KV sub station capacity, over 2500 MVA of 132/33 KV sub-station capacity, 105 distribution stations, 7692 LT sub-stations of over 2500 MVA comprising over 2000 circuit kilometer of transmission lines linking CESC's generating and receiving stations with 85 distribution stations. There are over 6,000/- circuit kilometer of high

tension lines linking distribution stations with low tension substations to large industrial consumers and over 12,000/- circuit kilometer of low tension lines connecting the low tension substations to low tension consumers.

6. The Electricity Act, 2003 was enacted by the Parliament and the object behind the Act was to consolidate the law relating to generation, transmission, distribution, trading and use of electricity and generally for taking measures conducive to development of electricity industry, promoting competition therein, protecting interest of consumers and supply of electricity to all areas, rationalization of electricity tariff, ensuring transparent policies regarding subsidies, promotion of efficient and environmentally benign policies, constitution of Central Electricity Authority, Regulatory Commissions and establishment of Appellate Tribunal and for matters connected therewith or incidental thereto.

7. Since the generation of supply and distribution of electricity for whatsoever reasons was erratic, Jharkhand State Electricity Board (hereinafter referred to as the JSEB) decided to bring in management expertise through public private participation for distribution of electricity by appointing a distribution franchise, pursuant to which, on 7.3.2011, a resolution was adopted by the Cabinet of State of Jharkhand for appointment of distribution franchise. The resolution noted that JSEB's aggregate transmission and commercial loss(A.T&C) was much higher than the national figure for such loss, as a result of which, JSEB was burdened with a huge financial crisis. The basic purpose, as had been recorded in the said resolution for appointment of distribution franchise, was to reduce AT & C loss, improved metering, billing and collection, reduced capex and operating expenses, increase in revenue, improvement in industrial and other economic activity and improved customer satisfaction. The Cabinet resolution dated 7.3.2011 further resolved that Jharkhand Infrastructure Development Corporation Ltd. (hereinafter referred to as JINFRA), which is a joint venture of JIDCO and IL&FS Ltd., would be appointed by JSEB as a consultant for the purpose of selection of distribution franchisee. In terms of the Cabinet Resolution mentioned above on 6.9.2011, JSEB executed an agreement in favour of JINFRA and on 18.10.2011, JSEB issued work order in favour of JINFRA.

8. On 30.04.2012, JSEB issued a Notice inviting Request for Proposal for selection of Distribution Franchisee for Ranchi Circle, Dhanbad Circle and Jamshedpur Circle. In terms of the said notice, the last date for submission of bids was 15.06.2012. A Pre-Bid Meeting was held with the prospective bidders on 21.05.2012 for the purpose of discussions and queries. Apart from CESC, several prospective bidders like M/s. Essar Power Ltd., M/s. Tata Power Ltd., M/s. Reliance Infra, M/s. JUSCO, M/s. India Power Corporation Ltd. etc. participated. A corrigendum was issued by the JSEB on 14.06.2012 modifying the terms of the original "Request for Proposal" for Ranchi Circle based on pre-bid discussions and queries received from prospective bidders and the last date for submission of bid was extended to 10.07.2012. On a communication made by CESC with respect to reserve price/bench mark price provided in modified Request for Proposal

document, since the same did not take into consideration, the costs of operation and detailed justification for revision thereof, a corrigendum dated 7.7.2012 was issued by JSEB extending the last date for submission of bid to 25.07.2012. The reserve price/bench mark price was revised by JSEB vide corrigendum dated 13.07.2012 and the said revision was made by JSEB based on the report of JINFRA dated 12.07.2012.

9. The petitioner No. 2 (CESC) submitted its bid in respect to Ranchi Circle, Dhanbad Circle and Jamshedpur Circle on 25.07.2012. Bids were also submitted by a consortium of Direct Media Distribution Ventures (P) Limited and Enzen Global Solutions Limited. CESC withdrew its bid in respect of Ranchi Circle, Dhanbad Circle and Jamshedpur Circle on 9.8.2012. In accordance with the terms of the Request for Proposal and subsequently on 10.08.2012, it resubmitted its bid with respect to Ranchi Circle and Jamshedpur Circle only leaving Dhanbad Circle, for which it did not bid. The technical bids were evaluated by the Technical Bid Evaluation Committee of JSEB on 4.9.2012 and the said committee recommended short listing of CESC and Tata Power, both for Ranchi and Jamshedpur Circles. On 9.10.2012, JSEB issued a Letter of Intent in favour of CESC appointing it as a Distribution Franchisee for Ranchi Circle.

10. In accordance with the terms of the "Request for Proposal", CESC incorporated a Special Purpose Company under the name and style of Ranchi Power Distribution Company Ltd., which is the petitioner No. 1 in the present writ application.

11. After the finalization of the process on or about 6.1.2014 in exercise of the powers conferred by Sections 131 , 133 and other applicable provisions of the Electricity Act, 2003, the Government of Jharkhand vide Notification No. 18 transferred the properties, interests, rights, assets, liabilities, obligations, proceedings and personnel of JSEB to the transferee namely Jharkhand Urja Vikas Nigam Ltd. (JUVNL), Jharkhand Urja Utpadan Nigam Ltd. (JUUNL), Jharkhand Urja Sancharan Nigam Ltd. (JUSNL) and Jharkhand Bijli Vitran Nigam Ltd. (JBVNL), in terms of Jharkhand State Electricity Reforms Transfer Scheme, 2013.

12. Mr. S. Pal, learned senior counsel for the petitioners, has referred to the Electricity Act, 2003 and has submitted that Part III of the Act refers to generation of electricity and Section 7 gives leverage to any generating company to establish, operate and maintain a generating station without obtaining a licence under the Act if it complies with the technical standards relating to connectivity with the grid referred to in Clause (b) of Section 73 . Section 12 prohibits any person to transmit electricity or distribute electricity or undertake trading in electricity unless he is authorised to do so by a licence under Section 14 or is exempt under section 13 . Section 14 of the Act deals with the grant of licence, in which the appropriate commission may, on an application under section 15 , grant a licence to any person to transmit electricity as a transmission licensee or to distribute electricity as a distribution licensee; or to undertake

trading in electricity as an electricity trader, in any area as may be specified in the licence. The appropriate commission so far as the present case is concerned is the Jharkhand State Electricity Regulatory Commission (hereinafter referred to as the JSERC). Learned senior counsel has while referring to section 14 of the Act highlighted the 7th proviso to section 14, wherein it has been envisaged that in a case where a distribution licensee proposes to undertake distribution of electricity for a specified area within his area of supply through another person, that person shall not be required to obtain any separate licence from the concerned State Commission, which in the present case is JSERC and such distribution licensee shall be responsible for distribution of electricity in his area of supply. It has, therefore, been submitted that the initiation of appointing a distribution franchisee in separate areas flows from the provisions of the Act. In this background, Mr. Pal, learned senior counsel for the petitioner, has tried to focus on the agreement the subsequent developments framed in the minutes of meetings and the various steps taken by the distribution franchisee to fulfill their part of the agreement, which has been frustrated on account of dilatory tactics and non-cooperation from the Board leading to termination of the agreement itself.

13. It has been submitted that JSEB was incharge of generation, transmission, distribution etc. of electricity in the entire State of Jharkhand. Since the JSEB was suffering from severe financial constraints and aggregate transmission and commercial loss (AT&C) was to the tune of 40%, it decided to appoint distribution franchisee for various areas, it had carved out. The Request for Proposal for appointment of distribution franchisee, was issued and Article 12.1 of the Request for Proposal, delineates mandating JINFRA by JSEB to undertake the competitive bidding process for selection of a distribution franchisee for distribution of electricity in franchisee area. Subsequently, on 5.12.2012, the Distribution Franchisee Agreement for distribution of power for Ranchi Circle was entered into between the JSEB and M/s. Ranchi Power Distribution Company Pvt. Ltd.(petitioner No. 1) referred to in the agreement as distribution franchisee and M/s. CESC Ltd. (petitioner No. 2) was referred to in the agreement as the successful bidder.

14. Learned senior counsel for the petitioners has drawn the attention of the Court to Article 1(A) of the Agreement dated 5.12.2012, which relates to definition of various terms and which are according to learned senior counsel carries importance in the ultimate analysis of the pros and cons of the entire case in its proper perspective and the meaning assigned to each of the said definition, which for a constructive decision in the case, is quoted hereinbelow:--

"Article-1: Definition of Terms

A. Definitions

For the purpose of this Distribution Franchisee Agreement (including all its Appendices), the following capitalized terms, phrases and their derivations shall

have the meanings given below unless the context clearly mandates a different interpretation. Where the context so indicates, the present tense shall imply the future tense, words in plural include the singular, and words in the singular include the plural.

Accounting year

Shall mean the financial year commencing on 1st April in each year and ending on 31st March in the next year except in the first and last calendar year. In the first year of the subsistence of this Agreement, it means the period from the Effective Date to the next date of 31st March and in the last year of the subsistence of this Agreement, it means the period from 1st April till the transfer date;

Accounting Firm

Shall mean the accounting and/or auditing firms duly recognized by the institute of Chartered Accountants of India (ICAI). ICAI is a statutory body established under the Chartered Accountants Act, 1949 (Act No. XXXVIII of 1949) for the regulation of the profession of Chartered Accountants in India;

Agreement Representative

Shall mean the persons, nominated by the parties as set forth in Article-19.4;

Aggregate Technical and Commercial Losses (AT & C Losses)

Shall mean the sum total of technical loss, commercial losses and shortage due to non realization of total billed demand. The AT & C losses shall be measured using the formula mentioned below:--

Formula for AT & C: Losses

AT & C Losses : $[1 - (\text{Billing Efficiency} \times \text{Collection Efficiency})] \times 100$

Where,

Billing Efficiency = $\text{Total Units Sold (LU)} / \text{Total Input (LU)}$

Collection Efficiency = $\text{Revenue collected (Rs.)} / \text{Amount Billed (Rs.)}$

Illustration:

AT&C Losses for the Project Area (Sample)

Appointed Date

Shall mean the date of execution of the Distribution Franchisee Agreement;

Base Year

Shall mean the financial year 2010-2011;

Effective Date

Shall mean the date of handing over of the business operations of Franchisee Area by JSEB to the Distribution Franchisee pursuant to this Agreement after the respective conditions precedent have been satisfied/fulfilled by the Parties:--

Input Energy or Energy Input

Shall mean electricity supplied by JSEB at the Input Points;

Input Point

Shall mean 33 KV side of 132/33 KV Sub-stations and shall include such other EHV/HV substations or feeders, which may feed energy to the Franchisee Area at the Effective Date or during the term of the Agreement;"

15. It has been submitted that the supply of electricity begins at the generating station and from the Power Generating Station the extra high voltage transmission line transmits electricity to the grid sub station and thereafter by virtue of 132 KV transmission line, the same gets connected to 132/133 KV Sub station, which is the 33 KV transmission input point, from where the distribution of electricity starts, which is the role of the distribution franchisee and through various processes it comes to the distribution transformers, from where the distribution lines connect to the low tension consumer.

16. It has further been submitted that the input energy or energy input are with respect to the supply of electricity by the JSEB. At the input point the input energy is also a pervasive factor in calculating sum total of technical loss, commercial loss and shortage due to non realization of total billed demand and it is commonly referred to as the aggregate technical and commercial loss (AT&C) losses. It has, thus, been submitted that by virtue of the Distribution Franchisee Agreement, the distribution of electricity became the bounden duty of the franchisee i.e. the petitioner No. 1 to distribute electricity in Ranchi Circle after the terms and conditions of the agreement are fulfilled. It has also been submitted that AT&C losses again comes into the picture with reference to Article 2 of the Agreement, which relates to conditions precedent and conditions subsequent and the conditions precedent are quoted hereunder:--

"2.1.1- Submission of Performance Guarantee

The Distribution Franchisee shall submit and maintain valid for the term of this Agreement, a Performance Guarantee to the satisfaction of JSEB in the form of an irrevocable and unconditional standby Bank Guarantee (BG) from any nationalized bank of ICICI bank, IDBI bank, Axis bank, HDFC bank for an amount equivalent to estimated amount payable to JSEB by Distribution Franchisee based on thrice the monthly average of Energy Input at Input Points in Franchisee Area in the Base Year and Input Rates quoted by the Distribution Franchisee for first year of Franchisee term and to be renewed in line with Article 11 of the DFA, each year upto one(1) year after the Expiry of the Franchisee term.

2.1.2- Infrastructure Roll-out Plan

The Distribution Franchisee shall submit an infrastructure roll-out plan to JSEB stating the Investments to be carried out by the Distribution Franchisee in the Franchisee Area to lower the AT&C Losses and improve the quality of supply. However, such investments by the Distribution Franchisee shall be subject to JSERC approval. JSEB shall facilitate, on best effort basis, the approval of the infrastructure roll out plan from JSERC. Any investment by the Distribution Franchisee which is not approved by the JSERC shall not be compensated by JSEB at the Distribution of the Franchisee. The approved infrastructure Rollout plan shall become the part of the Distribution Franchisee Agreement as Annexure-A.

2.1.3- Completion of Audit of Various Parameters.

In order to carry out the Audit of various parameters, JSEB and the Distribution Franchisee shall appoint an Independent Auditor in mutual consultation within one (1) month of the signing of the Agreement. The Independent Auditor shall carry out and complete audit of the parameters within four (4) months of the Distribution Franchisee Agreement as listed below.

2.1.3.1 Opening level of AT&C Losses and Collection Efficiency.

2.1.3.2 Opening Asset Register

2.1.3.3 Opening level of inventory;

2.1.3.4 Opening Contracts as on Effective Date; and

2.1.3.5 Determination of average tariff for the Base Year for the purpose of Article 7.

In case upto 10% variation found by the Independent Auditor between the figures given in the RFP document and the final figures arrived by the Independent Auditor, the Financial Proposal as submitted by the Successful Bidder will remain unchanged. In case of abnormal gap (more than 10%) found by Independent Auditor between the figures given in the RFP document and the final figures arrived by the Independent Auditor, the Input price as framed up of Successful Bidder shall be adjusted as per the decision of the Independent auditor in this regard and the decision of the independent Auditor shall be final.

2.1.4 Calibration of Meters

The authorized representatives of JSEB and the Distribution Franchisee shall conduct a joint Calibration of the Interface meters at the Input Points. The Distribution Franchisee shall install 0.2 Class Main Meters and Check Meters at all the Input Points at its own cost and expense.

2.1.8 Each party shall make all reasonable endeavors at its respective cost and expense to comply in full with the Conditions Precedent relating to it within six(6) months of signing of this Agreement or such further period as may be extended

by the parties mutually. If, the Distribution Franchisee fails to satisfy its condition precedent, within the stipulated duration, JSEB shall be entitled to terminate this Agreement and forfeit the earnest money deposit of the Distribution Franchisee at its discretion.

2.1.9 In the event this Agreement is terminated due to non fulfillment of the JSEB's Conditions Precedent and the same is not due to Distribution Franchisee default, JSEB shall upon such termination return/refund in full the earnest money deposit/Performance Guarantee, if any, to the Distribution Franchisee without any interest, provided there are no outstanding claims of JSEB on Distribution Franchisee."

17. Attacking the tenor and purport of Article 2.1.1, learned senior counsel for the petitioners submits that as a condition precedent, the bank guarantee was to be submitted for an amount equivalent to estimated amount payable to JSEB by the distribution franchisee and it is based on a certain formula mentioned in the said clause itself but the amount of bank guarantee, which is to be furnished by the distribution franchisee was an unknown figure and the same was subject to the audit, which was to be conducted by an independent auditor and the first parameter, which was necessary to be fulfilled was the qualification of opening level of AT & C Losses and collection efficiency and therefore, it has been submitted that in absence of a final calculation of the opening level of AT & C Losses and collection efficiency, no bank guarantee could have been estimated or prepared on the basis of an unspecified amount. It has further been submitted that the infrastructure roll-out plan to be submitted by the distribution franchisee was subject to special approval of JSERC as non approval by JSERC, as has been indicated in the said clause of any investment by the distribution franchisee, shall not be compensated by JSEB. Mr. Pal, learned senior counsel, while referring to the infrastructure roll-out plan has given much stress on the terms "facilitate", "best effort basis" in order to substantiate his argument to the effect that the said clause also indicate the lead role, JSEB had to play to get the said plan approved by the JSERC. Article 2.1.3 of the agreement is according to learned senior counsel for the petitioners of utmost importance in view of subsequent developments, which had occurred leading to termination of the agreement. Learned senior counsel for the petitioners further submits that an independent auditor in mutual consultation with the JSEB and petitioner No. 1 was appointed but the independent auditor was handicapped on account of non furnishing of several relevant information required for the purposes of submission of the report based on the parameters mentioned at Article 2.1.3.1 to Article 2.1.3.5. Much thrust has been given on Article 2.1.8 for complying with the conditions precedent within six months from the date of signing of the agreement. Mr. Pal, learned senior counsel, has submitted that the spirit of Article 2.1.8. is for each party in the agreement to make reasonable endeavours for fulfilling the conditions precedent within six months of signing of the agreement, which would mean that it was incumbent upon the JSEB also to cooperate and fulfill its responsibility in a constructive fashion. Article 2.1.8, as argued by learned senior

counsel for the petitioners, stipulates that the time was not the essence of the contract, which can be read into the agreement itself, which can be extended mutually for further periods. The discretion, which vests in JSEB for termination of the agreement, cannot be in a whimsical and capricious manner, as has been done in the present case but the same has to be exercised in a fair and reasonable manner. JSEB being a public authority cannot be expected to act in such fashion as it has, as duty is cast upon the JSEB to respect and regard the entire facets starting from entering into an agreement and the subsequent progress made for commissioning the entire system towards handing over of the distribution franchisee to the petitioner No. 1. Article 16.3 envisages termination procedure in event of default by distribution franchisee but the said provision has been completely ignored while issuing the letter of termination by taking recourse to Article 2.1.8 of the agreement, wherein by exercising its discretion, which itself is an arbitrary action on the part of the JSEB, as such discretion is apparently unreasonable and beyond the purview of the principles of natural justice. Mr. Pal, learned senior counsel for the petitioners, has next drawn the attention of the court to Article 11 of the Agreement, which relates to performance guarantee and which is quoted herein below:--

"Article-11 Performance Guarantee

As provisioned in the Article-2.1.1 of this Agreement. The Distribution Franchisee shall submit and maintain valid for the term of this Agreement, a Performance Guarantee to the satisfaction of JSEB in the form of an Irrevocable and unconditional standby Bank Guarantee (BG) from any nationalized bank or ICICI bank, IDBI bank, Axis bank, HDFC bank for an amount equivalent to estimated amount payable to JSEB by Distribution Franchisee based on thrice the monthly average of Energy Input at Input points in Franchisee Area in the Base Year and Input Rates quoted by the Distribution Franchisee for first year of Franchisee term and to be renewed in line with this Article of the DFA; each year upto one (1) year after the Expiry of the Franchisee term.

11.1-The Bank guarantee (BG) shall be initially valid for a period of one (1) year from the Effective Date.

Article 11 is in conformity with the Article 2.1.1 of the Agreement and it does not resolve the specific amount of bank guarantee, that has to be deposited as a conditions precedent, rather the same merely reiterates what has been stated at Article 2.1.1 dealing with an "estimated amount".

18. Mr. Pal, learned senior counsel has thereafter referred to Article 16 of the agreement which relates to event of default and termination and Article 16.1.1 depicts the critical event of default by Distribution Franchisee on failure to perform the obligations mentioned in the sub-articles. Mr. Pal has highlighted the termination procedure in the event of default by the Distribution Franchisee and the same envisages notice upon the Distribution Franchisee in the event of default or failure to eliminate the consequences of event of default which have

led to preliminary service of notice of termination to the Distribution Franchisee. For better appreciation of the case, Article 16, 16.1 and 16.3 along with its sub-articles are quoted hereinbelow:

"Article 16: Event of Default and Termination

16.1 Distribution Franchisee Event of Default

The occurrence and continuation of any of the following events, unless any such event occurs as a result of a Force Majeure event or a breach by JSEB of its obligations under this Agreement shall constitute a Distribution Franchisee event of default.

16.1.1 Critical Event of Default

16.1.1.1 Critical event of default by the Distribution Franchisee shall mean failure or refusal by Distribution Franchisee to perform its following obligations under the Agreement:

- a. Failure on account of Distribution Franchisee to make payments as per Article - 7 of this Agreement;
- b. Failure to submit in time the Information Report as per Article 13.1.1, 13.1.2 and 13.1.3;
- c. Failure to maintain a Performance Guarantee as per the Article 11 of this Agreement;
- d. Failure to maintain minimum service quality due to inadequate capital investments.

16.1.2 The other critical events of default are:

- a. The Distribution Franchisee has engaged in a corrupt practice or/and fraudulent practice in competing for executing the contract.
- b. A resolution for winding up has been passed by the majority shareholders of the Distribution Franchisee.
- c. The Distribution Franchisee is declared insolvent or bankrupt.
- d. The Distribution Franchisee has unlawfully repudiated this Agreement or has otherwise expressed an intention not to be bound by this agreement.
- e. Any representation or warranty made by the Distribution Franchisee during the term of the agreement is found to be false and misleading.
- f. The Distribution Franchisee is indulging in any malpractice or corrupt practice or fraudulent practice(s).
- g. Sale of Input energy in the Franchisee Area to any party outside the Franchisee Area.

h. Failure to comply with non-critical events of default within the specified period.

16.3 Termination Procedure for Event of Default by Distribution Franchisee

16.3.1 On the occurrence of any Event of Default, or its coming to notice of JSEB, JSEB shall issue an Event of Default notice to the Distribution Franchisee.

16.3.2 The Distribution Franchisee shall eliminate/mitigate consequences of such Event of Default within a period of 15 days for Event of Default cited at Article 16.1.1.1 and 60 days for Events of Default cited at Article 16.1.1.2

16.3.3 In case of Distribution Franchisee is unable to eliminate/mitigate the consequences of Event of Default within the period stipulated at Article 16.3.2 a preliminary notice of termination may be served by JSEB to the Distribution Franchisee, elaborating the event of default by Distribution Franchisee.

16.3.4 If the default is not cured within a period of thirty days from the date of issuance of preliminary notice for termination as provided in Article 16.3.3, this Agreement may be terminated after serving the final termination notice to the Distribution Franchisee. The final termination notice shall mention the date of termination of agreement.

16.3.5 It is expressly agreed that both the parties shall continue to perform their respective obligations until the serving of final termination notice, whereupon this Agreement shall terminate on date of such notice.

16.3.6 JSEB shall exercise its step-in-rights after serving the final termination notice. The Distribution Franchisee shall be obliged to extend transition assistance for a period of 30 days from the serving of such Final termination notice, failing which the costs and expenses incurred by JSEB on the account of non-provision of such assistance by the Distribution Franchisee shall be recovered from the Termination payment of the Distribution Franchisee."

19. While referring to Article 16.3, it has been strenuously argued that the entire chronology of events leading to termination of the agreement never does suggest that the petitioner No. 1 was ever at fault or for that matter any prior notice of termination was issued upon the distribution franchisee. Reiterating his argument earlier that a public authority has to act in a reasonable and fair manner being an embodiment of public authority and trust, it could not have taken recourse to Article 2.1.8 when there is a specific provision provided in Article 16.3, and the act of the respondent No. 1 in terminating the contract shows its apathy towards the principles of natural justice. It has further been submitted that active participation is envisaged in the termination clause before coming to a finding but the termination letter, which has been issued was like a bolt from the blue without any prior warning or a prior intimation for petitioner No. 1 to clarify and convince the Board about the efforts being made by the petitioner No. 1. Learned senior counsel also submits that Article 2.1.8 of the Agreement and Article 16.3 is not mutually exclusive as Article 2.1.9 does not in express terms exclude the operation of the termination clause at Article 16.3. Referring to Article 16.4,

which relates to the termination procedure in the event of default by JSEB, it has been submitted that the entire process was slow on account of dilatory tactics and non fulfillment on their part of the agreement but the petitioners did not invoke Article 16.4 strictly on the issue of public interest and public purpose as the background would suggest that in corroborating a distribution franchisee for distribution of electricity was only to sub-serve public purpose and the petitioner No. 2 being a company of repute had entered into the playing field only to serve the people coming within the ambit of Ranchi Circle.

20. It has been submitted that Article 2.1.8 of the DFA is a substantive provision and gives entitlement to the respondents to terminate the DFA and there is no compulsion upon the respondents to terminate the contract. If intention of Article 2.1.8 was not to comply with Article 16, then Article 2.1.8 would have expressly provided use of such expression as "termination at discretion notwithstanding Article 16 or any other provision of this Agreement." Submission has therefore been advanced that Article 2.1.8 and Article 16 of the DFA have to be read, interpreted and understood in consonance with the tenor and purport of the meanings assigned to each of them and since Article 2.1.8 is a substantive provision and not a procedural provision, the procedures enumerated in Article 16 has to be rigorously followed. It has been submitted that the issues which have been raised by the petitioners showing arbitrariness on the part of the State authorities in issuing the letter of termination dated 06.05.2015 are all related and has to be considered in unison to arrive at a just conclusion. Continuing with his argument, learned senior counsel has submitted that Article 2.1.8 contemplates 3 elements/criteria to be fulfilled in order to give occasions of entitlement for termination of the agreement. The three criteria are -

"(A) That reasonable endeavour has not been made by the writ petitioners within 6 months or mutually agreed extended period,

(B) That the respondent must be satisfied that a particular condition precedent has not been fulfilled by the writ petitioners within such period, and

(C) That the enforcement of termination is a matter of discretion."

21. Being a public body and an instrumentality of the State, the respondents cannot be permitted to take recourse to Article 2.1.8 by terminating the DFA by submitting that it had the discretion to terminate the agreement. It is a settled law that such instrumentality of the State cannot exercise its discretion in an arbitrary fashion. It must apply its mind to the factual aspects borne in each case and thereafter draw a credible inference. Mr. Pal submits that the entire facts of the case would suggest total non-application of mind on the part of the respondents as well as total non-consideration of the facts and the cooperation and the efforts which have been made by the petitioners in its determined attempts to adhere to the terms and conditions of the DFA and take up the supply of electricity in the Ranchi Circle. The arbitrary exercise of discretion also falls within the mischief of violation of principles of natural justice. Submission

has been advanced that rule of law and the constitutional scheme require that when an order is made having adverse civil consequences, principles of natural justice have to be followed irrespective of whether there is an express provision of such compliance in a statute or contract as the case may be. Initially perhaps though without any basis as would be evident from the meeting of the Board of Directors dated 05.08.2015 compliance with the principles of natural justice was contemplated, but it was not acted out which is apparent from the issuance of letter of termination dated 06.05.2015. It is an admitted fact that before issuance of the letter of termination dated 06.05.2015, the petitioners were neither given any notice of the proposed action nor were given any prior hearing and in such circumstances, therefore it has been submitted that the letter of termination dated 06.05.2015 can be held to be a nullity in view of apparent violation of principles of natural justice on the part of the respondent Nos. 1 and 2.

22. Mr. Pal, learned senior counsel in his attempt to decimate the impugned letter of termination has submitted that the letter of termination suffers from perversity as the entire evidence on record do suggest that active and earnest steps were taken by the Distribution Franchisee, the distribution licensee and the independent auditor for completion of the condition precedent. Silence on the part of the respondent Nos. 1 and 2 after 03.07.2014 was perhaps on account of interference of the minister of the State Cabinet as reflected in the letter dated 03.07.2014. It is all the more perverse to suggest that from 05.12.2012 to 06.05.2015, no activity or action was initiated by the petitioners for completion of the conditions precedent which is apparently a misdirected and misplaced version on the part of the respondents as would be evident from the continuous activities undertaken by the petitioner and which stands out if one goes through the various communications and the minutes of the meetings held between the parties. In the context of the cooperation which had been consistently extended by the petitioners, reference has been made to the communications exchanged as well as the multiple meetings attended by the officials of the petitioner. Reference has been made firstly to the letter dated 24.12.2012 issued to the Board which relates to submission of input metering scheme and on approval of the Board, the arrangement for procurement, and installment of input meters shall be made. The stipulated time for appointment of the independent auditor as mentioned in the Request for Proposal document was also extended and subsequently M/s. Ernest & Young was appointed as the independent auditor. Reference has also been made to the meetings dated 08.05.2013, 28.05.2013, 01.07.2013 and 12.07.2013 as also the consequent meetings. It has been submitted that the modalities for completing the conditions precedent were jointly worked out and in all the meetings, there was no indication of any dissent on the part of the distribution licensee and the matter was being worked out smoothly and in proper cooperation. From the communication made by M/s. Ernest & Young dated 08.09.2014, it appears that the independent auditor was making good progress and had clearly indicated that they were nearly at the

concluding stage of the assignment. The suggestions which have been given by the independent auditor was not objected to, rather the same were accepted, but in the counter affidavit filed by the respondents dated 30.06.2015, the answering respondents have made a complete U turn by stating that irrelevant objections and hurdles were put in to create delay in the implementation of the project. This according to the learned senior counsel for the petitioners is an absolutely frivolous and fallacious statement if considered in the backdrop of the work which was carried out by the petitioner. Learned senior counsel submits that the petitioner never did try to wriggle out from the agreement, but has all along shown his willingness to undertake the project, and this fact can be borne out from the letter issued on behalf of the petitioner No. 1 to the Managing Director of Jharkhand Bijli Vitran Nigam Ltd. dated 07.04.2015. Thus it would appear as per the learned senior counsel for the petitioners that from 05.12.2012 to 01.07.2014, both the parties have taken active earnest step for completion of the conditions precedent, but from 03.07.2014 to 25.02.2015, there was complete inaction on the part of the respondents - authorities towards performance of the conditions precedent.

23. Mr. Pal, learned senior counsel has also submitted that the letter of termination dated 06.05.2015 does not disclose any reasons and the reasons have been tried to be supplemented by the respondents - authorities in their counter affidavit which cannot be taken note of in view of the judgment of the Hon'ble Supreme Court in the case of Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others, . It has therefore been submitted that the respondents -authorities cannot improve their stand or travel beyond the letter of termination in trying to justify the termination of the agreement and even otherwise, the respondents - authorities did not virtually have any reason to terminate the agreement.

24. It has been submitted that in any view of the matter, the respondents - authorities had waived their right to terminate the DFA on purported ground of non completion of the conditions precedent within a period of 6 months which is the time period prescribed in Article 2.1.8 by reason of its conduct. It has further been submitted that the period for compliance of the conditions precedent was repeatedly extended by the respondents and lastly it was extended from 02.04.2013 to 14.06.2015. In fact the contract with the independent auditor M/s. Ernest & Young was also extended from time to time and lastly the same was done from 01.07.2014 till 30.09.2014. The respondents - authorities till a certain period which included the extended period also had continued to take active steps along with the petitioners for completion of the conditions precedent and even just prior to the termination of agreement, the content of the meeting held was to handover the distribution franchisee to the petitioners. Submissions have been advanced that having waived its right to terminate on purported ground of non-completion of conditions precedent within 6 months, the respondents - authorities are estopped from enforcing the same. Silence when there is duty to speak, amounts to a waiver. In this context reference has been made to the

cases of State of Rajasthan Vs. Chandra Mohan Chopra, and P.R. Deshpande Vs. Maruti Balaram Haibatti, .

25. Malafide on the part of the respondents - authorities has also been much highlighted by the learned senior counsel for the petitioners as it has been submitted that from the letter of the Department of Energy dated 03.07.2014, the Board resolution dated 05.08.2014 and the affidavit of the Jharkhand Vidyut Vitran Nigam Ltd. dated 17.11.2014 would reveal that there was a concerted move by some vested interest in not proceeding with the DFA executed in favour of the petitioners. Allegations which have been levelled in the documents under reference with respect to irregularities in the tender process leading to loss of revenue is a baseless and unfounded allegation which would be evident from the various reports/notes issued by the officials of JSEB, JINFRA and the Secretary, of the Department of Energy. It has been submitted that the initial allegations of irregularity made by the respondents seems to have been abandoned by them after the instant writ petition was filed wherein the various reports/notes were brought on record by the petitioners and a new stand has been taken by the respondents - authorities of failure to complete the conditions precedent. The entire narration of events would go to show the act of malafide on the part of the respondents in terminating the agreement.

26. It has therefore been submitted that the respondents - authorities having acted in a manner unbecoming of an instrumentality of State and the entire scenario as depicted above would go to show the inclination and cooperation of the petitioners in taking the agreement to its logical conclusion and in such circumstances, the letter of termination dated 06.05.2015 being without any basis and in violation of Article 14 of the Constitution of India deserves to be quashed and set aside.

27. Per contra, Mr. Ajit Kumar, learned senior counsel appearing on behalf of the respondent Nos. 1 and 2 has given the factual background leading to publication of a notification in the Gazette dated 07.03.2010 authorising JINFRA to prepare a scheme for appointment of Distribution Franchisee. The notice inviting tender for appointment of Distribution Franchisee has been referred as also the Request For Proposal which ultimately culminated in the petitioner No. 1 being appointed as a Distribution Franchisee. Reference has been made to the Electricity Act, 2003 by submitting that earlier enactments on the subject that is, the Electricity Act, 1910 and Electricity Act, 1948 had many fallacies and shortcomings and in order to overcome the same, the Electricity Act, 2003 was enacted. He has referred to Section 14 of the Electricity Act, 2003 which deals with the grant of licence and has further referred to 6th proviso to Section 14 while submitting that it was incumbent upon the Distribution Franchisee to complete all the formalities/requirements necessary for grant of licence. It has been submitted that even after expiry of more than 2 years from the date of entering into the DFA, the condition precedent was not fulfilled by the Distribution Franchisee ultimately leading to issuance of the impugned letter of termination of the DFA dated

06.05.2015. Referring to Article 2.1.1, it has been submitted that the petitioners in spite of being granted extension till June 2014 did not fulfill the conditions precedent. The initial report of the auditor was submitted and the petitioner could have furnished the performance guarantee by way of bank guarantee, but even then on one pretext or the other, the petitioners had delayed such submission. It has been submitted that even the work with respect to calibration of meters were also not done properly. Learned senior counsel has submitted that the termination clause has been mentioned at Article 2.1.8 at the DFA and on such basis which gives the discretionary power to the authorities, the DFA has been terminated. It has also been submitted that Article 2.1.8 cannot be equated with Article 16 as both prescribe different procedure for different circumstances. Reference has also been made to Article 17 which concerns the dispute resolution mechanism and Article 17.2.5 clearly gives a prerogative for resolution of the dispute by submitting itself to arbitration proceeding. Such specific provision mentioned in the DFA precludes the petitioner from challenging the letter of termination dated 06.05.2015 in an application under Article 226 of the Constitution of India. The minutes of the meeting dated 28.05.2013 has also been referred to by the learned senior counsel for the respondents and has submitted that the demand of the petitioner in making available the list of the employees, who wish to work with the Distribution Franchisee on deputation and framing of new pay structure of such employees as per the existing service rules do suggest that the petitioner was interested in other aspects of the matter by giving a complete go bye to its main purpose of completing the conditions precedent. Submissions have been advanced that whatever request has been made from the Distribution Franchisee had been fully cooperated upon by the respondents, but as would be evident these were only used as a tool by the petitioner for delaying the project altogether. Submissions have also been advanced to the effect that Article 2.1.8 had been invoked in view of the continuous delay in the project on the part of the petitioners in not complying with the conditions precedent and since the said Article reveals about the termination of the agreement at the discretion of the respondents, the question of issuing a show-cause notice prior to exercising of such discretion is a non requirement in terms of the agreement. The meetings which were held between both the sides would suggest that there was full cooperation on the part of the answering respondents in order to try and remove the various anomalies and obstructions which had cropped up, but as it seems from the minutes of the meeting as well as from the various correspondences, the petitioners were never really interested in fulfilling their part of the agreement and if at all they were interested to undertake the work, the conditions precedent would have been fulfilled. The excuse of the petitioners of not submitting bank guarantee in spite of repeated extensions on the part of the respondents, when the amount could not be ascertained in absence of the report of the independent auditor does not hold ground as in terms of Article 2.1.3.5 the average tariff for the base year shall not be changed if the variance is less than 10%. Moreover, from a bare reading of Article 2.1, Article 11.1 or the definition of effective date as per Article

1 of DFA the same does not suggest that only after the assets are handed over to the Distribution Franchisee, the bank guarantee has to be furnished. Therefore, the first and foremost step which the learned senior counsel for the respondents has much stressed upon is of complying with the conditions precedent and that too the submission of performance guarantee by way of an irrevocable bank guarantee. Further submission has been advanced to the effect that the agreement which was entered into by and between the petitioners and respondents is not a statutory contract and a pure contractual agreement can be the subject of scrutiny before the Civil Court or can be subjected to an arbitration proceeding in terms of Article 17.2.5 and such aspects and disputes cannot be looked into or interfered with in view of the limited jurisdiction of a Writ Court. It has also been submitted that the petitioners were directed to submit a power point presentation and the same would suffice as adherence to the principles of natural justice. The facts emanating from the case would thus suggest that the discretion which was exercised by the respondents have been done in a proper and legal manner and the same is justifiable considering the events leading to termination of the agreement.

28. Refuting the contentions of the learned senior counsel for the respondents Mr. Pal, learned senior counsel for the petitioners has referred to various judgments to substantiate his argument that the writ petition is maintainable. The judgments which have been referred to are as follows:

- "1. The Calcutta Gas Company (Proprietary) Ltd. Vs. The State of West Bengal and Others,
2. The D.F.O., South Kheri and Others Vs. Ram Sanahi Singh,
3. Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others, ;
4. Ramana Dayaram Shetty Vs. International Airport Authority of India and Others,
5. Gujarat State Financial Corporation Vs. Lotus Hotels Pvt. Ltd.,
6. Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust and Others Vs. V.R. Rudani and Others,
7. Kumari Shrilekha Vidyarthi and Others Vs. State of U.P. and Others,
8. Food Corporation of India Vs. M/s. Kamdhenu Cattle Feed Industries, ."

29. The next contention which has been refuted by the learned senior counsel for the petitioners is that the writ petition involves disputed questions of fact. It has been submitted that the petitioners have never relied on any document which seems to be disputed, but has only placed such documents which are admitted document, for instance the various communications and minutes of the meetings which are the document of the respondent Nos. 1 and 2. Even assuming that some facts are disputed, the entire gamut of the issue at hand can be looked into

by a Writ Court for which he has placed reliance upon the case of Smt. Gunwant Kaur and Others Vs. Municipal Committee, Bhatinda and Others, .

30. The plea of alternative remedy as raised by the learned senior counsel for the respondents in view of the dispute resolution mechanism enunciated in the DFA itself as also in view of the submission that petitioners had an alternative remedy to move before the Civil Court as it is purely a case of contractual dispute, submissions have been advanced that it is a settled principle of law that existence of alternative remedy can never be a bar for entertaining a writ application. It has been submitted that in spite of an alternative remedy which may be available to an aggrieved party, but even then a writ petition is entertainable when the writ petition seeks enforcement of the fundamental rights, or when there is a violation of the principles of natural justice or/and where the order of proceedings are wholly without jurisdiction or vires of an Act is challenged. In this context reference has been made to the case of Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others, and Harbanslal Sahnia and Another Vs. Indian Oil Corpn. Ltd. and Others, .

31. As regards the maintainability of the writ petition, it has been submitted that the agreement entered into is a contract in furtherance of statutory provisions and public interests and the same cannot be termed to be purely a private/commercial contract. In this context, reference has been made to Section 2(27) and Section 14 of the Electricity Act, 2003, Clause 2.1 of the RFP, Article 2.1.7, Article 4 and recital (A) & (B) of the Distribution Franchisee Agreement. Thus, the termination of the DFA will have to withstand the test of safeguard provided against the action of the State under the provisions of the Constitution of India.

32. In order to appreciate the elaborate and structured arguments advanced by both the sides, it will be apt to refer to the Electricity Act, 2003 as the entire process for appointment of a Distribution Franchisee flows from the provision of the Act. The preamble of the Electricity Act, 2003 reflects that the Act was enacted to slight the loss relating to generation, transmission, distribution, trading and use of electricity and generally for taking measures conducive to develop the electricity industry, promoting competition therein, protecting interest of consumers and supply of electricity to all areas, rationalisation of electricity tariff, ensuring transparent issues regarding subsidies, promotion of efficiency and environmental benign issues, constitution of Central Electricity Authority, Regulatory Commission and establishment of Appellate Tribunal and matters connected therewith or incidental thereto. Section 2 of the Act relates to definition and for the purposes of the present case, the definition of a Board as in Section 2(7) , a distribution licensee as in Section 2(17) and franchisee as in Section 2(27) are quoted hereinbelow:

"2(7) "Board" means a State Electricity Board, constituted before the commencement of this Act, under sub-section (1) of section 5 of the Electricity (Supply) Act, 1948 (54 of 1948);

2(17) "distribution licensee" means a licensee authorised to operate and maintain a distribution system for supplying electricity to the consumers in his area of supply;

2(27) "franchisee" means a person authorised by a distribution licensee to distribute electricity on its behalf in a particular area within his area of supply."

33. Section 12 of the Act deals with authorised persons to transmit supply etc. of electricity and it clearly envisages that no person shall transmit electricity or distribute electricity or undertake trading in electricity unless he is authorised to do so by a licence issued under Section 14 or is examined under Section 13 of the Act. Section 14 of the Act deals with grant of licence and which reads thus:

"14. Grant of licence - The Appropriate Commission may, on an application made to it under section 15 , grant a licence to any person -

(a) to transmit electricity as a transmission licensee; or

(b) to distribute electricity as a distribution licensee; or

(c) to undertake trading in electricity as an electricity trader, in any area as may be specified in the licence:"

34. The provisions which have been referred to above reveals that the distribution licensee is not required to obtain any separate licence from the concerned State Commission and it is the distribution licensee which can authorise a person to act as a franchisee to distribute electricity on its behalf within its area of supply. Therefore, by virtue of enabling provisions of the Act, the Electricity Board or the various companies which have been created after unbundling of the Board, steps into the shoes of a distribution licensee. Since erstwhile JSEB was bestowed with the legal status of the distribution licensee, a Request for Proposal was published by the then JSEB inviting applications for appointment of Distribution Franchisee for various Circles and the petitioner No. 2 having bid for Ranchi Circle was declared to be a successful bidder and pursuant thereto the Distribution Franchisee Agreement was entered into by and between the petitioners and the erstwhile JSEB. Article 2 of the DFA deals with the conditions precedent and the conditions subsequent. The conditions precedent which have to be satisfied by the Distribution Franchisee and JSEB has been referred to in Articles 2.1.1, 2.2.2, 2.1.3 and 2.1.4.

35. Article 2.1.2 relates to infrastructure roll out plan, Article 2.1.3 is with respect to completion of audit of various parameters and it includes within its fold the appointment of an independent auditor in mutual consultation with the Distribution Franchisee and the Distribution Licensee. Article 2.1.4 deals with calibration of meters. Article 11 deals with bank guarantee and article 11.1 deals with the provision that the bank guarantee shall be valid for a period of one year from the effective date. Submission of the performance guarantee in the form of an irrevocable bank guarantee do not specify an amount as the same is dependent on the audit. Article 2.1.3.5 deals with the determination of average

tariff for the base year which states that if a variance of more than 10% is detected by independent auditor between the figures given in the RFP document and the final figures arrived at by the independent auditor, the input price of the successful bidder shall be adjusted as per the decision of the independent auditor. Article 2.1.1, Article 11.1 and the definition of effective date at Article 1 of DFA would have to be read in unison, but even then it does not reflect that the bank guarantee had to be furnished prior to handing over of the assets to the Distribution Franchisee. The bank guarantee is valid for a period of 1 year from the effective date and the effective date is the date of handing over of the business operations to the Distribution Franchisee after the respective conditions precedent have been satisfied. Moreover, the amount of bank guarantee could have finally be decided after the final report of the independent auditors and in absence of the same no bank guarantee could have been estimated or calculated on the basis of an unspecified figure. The contentions of the learned senior counsel for the respondent Nos. 1 and 2 with respect to fulfilling the conditions precedent before the business operations were to have been handed over to the Distribution Franchisee seems bereft of any foundational basis. The conditions precedent of submission of bank guarantee was subject to various parameters and until and unless the said parameters were fulfilled with the active and joint cooperation of all the stake holders including the independent auditor, the question of submission of bank guarantee prior to handing over of the business operations to the Distribution Franchisee pales into insignificance. It is therefore, held that one of the reasons which have been assigned in the impugned letter dated 06.05.2015 of nonfulfillment of the conditions precedent/obligations in view of circumstances enumerated above does not reflect the true picture and cannot be a basis for terminating the DFA. If indeed, there was some confusion on the part of respondent No. 1 and 2, although there does not appear to be so on going through the various articles of the DFA, the authorities could have got the issue clarified, but silence on their part does also suggest that the contention of the petitioners was justified.

36. Both the learned senior counsels on behalf of the petitioners as well as the respondent Nos. 1 and 2 had frequently referred to the minutes of meetings as well as the various conversations which have been exchanged between the parties. The deluge of meetings held between the representatives of both the sides would suggest that the only issue which fell for consideration was the issue of handing over of operations to the Distribution Franchisee in Ranchi and Jamshedpur Circle. Without going into a detailed discussion about the meetings only a reference is being made of the captions of some of the meetings which would sufficiently explain the intent, purport and cooperation extended on behalf of both the sides:

"Minutes of meeting held on 08.05.2013 in the office chamber of Chairman, JSEB to discuss the issue of handing over of operations to DFs in Ranchi and Jamshedpur Circle.

Minutes of meeting held on 28.05.2013 in the Conference Room of Board Headquarters to discuss the issue of checklist submitted by independent Auditor & issue related to handing over of Distribution Network to DFs in Ranchi and Jamshedpur Circle.

Minutes of meeting held on 01.07.2013 in the Conference Room of Board Headquarters to discuss the Progress made by Independent Auditor & issues related to handing over of Distribution Network to DFs in Ranchi and Jamshedpur Circle.

Minutes of meeting held on 12.07.2013 in the office Chamber of Hon"ble Chairman, Board Headquarters to discuss the Progress made by Independent Auditor & issues related to handing over of Distribution Network to DFs in Ranchi and Jamshedpur Circle.

Minutes of meeting held on 26.07.2013 in the Conference Hall, Board Headquarters headed by Hon"ble Chairman to discuss the Progress made by Independent Auditor & issues related to handing over of Distribution Network to DFs in Ranchi and Jamshedpur Circle.

Minutes of meeting held on 03.04.2014 in the office chamber of CMD, JUVNL to discuss the issue of Distribution Franchisee."

37. The minutes of various meetings undertaken would project the bonhomie existing between both the sides and the cooperative attitude between them. The entire scenario changed on issuance of a letter of Department of Energy, Government of Jharkhand addressed to the Chairman-cum-Managing Director, JUVNL dated 03.07.2014 giving a direction for canceling the entire tender process for Ranchi and Jamshedpur Circle on the ground of irregularities which had been committed. Even at that stage, the respondents which had undertaken the entire process of floating the request for proposal and ultimately selecting the Distribution Franchisee did not have any doubt or did not raise any issue or question with respect to alleged irregularities in the tender process and in fact in W.P.(C) No. 5224 of 2012 preferred by the Direct Media Distribution Ventures Pvt. Ltd., an unsuccessful participant, the Board had candidly refuted the allegations of any irregularities or malpractices. The letter dated 03.07.2014 issued by the Energy Department, State of Jharkhand prompted the respondents to convene a meeting and the decision which was taken is as follows:

"The Board discussed the matter and decided to take opinion by senior legal advisor of the Company on the issue and thereafter issue show cause notice to the franchisee as per the advice."

38. However, the letter dated 25.02.2015 issued by the Chief Engineer (Commercial and Revenue) Jharkhand Bijli Vitran Nigam Ltd. suggests that the respondents were in respect of the decisions taken in the meeting dated 05.08.2014 had fixed a meeting on 27.02.2015 to discuss the issue relating to handing over of distribution network to the Distribution Franchisee. In the said

letter request was also made to prepare a power point presentation regarding the progress made by the Distribution Franchisee. Barring an aberration in the completion process in terms of letter dated 03.07.2014 and the meeting of the respondent dated 05.08.2014, the entire scenario depicts that there has never been an occasion for the respondents to suggest that the petitioners were never interested or they never intended to fulfill the conditions precedent or to take effort to complete the project at the earliest. The letter of termination dated 06.05.2015 seems to have struck the only discordant note amongst the harmonious efforts being made by both the sides. The issuance of the letter of the Energy Department, Government of Jharkhand dated 03.07.2014 and the decision of the Board of Directors on 05.08.2014 leading to termination of the agreement vide letter dated 06.05.2015 seems to have been issued for whatever reasons best known to the respondents.

39. Lengthy arguments have been advanced by both the sides with respect to maintainability of the writ petition. A catena of judgments have been cited on behalf of the parties and the relevant portion of the judgments are extracted hereinbelow.

40. In the case of "Calcutta Gas Company (Proprietary) Ltd." (supra) while dealing with the nature and scope of the proceeding under Article 226 of the Constitution of India, it was held as follows:

"2. "The facts that have given rise to this appeal may, be briefly stated. The Oriental Gas Company was originally, constituted by a deed of settlement dated April 25, 1853, by the name of the Oriental Gas Company, and it was subsequently registered in England under the provisions of the English Joint Stock Companies Act, 1862. By Act V of 1857 passed by the Legislative Council of India, it was empowered to lay pipes in Calcutta and its suburbs and to excavate the streets for the said purpose. By Acts of the Legislative Council of India passed from time to time special powers were conferred on the said Company. In 1946 Messrs. Soorajmul Nagarmull, a firm carrying on business in India, purchased 98 per cent of the shares of the said Oriental Gas Company Limited. The said firm floated a limited liability Company named the Calcutta Gas Co. (Proprietary) Limited and it was registered in India with its registered office at Calcutta. On July 24, 1948, under an agreement entered into between the Oriental Gas Company and the Calcutta Gas Company, the latter was appointed the manager of the former Company in India for a period of 20 years from July 5, 1948. The Oriental Gas Company is the owner of the industrial undertaking, inter alia, for the production, manufacture, supply, distribution and sale of fuel gas in Calcutta. The Calcutta Gas Company, by virtue of the aforesaid arrangement, was in charge of its general management for a period of 20 years for remuneration. The West Bengal Legislature passed the impugned Act and it received the assent of the President on October 1, 1960. On October 3, 1960, the West Bengal Government issued three notifications - the first declaring that the said Act would come into force on October 3, 1960, the second containing

the rules framed under the Act, and the third specifying October 7, 1960, as the date with effect from which the State Government would take over for a period of five years the management and control of the undertaking of the Oriental Gas Company for the purposes of, and in accordance with, the provisions of the said Act. The appellant i.e., the Calcutta Gas Company, filed a petition under Art. 226 of the Constitution in the High Court for West Bengal at Calcutta for appropriate writs for restraining the State Government from giving effect to the said Act and for quashing the said notifications. Respondents 1 to 4 to the petition were the State of West Bengal and the concerned officers, and respondent 5 was the Oriental Gas Company Limited. In the petition, the appellant contested the constitutional validity of the Act on various grounds, and in the counter-affidavit, the contesting respondents, i.e., respondents 1 to 4, sought to sustain its validity and also questioned the maintainability of the petition at the instance of the appellant. Ray, J., gave the following findings on the contention raised before him : (1) The appellant has no legal right to maintain the petition; (2) the appellant cannot question the validity of the Act on the ground that its provisions infringed his fundamental rights under Arts. 14, 19 and 31 in view of Art. 31A (1) (b) of the Constitution; (3) the West Bengal Legislature had the Legislative competence to pass the impugned Act by virtue of entry 42 of List III of the Seventh Schedule to the Constitution; (4) entry 25 of List II also confers sufficient authority and power on the State Legislature to make laws affecting gas and gas-works; and (5) even if the Act incidentally trenches upon any production aspect, the pith and substance of the legislation is gas and gas-works within the meaning of entry 25 of List II. The learned Judge rejected all the contentions of the appellant and dismissed the petition by his order dated November 15, 1960. Hence the appeal.

5. The first question that falls to be considered is whether the appellant has locus standi to file the petition under Art. 226 of the Constitution. The argument of learned counsel for the respondents is that the appellant was only managing the industry and it had no proprietary right therein and, therefore, it could not maintain the application. Article 226 confers a very wide power on the High Court to issue directions and writs of the nature mentioned therein for the enforcement of any of the rights conferred by Part III or for any other purpose. It is, therefore, clear that persons other than those claiming fundamental rights can also approach the Court seeking a relief thereunder. The Article in terms does not describe the classes of persons entitled to apply thereunder; but it is implicit in the exercise of the extraordinary jurisdiction that the relief asked for must be one to enforce a legal right. In *The State of Orissa Vs. Madan Gopal Rungta*, this Court has ruled that the existence of the right is the foundation of the exercise of jurisdiction of the Court under Art. 226 of the Constitution. In *Chiranjit Lal Chowdhuri Vs. The Union of India (UOI) and Others*, it has been held by this Court that the legal right that can be enforced under Art. 32 must ordinarily be the right of the petitioner himself who complains of infraction of such right and approaches the Court for relief. We do not see any reason why a

different principle should apply in the case of a petitioner under Art. 226 of the Constitution. The right that can be enforced under Art. 226 also shall ordinarily be the personal or individual right of the petitioner himself, though in the case of some of the writs like habeas corpus or quo warrant this rule may have to be relaxed or modified. The question, therefore, is whether in the present case the petitioner has a legal right and whether it has been infringed by the contesting respondents. The petitioner entered into an agreement dated July 24, 1918, with respondent No. 5 in regard to the management of the Oriental Gas Company. Under the agreement, the appellant was appointed as Manager and the general management of the affairs of the Company was entrusted to it for a period of 20 years. The appellant would receive thereunder by way of remuneration for its services, (a) an office allowance of Rs. 3,000/- per mensem, (b) a commission of 10 per cent, on the net yearly profit of the Company, subject to a minimum of Rs. 60,000 per year in the case of absence of or inadequacy of profits, and (c) a commission of Re. 1 per ton of all coal purchased and negotiated by the Manager. In its capacity as manager, the appellant-Company was put in charge of the entire business and its assets in India and it was given all the incidental powers necessary for the said management. Under the agreement, therefore, the appellant had the right to manage the Oriental Gas Company for a period of 20 years and to receive the aforesaid amounts towards its remuneration for its services. Section 4 of the impugned Act reads:

"With effect from the appointed day and for a period of five years thereafter -

(a) the undertaking of the Company shall stand transferred to the State Government for the purpose of management and control;

(b) the Company and its agents, including managing agents, if any, and servants shall cease to exercise management or control in relation to the undertaking of the Company;

(c) all contracts, excluding any contract or contracts in respect of agency or managing agency, subsisting immediately before the appointed day and affecting the undertaking of the Company shall cease to have effect or to be enforceable against the Company, its agents or any person who was a surety thereto or had guaranteed the performance thereof and shall be of as full force and effect, against or in favour of the State of West Bengal and shall be enforceable as fully and effectively as if instead of the Company the State of West Bengal had been named therein or had been a party thereto:"

Under the said section, with effect from the appointed day and for a period of five years thereafter, the management of the Company shall stand transferred to the State Government, and the Company, its agents and servants shall cease to exercise management or control of the same. Under cl. (c) of the section, the contracts of agency or managing agency are not touched, but all the other contracts cease to have effect against the Company and are enforceable by or against the State. It is not necessary in this case to decide whether under the

said agreement the appellant was constituted as agent or managing agent or a servant of the Oriental Gas Company. Whatever may be its character, by reason of S. 4 of the impugned Act, it was deprived of certain legal rights it possessed under the agreement. Under the agreement, the appellant had the right to manage the Oriental Gas Company for a period of 20 years and to receive remuneration for the same. But under S. 4 of the impugned Act, it was deprived of that right for a period of five years. There was certainly a legal right accruing to the appellant under the agreement and that was abridged, if not destroyed, by the impugned Act. It is, therefore, impossible to say that the legal right of the appellant was not infringed by the provisions of the impugned Act. In the circumstances, as the appellant's personal right to manage the Company and to receive remuneration therefor had been infringed by the provisions of the statute, it had locus standi to file the petition under Art. 226 of the Constitution."

41. In the case of "DFO South Kheri v. Ram Sanahi Singh" (supra), the Hon'ble Supreme Court while considering the issue as to whether a writ petition is maintainable against a public authority even if the right claim arise out of a contract, wherein the findings which were given is quoted thus:

"4. "Counsel for the appellants contends that since the dispute arose out of the terms of the contract and the Divisional Forest Officer under the terms of the contract had authority to modify any action taken by a subordinate forest authority, the remedy of the respondent was to institute an action in the civil court and that the writ petition was not maintainable. But in the present case the order is passed by a public authority modifying the order or proceeding of a subordinate forest authority. By that order he has deprived the respondent of a valuable right. 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 case 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.

5. It is unnecessary to consider whether the order of the Divisional Forest Officer is made on "irrelevant grounds" because it is clear that before passing the order the Divisional Forest Officer did not call for any explanation of the respondent, and gave him no hearing before passing the order. It is averred in para 22(i) of the petition that the "cancellation order is in violation of the principles of natural justice having been done at a very late stage without affording any opportunity to the petitioner (respondent) to say anything against the action cancelling his tallies". To that averment, no reply was made by the forest authorities against whom the petition was filed. Granting that the order was administrative and not quasi-judicial, the order had still to be made in a manner consonant with the rules of natural justice when it affected the respondent's rights to property. This

Court in the case of *State of Orissa v. Miss Binapani Dei (Dr)* held in dealing with an administrative order that "the rule that a party to whose prejudice the order is intended to be passed is entitled to a hearing applied alike to judicial tribunals and bodies of persons invested with authority to adjudicate upon matters involving civil consequences. It is one of the fundamental rules of our constitutional set-up that every citizen is protected against exercise of arbitrary authority by the State or its officers". The Divisional Forest Officer in the present case set aside the proceeding of a subordinate authority and passed an order which involved the respondent in considerable loss. The order involved civil consequences. Without considering whether the order of the Divisional Forest Officer was vitiated because of irrelevant considerations, the order must be set aside on the simple ground that it was passed contrary to the basic rules of natural justice.

6. Counsel for the appellants contended that this object was not raised before the High Court either in the Court of First Instance or before the Division Bench. But the objection was prominently mentioned in the petition and there is no reply to it. We are unable to hold that because the High Court has not considered the question, the respondent will not be allowed to rely upon this contention in support of the order. If the plea raised by the respondent in his petition is true, and we see no reason to hold that it is not the order challenged by him is plainly illegal and is liable to be set aside."

42. In the case of "*Ramana Dayaram Shetty v. International Airport Authority of India and others*" (*supra*), it was decided thus:

"12. "We agree with the observations of Mathew, J., in *V. Punnann Thomas v. State of Kerala* that:

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

The same point was made by this Court in *Erusian Equipment and Chemicals Ltd. v. State of West Bengal* where the question was whether blacklisting of a person without giving him an opportunity to be heard was bad? Ray, C.J., speaking on behalf of himself and his colleagues on the Bench pointed out that blacklisting of a person not only affects his reputation which is, in Poundian terms, an interest both of personality and substance, but also denies him equality in the matter of entering into contract with the Government and it cannot, therefore, be supported without fair hearing. It was argued for the Government that no person has a right to enter into contractual relationship with the Government and the Government, like any other private individual, has the absolute right to enter into contract with any one it pleases. But the Court, speaking through the learned Chief, Justice, responded that the Government is not like a private individual who

can pick and choose the person with whom it will deal, but the Government is still a Government when it enters into contract or when it is administering largesse and it cannot, without adequate reason, exclude any person from dealing with it or take away largesse arbitrarily. The learned Chief Justice said that when the government is trading with the public, "the democratic form of Government demands equality and absence of arbitrariness and discrimination in such transactions... The activities of the Government have a public element and, therefore, there should be fairness and equality. The State need not enter into any contract with anyone, but if it does so, it must do so fairly without discrimination and without unfair procedure". This proposition would hold good in all cases of dealing by the Government with the public, where the interest sought to be protected is a privilege. It must, therefore, be taken to be the law that where the Government is dealing with the public, whether by way of giving jobs or entering into contracts or issuing quotas or licences or granting other forms of largesse, 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 norms which is not arbitrary, irrational or irrelevant. The power or discretion of the Government in the matter of grant of largesse including award of jobs, contracts, quotas, licences, etc. must be confined and structured by rational, relevant and non-discriminatory standard or norm and if the Government departs from such standard or norm in any particular case or cases, the action of the Government would be liable to be struck down, unless it can be shown by the Government that the departure was not arbitrary, but was based on some valid principle which in itself was not irrational, unreasonable or discriminatory.

20. Now, obviously where a corporation is an instrumentality or agency of Government, it would, in the exercise of its power or discretion, be subject to the same constitutional or public law limitations as Government. The rule inhibiting arbitrary action by Government which we have discussed above must apply equally where such corporation is dealing with the public, whether by way of giving jobs or entering into contracts or otherwise, and it cannot act arbitrarily and enter into relationship with any person it likes at its sweet will, but its action must be in conformity with some principle which meets the test of reason and relevance.

21. This rule also flows directly from the doctrine of equality embodied in Article 14 . It is now well-settled as a result of the decisions of this Court in *E.P. Royappa v. State of Tamil Nadu* and *Maneka Gandhi v. Union of India* that Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. It requires that State action must not be arbitrary but must be based on some rational and relevant principle which is non-discriminatory: it must not be guided by any extraneous or irrelevant considerations, because that would be denial of equality. The principle of reasonableness and rationality which is legally as well as philosophically an essential element of equality or non-arbitrariness is projected by Article 14 and it must characterise every State action, whether it be

under authority of law or in exercise of executive power without making of law. The State cannot, therefore, act arbitrarily in entering into relationship, contractual or otherwise with a third party, but its action must conform to some standard or norm which is rational and non-discriminatory. This principle was recognised and applied by a Bench of this Court presided over by Ray, C.J., in *Erusian Equipment and Chemicals Ltd. v. State of West Bengal* where the learned Chief Justice pointed out that

"the State can carry on executive function by making a law or without making a law. The exercise of such powers and functions in trade by the State is subject to Part III of the Constitution. Article 14 speaks of equality before the law and equal protection of the laws. Equality of opportunity should apply to matters of public contracts. The State has the right to trade. The State has there the duty to observe equality. An ordinary individual can choose not to deal with any person. The Government cannot choose to exclude persons by discrimination. The order of blacklisting has the effect of depriving a person of equality of opportunity in the matter of public contract. A person who is on the approved list is unable to enter into advantageous relations with the Government because of the order of blacklisting.... A citizen has a right to claim equal treatment to enter into a contract which may be proper, necessary and essential to his lawful calling.... It is true that neither the petitioner nor the respondent has any right to enter into a contract but they are entitled to equal treatment with others who offer tender or quotations for the purchase of the goods".

It must, therefore follow as a necessary corollary from the principle of equality enshrined in Article 14 that though the State is entitled to refuse to enter into relationship with any one, yet if it does so, it cannot arbitrarily choose any person it likes for entering into such relationship and discriminate between persons similarly circumstanced, but it must act in conformity with some standard or principle which meets the test of reasonableness and non-discrimination and any departure from such standard or principle would be invalid unless it can be supported or justified on some rational and non discriminatory ground."

43. In the case of *Gujarat State Financial Corporation Vs. Lotus Hotels Pvt. Ltd.*, consideration was made with respect to a dispute between the parties which was in the realm of a contract and whether the aggrieved party has a remedy elsewhere, it was held as follows:

"9. "It was next contended that the dispute between the parties is in the realm of contract and even if there was a concluded contract between the parties about grant and acceptance of loan, the failure of the Corporation to carry out its part of the obligation may amount to breach of contract for which a remedy lies elsewhere but a writ of mandamus cannot be issued compelling the Corporation to specifically perform the contract. It is too late in the day to contend that the instrumentality of the State which would be "other authority" under Article 12 of the Constitution can commit breach of a solemn undertaking on which other side

has acted and then contend that the party suffering by the breach of contract may sue for damages but cannot compel specific performance of the contract. It was not disputed and in fairness to Mr. Bhatt, it must be said that he did not dispute that the Corporation which is set up under Section 3 of the State Financial Corporation Act, 1955 is an instrumentality of the State and would be "other authority" under Article 12 of the Constitution. By its letter of offer dated July 24, 1978 and the subsequent agreement dated February 1, 1979 the appellant entered into a solemn agreement in performance of its statutory duty to advance the loan of Rs. 30 lakhs to the respondent. Acting on the solemn undertaking, the respondent proceeded to undertake and execute the project of setting up a 4-star hotel at Baroda. The agreement to advance the loan was entered into in performance of the statutory duty cast on the Corporation by the statute under which it was created and set up. On its solemn promise evidenced by the aforementioned two documents, the respondent incurred expenses, suffered liabilities to set up a hotel. Presumably, if the loan was not forthcoming, the respondent may not have undertaken such a huge project. Acting on the promise of the appellant evidenced by documents, the respondent proceeded to suffer further liabilities to implement and execute the project. In the back drop of this incontrovertible fact situation, the principle of promissory estoppel would come into play. In *Motilal Padampat Sugar Mills Co. (P) Ltd. v. State of U.P.* this Court observed as under : [SCC para 8, p. 425 : SCC (Tax) p. 160]

"The true principle of promissory estoppel, therefore, seems to be that where one party has by his words or conduct made to the other a clear and unequivocal promise which is intended to create legal relations or affect a legal relationship to arise in the future, knowing or intending that it would be acted upon by the other party to whom the promise is made and it is in fact so acted upon by the other party, the promise would be binding on the party making it and he would not be entitled to go back upon it, if it would be inequitable to allow him to do so having regard to the dealings which have taken place between the parties, and this would be so irrespective of whether there is any pre-existing relationship between the parties or not."

10. Thus the principle of promissory estoppel would certainly estop the Corporation from backing out of its obligation arising from a solemn promise made by it to the respondent.

12. Viewing the matter from a slightly different angle altogether, it would appear that the appellant is acting in a very unreasonable manner. It is not in dispute that the appellant is an instrumentality of the Government and would be "other authority" under Article 12 of the Constitution. If it be so, as held by this court in *R.D. Shetty v. International Airport Authority of India* the rule inhibiting arbitrary action by the Government would equally apply where such corporation dealing with the public whether by way of giving jobs or entering into contracts or otherwise and it cannot act arbitrarily and its action must be in conformity with some principle which meets the test of reason and relevance.

13. Now if appellant entered into a solemn contract in discharge and performance of its statutory duty and the respondent acted upon it, the statutory corporation cannot be allowed to act arbitrarily so as to cause harm and injury, flowing from its unreasonable conduct, to the respondent. In such a situation, the court is not powerless from holding the appellant to its promise and it can be enforced by a writ of mandamus directing it to perform its statutory duty. A petition under Article 226 of the Constitution would certainly lie to direct performance of a statutory duty by "other authority" as envisaged by Article 12."

44. In the case of *Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust and Others Vs. V.R. Rudani and Others*, , in a similar issue, the Hon"ble Supreme Court has held as follows:

"15. "If the rights are purely of a private character no mandamus can issue. If the management of the college is purely a private body with no public duty mandamus will not lie. These are two exceptions to mandamus. But once these are absent and when the party has no other equally convenient remedy, mandamus cannot be denied. It has to be appreciated that the appellants trust was managing the affiliated college to which public money is paid as government aid. Public money paid as government aid plays a major role in the control, maintenance and working of educational institutions. The aided institutions like government institutions discharge public function by way of imparting education to students. They are subject to the rules and regulations of the affiliating University. Their activities are closely supervised by the University authorities. Employment in such institutions, therefore, is not devoid of any public character. So are the service conditions of the academic staff. When the University takes a decision regarding their pay scales, it will be binding on the management. The service conditions of the academic staff are, therefore, not purely of a private character. It has super-added protection by University decisions creating a legal right-duty relationship between the staff and the management. When there is existence of this relationship, mandamus cannot be refused to the aggrieved party.

17. There, however, the prerogative writ of mandamus is confined only to public authorities to compel performance of public duty. The "public authority" for them means everybody which is created by statute -- and whose powers and duties are defined by statute. So government departments, local authorities, police authorities, and statutory undertakings and corporations, are all "public authorities". But there is no such limitation for our High Courts to issue the writ "in the nature of mandamus". Article 226 confers wide powers on the High Courts to issue writs in the nature of prerogative writs. This is a striking departure from the English law. Under Article 226 , writs can be issued to "any person or authority". It can be issued "for the enforcement of any of the fundamental rights and for any other purpose".

19. The scope of this article has been explained by Subba Rao, J., in *Dwarkanath v. ITO*: (SCR pp. 540-41)

"This article is couched in comprehensive phraseology and it ex-facie confers a wide power on the High Courts to reach injustice wherever it is found. The Constitution designedly used a wide language in describing the nature of the power, the purpose for which and the person or authority against whom it can be exercised. It can issue writs in the nature of prerogative writs as understood in England; but the scope of those writs also is widened by the use of the expression "nature", for the said expression does not equate the writs that can be issued in India with those in England, but only draws an analogy from them. That apart, High Courts can also issue directions, orders or writs other than the prerogative writs. It enables the High Court to mould the reliefs to meet the peculiar and complicated requirements of this country. Any attempt to equate the scope of the power of the High Court under Article 226 of the Constitution with that of the English courts to issue prerogative writs is to introduce the unnecessary procedural restrictions grown over the years in a comparatively small country like England with a unitary form of Government into a vast country like India functioning under a federal structure. Such a construction defeats the purpose of the article itself."

20. The term "authority" used in Article 226 , in the context, must receive a liberal meaning unlike the term in Article 12. Article 12 is relevant only for the purpose of enforcement of fundamental rights under Article 32. Article 226 confers power on the High Courts to issue writs for enforcement of the fundamental rights as well as non-fundamental rights. The words "any person or authority" used in Article 226 are, therefore, not to be confined only to statutory authorities and instrumentalities of the State. They may cover any other person or body performing public duty. The form of the body concerned is not very much relevant. What is relevant is the nature of the duty imposed on the body. The duty must be judged in the light of positive obligation owed by the person or authority to the affected party. No matter by what means the duty is imposed, if a positive obligation exists mandamus cannot be denied.

21. In *Praga Tools Corpn. v. C.A. Imanuel* this Court said that a mandamus can issue against a person or body to carry out the duties placed on them by the statutes even though they are not public officials or statutory body. It was observed: (SCC p. 589, para 6 : SCR p. 778)

"It is, however, not necessary that the person or the authority on whom the statutory duty is imposed need be a public official or an official body. A mandamus can issue, for instance, to an official of a society to compel him to carry out the terms of the statute under or by which the society is constituted or governed and also to companies or corporations to carry out duties placed on them by the statutes authorising their undertakings. A mandamus would also lie against a company constituted by a statute for the purpose of fulfilling public responsibilities. (Cf. Halsbury's Laws of England, 3rd Edn., Vol. II, p. 52 and onwards.)"

22. Here again we may point out that mandamus cannot be denied on the

ground that the duty to be enforced is not imposed by the statute. Commenting on the development of this law, Professor de Smith states: "To be enforceable by mandamus a public duty does not necessarily have to be one imposed by statute. It may be sufficient for the duty to have been imposed by charter, common law, custom or even contract." We share this view. The judicial control over the fast expanding maze of bodies affecting the rights of the people should not be put into watertight compartment. It should remain flexible to meet the requirements of variable circumstances. Mandamus is a very wide remedy which must be easily available "to reach injustice wherever it is found". Technicalities should not come in the way of granting that relief under Article 226 . We, therefore, reject the contention urged for the appellants on the maintainability of the writ petition.

23. In the result, the appeals fail and are dismissed but with a direction to the appellants to pay all the amounts due to the respondents as per the judgment of the High Court. The amount shall be paid with 12 per cent interest. The balance remaining shall be paid within two months from today. The appellants shall also pay the costs of the respondents teachers which we quantify at Rs. 20,000."

45. In the case of Kumari Shrilekha Vidyarthi and Others Vs. State of U.P. and Others, , while considering the powers of judicial review in the touch stone of the Article 14 of the Constitution of India, it was held as follows:

"18. "The scope of judicial review permissible in the present case, does not require any elaborate consideration since even the minimum permitted scope of judicial review on the ground of arbitrariness or unreasonableness or irrationality, once Article 14 is attracted, is sufficient to invalidate the impugned circular as indicated later. We need not, therefore, deal at length with the scope of judicial review permissible in such cases since several nuances of that ticklish question do not arise for consideration in the present case.

19. Even otherwise and sans the public element so obvious in these appointments, the appointment and its concomitants viewed as purely contractual matters after the appointment is made, also attract Article 14 and exclude arbitrariness permitting judicial review of the impugned State action. This aspect is dealt with hereafter.

20. Even apart from the premise that the "office" or "post" of D.G. Cs. has a public element which alone is sufficient to attract the power of judicial review for testing validity of the impugned circular on the anvil of Article 14 , we are also clearly of the view that this power is available even without that element on the premise that after the initial appointment, the matter is purely contractual. Applicability of Article 14 to all executive actions of the State being settled and for the same reason its applicability at the threshold to the making of a contract in exercise of the executive power being beyond dispute, can it be said that the State can thereafter cast off its personality and exercise unbridled power unfettered by the requirements of Article 14 in the sphere of contractual matters

and claim to be governed therein only by private law principles applicable to private individuals whose rights flow only from the terms of the contract without anything more? We have no hesitation in saying that the personality of the State, requiring regulation of its conduct in all spheres by requirements of Article 14 , does not undergo such a radical change after the making of a contract merely because some contractual rights accrue to the other party in addition. It is not as if the requirements of Article 14 and contractual obligations are alien concepts, which cannot co-exist.

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 fulfil 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.

34. In our opinion, the wide sweep of Article 14 undoubtedly takes within its fold the impugned circular issued by the State of U. P. in exercise of its executive power, irrespective of the precise nature of appointment of the Government counsel in the districts and the other rights, contractual or statutory, which the appointees may have. It is for this reason that we base our decision on the ground that independent of any statutory right, available to the appointees, and assuming for the purpose of this case that the rights flow only from the contract of appointment, the impugned circular, issued in exercise of the executive power of the State, must satisfy Article 14 of the Constitution and if it is shown to be arbitrary, it must be struck down. However, we have referred to certain provisions relating to initial appointment, termination or renewal of tenure to indicate that the action is controlled at least by settled guidelines, followed by the State of U. P., for along time. This too is relevant for deciding the question of arbitrariness alleged in the present case.

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

39. No doubt, it is for the person alleging arbitrariness who has to prove it. This can be done by showing in the first instance that the impugned State action is uninformed by reason inasmuch as there is no discernible principle on which it is based or it is contrary to the prescribed mode of exercise of the power or is unreasonable. If this is shown, then the burden is shifted to the State to repeal the attack by disclosing the material and reasons which led to the action being

taken in order to show that it was an informed decision which was reasonable. If after a prima facie case of arbitrariness is made out, the State is unable to show that the decision is an informed action which is reasonable, the State action must perish as arbitrary.

42. It is difficult to appreciate this as a reasonable basis for the drastic and sweeping action throughout the State, particularly when the provisions in the Legal Remembrancer's Manual referred earlier provide ordinarily for renewal of the tenure of the appointees. To say the least, the contents of para 29 of this counter-affidavit which alone are relied on to disclose the reasons for the circular are beautifully vague and convey nothing of substance and cannot furnish any tangible support to the impugned circular. It was stated by the learned Additional Advocate-General that many of the old incumbents were to be reappointed even after this exercise and, therefore, a wholesale change was not to be made. If at all, this submission discloses a further infirmity in the impugned circular. If it be true that many of the existing appointees were to be continued by giving them fresh appointments, the action of first terminating their appointment and then giving them fresh appointment is, to say the least, uninformed by reason and does not even fall within the scope of the disclosed reason "to streamline the conduct of government cases and effective prosecution thereof. It is obvious that at least in respect of all such appointees who are to be continued by giving them fresh appointments, the act of terminating their appointment in one stroke, was without application of mind by anyone to the question whether a change was at all needed in their case. It would be too much to assume that every Government counsel in all the districts of the State of U. P. was required to be replaced in order to streamline the conduct of Government cases and indeed, that is not even the case of the State which itself says that many of them were to be reappointed."

46. In the case of Food Corporation of India Vs. M/s. Kamdhenu Cattle Feed Industries, , the Hon"ble Supreme Court, in a case relating to determination of a contractual dispute when large public interests are involved has held as follows:

"7. "In contractual sphere as in all other State actions, the State and all its instrumentalities have to conform to Article 14 of the Constitution of which non-arbitrariness is a significant facet. There is no unfettered discretion in public law: A public authority possesses powers only to use them for public good. This imposes the duty to act fairly and to adopt a procedure which is "fairplay in action". Due observance of this obligation as a part of good administration raises a reasonable or legitimate expectation in every citizen to be treated fairly in his interaction with the State and its instrumentalities, with this element forming a necessary component of the decision-making process in all State actions. To satisfy this requirement of non-arbitrariness in a State action, it is, therefore, necessary to consider and give due weight to the reasonable or legitimate expectations of the persons likely to be affected by the decision or else that unfairness in the exercise of the power may amount to an abuse or excess of

power apart from affecting the bona fides of the decision in a given case. The decision so made would be exposed to challenge on the ground of arbitrariness. Rule of law does not completely eliminate discretion in the exercise of power, as it is unrealistic, but provides for control of its exercise by judicial review.

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

9. In *Council of Civil Service Unions v. Minister for the Civil Service* the House of Lords indicated the extent to which the legitimate expectation interfaces with exercise of discretionary power. The impugned action was upheld as reasonable, made on due consideration of all relevant factors including the legitimate expectation of the applicant, wherein the considerations of national security were found to outweigh that which otherwise would have been the reasonable expectation of the applicant. Lord Scarman pointed out that "the controlling factor in determining whether the exercise of prerogative power is subject to judicial review is not its source but its subject-matter". Again in *Preston*, in re it was stated by Lord Scarman that "the principle of fairness has an important place in the law of judicial review" and "unfairness in the purported exercise of a power can be such that it is an abuse or excess of power". These decisions of the House of Lords give a similar indication of the significance of the doctrine of legitimate expectation. Shri A.K. Sen referred to *Shanti Vijay and Co. v. Princess Fatima Fouzia* which holds that court should interfere where discretionary power is not exercised reasonably and in good faith.

10. From the above, it is clear that even though the highest tenderer can claim no right to have his tender accepted, there being a power while inviting tenders to reject all the tenders, yet the power to reject all the tenders cannot be exercised arbitrarily and must depend for its validity on the existence of cogent reasons for such action. The object of inviting tenders for disposal of a commodity is to procure the highest price while giving equal opportunity to all the intending bidders to compete. Procuring the highest price for the commodity is undoubtedly in public interest since the amount so collected goes to the public

fund. Accordingly, inadequacy of the price offered in the highest tender would be a cogent ground for negotiating with the tenderers giving them equal opportunity to revise their bids with a view to obtain the highest available price. The inadequacy may be for several reasons known in the commercial field. Inadequacy of the price quoted in the highest tender would be a question of fact in each case. Retaining the option to accept the highest tender, in case the negotiations do not yield a significantly higher offer would be fair to the tenderers besides protecting the public interest. A procedure wherein resort is had to negotiations with the tenderers for obtaining a significantly higher bid during the period when the offers in the tenders remain open for acceptance and rejection of the tenders only in the event of a significant higher bid being obtained during negotiations would ordinarily satisfy this requirement. This procedure involves giving due weight to the legitimate expectation of the highest bidder to have his tender accepted unless outbid by a higher offer, in which case acceptance of the highest offer within the time the offers remain open would be a reasonable exercise of power for public good."

47. Learned senior counsel for the respondent Nos. 1 and 2 has firstly referred to the judgment in the case of Radhakrishna Agarwal and Others Vs. State of Bihar and Others, by stating that in a case of breach of contract, no right or order can be issued under Article 226 of the Constitution of India. It has been submitted that the present case relates to dispute of contract and therefore, applying the ratio of the case of "Radhakrishna Agarwal" (supra), the writ petition is not maintainable. Furthering his cause, learned senior counsel for respondent Nos. 1 and 2 has referred to various paragraphs of the case of "Radhakrishna Agarwal" (supra) which are extracted hereinbelow:

"10. "It is thus clear that the Erusian Equipment & Chemicals Ltd. case involved discrimination at the very threshold or at the time of entry into the field of consideration of persons with whom the Government could contract at all. At this stage, no doubt, the State acts purely in its executive capacity and is bound by the obligations which dealings of the State with the individual citizens import into every transaction entered into in exercise of its constitutional powers. But, after the State or its agents have entered into the field of ordinary contract, the relations are no longer governed by the constitutional provisions but by the legally valid contract which determines rights and obligations of the parties inter se. No question arises of violation of Article 14 or of any other constitutional provision when the State or its agents, purporting to act within this field, perform any act. In this sphere, they can only claim rights conferred upon them by contract and are bound by the terms of the contract only unless some statute steps in and confers some special statutory power or obligation on the State in the contractual field which is apart from contract.

11. In the cases before us the contracts do not contain any statutory terms or obligations and no statutory power or obligation which could attract the application of Article 14 of the Constitution is involved here. Even in cases where

the question is of choice or consideration of competing claims before an entry into the field of contract facts have to be investigated and found before the question of a violation of Article 14 could arise. If those facts are disputed and require assessment of evidence the correctness of which can only be tested satisfactorily by taking detailed evidence, involving examination and cross-examination of witnesses, the case could not be conveniently or satisfactorily decided in proceedings under Article 226 of the Constitution. Such proceedings are summary proceedings reserved for extraordinary cases where the exceptional and what are described as, perhaps not quite accurately, "prerogative" powers of the Court are invoked. We are certain that the cases before us are not such in which powers under Article 226 of the Constitution could be invoked.

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

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

13. It rightly held that the cases such as *Union of India v. Anglo-Afgan Agencies and Century Spinning & Manufacturing Co. Ltd. v. Ulhasnagar Municipal Council* and *Robertson v. Minister of Pensions*, belong to the first category where it could be held that public bodies or the State are as much bound as private individuals are to carry out obligations incurred by them because parties seeking to bind the authorities have altered their position to their disadvantage or have acted to their detriment on the strength of the representations made by these authorities. The High Court thought that in such cases the obligation could sometimes be appropriately enforced on a writ petition even though the obligation was equitable only. We do not propose to express an opinion here on the question whether such an obligation could be enforced in proceedings under Article 226 of the Constitution now. It is enough to observe that the cases before us do not belong to this category.

14. The Patna High Court also distinguished cases which belong to the second category, such as *K.N. Guruswamy v. State of Mysore*; *DFO South Kheri v. Ram Sanahi Singh* and *Shri Krishna Gyanoday Sugar Ltd. v. State of Bihar*, where the

breach complained of was of a statutory obligation. It correctly pointed out that the cases before us do not belong to this class either.

15. It then, very rightly, held that the cases now before us should be placed in the third category where questions of pure alleged breaches of contract are involved. It held, upon the strength of *Umakant Saran v. State of Bihar* and *Lekhraj Satramdas v. Deputy Custodian-cum-Managing Officer* and *B.K. Sinha v. State of Bihar* that no writ or order can issue under Article 226 of the Constitution in such cases "to compel the authorities to remedy a breach of contract pure and simple."

48. In the case of *Orissa Agro Industries Corporation Ltd. and Others Vs. Bharati Industries and Others*, , by following the judgment in the case of "*Radhakrishna Agarwal*" (*supra*), it was held as follows:

"7. "A bare perusal of the High Court's judgment shows that there was clear non-application of mind. On one hand the High Court observed that the disputed questions cannot be gone into a writ petition. It was also noticed that the essence of the dispute was breach of contract. After coming to the above conclusions the High Court should have dismissed the writ petition. Surprisingly, the High Court proceeded to examine the case solely on the writ petitioner's assertion and on a very curious reasoning that though the appellant Corporation claimed that the value of articles lifted was nearly Rs. 14.90 lakhs no details were specifically given. From the counter-affidavit filed before the High Court it is crystal-clear that relevant details disputing claim of the writ petitioner were given. Value of articles lifted by the writ petitioner is a disputed factual question. Where a complicated question of fact is involved and the matter requires thorough proof on factual aspects, the High Court should not entertain the writ petition. Whether or not the High Court should exercise jurisdiction under Article 226 of the Constitution would largely depend upon the nature of dispute and if the dispute cannot be resolved without going into the factual controversy, the High Court should not entertain the writ petition. As noted above, the writ petition was primarily founded on allegation of breach of contract. Question whether the action of the opposite party in the writ petition amounted to breach of contractual obligation ultimately depends on facts and would require material evidence to be scrutinised and in such a case writ jurisdiction should not be exercised. (See *State of Bihar v. Jain Plastics & Chemicals Ltd.*)

11. In *Radhakrishna Agarwal v. State of Bihar* the types of cases in which breaches of alleged obligation by the State or its agents can be set up were enumerated. The third category, indicated is 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 in exercise of executive power of the State. The present case is covered by the said category. No writ order can be issued under Article 226 to compel the authorities to remedy a breach of contract; pure and simple. It is more so when factual disputes are involved."

49. In the case of The Rajasthan State Industrial Development and Investment Corporation and Another Vs. Diamond and Gem Development Corporation Ltd. and Another, , reference has been made to paragraph Nos. 19, 20 & 21 which is quoted as under:

"III. Contractual disputes and Writ Jurisdiction

19. "There can be no dispute to the settled legal proposition that matters/ disputes relating to contract cannot be agitated nor terms of the contract can be enforced through writ jurisdiction under Article 226 of the Constitution. Thus, the writ court cannot be a forum to seek any relief based on terms and conditions incorporated in the agreement by the parties. [Vide Bareilly Development Authority v. Ajai Pal Singh and State of U.P. v. Bridge & Roof Co. (India) Ltd.]

20. In Kerala SEB v. Kurien E. Kalathil this Court held that a writ cannot lie to resolve a disputed question of fact, particularly to interpret the disputed terms of a contract observing as under: (SCC pp. 298-99, paras 10-11)

"10. ... The interpretation and implementation of a clause in a contract cannot be the subject-matter of a writ petition. ... If a term of a contract is violated, ordinarily the remedy is not the writ petition under Article 226 . We are also unable to agree with the observations of the High Court that the contractor was seeking enforcement of a statutory contract.

11. ... The contract between the parties is in the realm of private law. It is not a statutory contract. The disputes relating to interpretation of the terms and conditions of such a contract could not have been agitated in a petition under Article 226 of the Constitution of India. That is a matter for adjudication by a civil court or in arbitration if provided for in the contract. ... The contractor should have relegated to other remedies."

21. It is evident from the above that generally the Court should not exercise its writ jurisdiction to enforce the contractual obligation. The primary purpose of a writ of mandamus is to protect and establish rights and to impose a corresponding imperative duty existing in law. It is designed to promote justice (ex debito justitiae). The grant or refusal of the writ is at the discretion of the court. The writ cannot be granted unless it is established that there is an existing legal right of the applicant, or an existing duty of the respondent. Thus, the writ does not lie to create or to establish a legal right, but to enforce one that is already established. While dealing with a writ petition, the court must exercise discretion, taking into consideration a wide variety of circumstances, inter alia, the facts of the case, the exigency that warrants such exercise of discretion, the consequences of grant or refusal of the writ, and the nature and extent of injury that is likely to ensue by such grant or refusal."

50. Reference has also been made to the case of National Highway Authority of India Vs. Ganga Enterprises and Another, and to the case of Kisan Sahkari Chini Mills Ltd. and Others Vs. Vardan Linkers and Others, .

51. The respondent Nos. 1 and 2 being instrumentalities of the State being foisted with the character of the Distribution Licencee in terms of Section 2(17) of the Electricity Act had appointed the petitioner No. 1 as the Distribution Franchisee for which an agreement was entered into. Merely because the contract between the Distribution Licencee and the Distribution Franchisee was terminated at the instance of the Distribution Licencee, the same cannot be said to come within the realm of an alternative remedy of moving the Civil Court or subjecting itself to an arbitration proceeding in terms of the DFA. The action challenged was that of a public authority encompassed with statutory powers and even in case of a breach of contract or a contractual dispute, a writ application under Article 226 of the Constitution of India can be maintained at the behest of an aggrieved party. The respondent Nos. 1 and 2 cannot be permitted to use its vast amplitude of power in an arbitrary or capricious manner as such action would be contrary to its duties and responsibilities, more so, when the issue at hand is of immense public importance as has been aptly stated by the Hon"ble Supreme Court in the case of "Ramana Dayaram Shetty v. International Airport Authority of India and others" (supra) that, the role inhibiting arbitrary action by Government must apply equally where such action is dealing with the public, whether by way of giving electricity or entering into contracts or otherwise and it cannot act arbitrarily and enter into relationship with any persons it likes at its sweet will, but its action must be in conformity with some principles which meets the test of reason and relevance. Here again, I quote what has been stated in "Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust v. V.R. Rudani and others" (supra) - "The judicial control over the fast expanding maze of bodies affecting the rights of the people should not be put into watertight compartment. It should remain flexible to meet the requirements of variable circumstances. Mandamus is a very wide remedy which must be easily available "to reach injustice wherever it is found". Technicalities should not come in the way of granting that relief under Article 226 . We, therefore, reject the contention urged for the appellants on the maintainability of the writ petition."

52. All the judgments referred to by the learned senior counsel for the petitioners unflinchingly point out that merely because of existence of a contractual dispute, the same won't shut the door for an aggrieved party in seeking remedy under Article 226 of the Constitution of India, when the action of the instrumentality of the States is emboldened with arbitrariness. So far as the judgments which have been referred to by the learned senior counsel for the respondent Nos. 1 and 2 the dicta given in the case of "Radhakrishna Agarwal" (supra) was watered down in the case of Verigamto Naveen Vs. Government of Andhra Pradesh and Others, , wherein it was held as follows:

"21. "On the question that the relief as sought for and granted by the High Court arises purely in the contractual field and, therefore, the High Court ought not to have exercised its power under Article 226 of the Constitution placed very heavy reliance on the decision of the Andhra Pradesh High Court in Y.S. Raja Reddy v.

A.P. Mining Corpn. Ltd. and the decisions of this Court in *Har Shankar v. Dy. Excise & Taxation Commr.*, *Radhakrishna Agarwal v. State of Bihar*, *Ramlal & Sons v. State of Rajasthan*, *Shiv Shankar Dal Mills v. State of Haryana*, *Ramana Dayaram Shetty v. International Airport Authority of India* and *Basheshar Nath v. CIT*. Though there is one set of cases rendered by this Court of the type arising in *Radhakrishna Agarwal* case much water has flown in the stream of judicial review in contractual field. In cases where the decision-making authority exceeded its statutory power or committed breach of rules or principles of natural justice in exercise of such power or its decision is perverse or passed an irrational order, this Court has interceded even after the contract was entered into between the parties and the Government and its agencies. We may advert to three decisions of this Court in *Dwarkadas Marfatia & Sons v. Board of Trustees of the Port of Bombay*, *Mahabir Auto Stores v. Indian Oil Corpn.* and *Shrilekha Vidyarthi (Kumari) v. State of U.P.* Where the breach of contract involves breach of statutory obligation when the order complained of was made in exercise of statutory power by a statutory authority, though cause of action arises out of or pertains to contract, brings it within the sphere of public law because the power exercised is apart from contract. The freedom of the Government to enter into business with anybody it likes is subject to the condition of reasonableness and fair play as well as public interest. After entering into a contract, in cancelling the contract which is subject to terms of the statutory provisions, as in the present case, it cannot be said that the matter falls purely in a contractual field. Therefore, we do not think it would be appropriate to suggest that the case on hand is a matter arising purely out of a contract and, therefore, interference under Article 226 of the Constitution is not called for. This contention also stands rejected."

53. No strict rules or guidelines can be laid down as to when the nature of action would come under the public law remedy or private law field. There cannot be a generalised concept with respect to any field of contractual obligations as to when would a writ application under 226 of the Constitution of India lie in case of a contractual dispute. Where Public law element is involved, the contractual obligations has to be considered if the same is resorted to under Article 226 of the Constitution of India. The entire decision making process leading to cancellation/termination of agreement by a statutory authority is a subject of judicial review and scrutiny and in the facts and circumstances of the present case, the same is amenable to Article 226 of the Constitution of India and therefore, the submission of the learned senior counsel for the respondent Nos. 1 and 2 with respect to maintainability of the writ application is rejected.

54. Since the issue of alternative remedy is entangled with the maintainability of the writ application as it has been strenuously contended by the learned senior counsel for the respondent Nos. 1 and 2 that dispute resolution mechanism already exists in the DFA by subjecting oneself to an arbitration proceeding envisaged under Article 17.2.5 of the DFA, it would be necessary to look into the case laws cited by both the learned senior counsels. Reference has been made by

the learned senior counsel for the petitioners to the judgment in the case of Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others, (supra) , wherein it has been held as follows:

"14. "The power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provision of the Constitution. This power can be exercised by the High Court not only for issuing writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari for the enforcement of any of the Fundamental Rights contained in Part III of the Constitution but also for "any other purpose".

15. Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. There is a plethora of case-law on this point but to cut down this circle of forensic whirlpool, we would rely on some old decisions of the evolutionary era of the constitutional law as they still hold the field."

55. Reference has also been made to the case of Harbanslal Sahnia and Another Vs. Indian Oil Corpn. Ltd. and Others, , wherein it has been held as follows:

"7. "So far as the view taken by the High Court that the remedy by way of recourse to arbitration clause was available to the appellants and therefore the writ petition filed by the appellants was liable to be dismissed is concerned, suffice it to observe that the rule of exclusion of writ jurisdiction by availability of an alternative remedy is a rule of discretion and not one of compulsion. In an appropriate case, in spite of availability of the alternative remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies: (i) where the writ petition seeks enforcement of any of the fundamental rights; (ii) where there is failure of principles of natural justice; or (iii) where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged. (See Whirlpool Corpn. v. Registrar of Trade Marks.) The present case attracts applicability of the first two contingencies. Moreover, as noted, the petitioners' dealership, which is their bread and butter, came to be terminated for an irrelevant and non-existent cause. In such circumstances, we feel that the appellants should have been allowed relief by the High Court itself instead of driving them to the need of initiating arbitration proceedings."

56. Learned senior counsel for the respondent Nos. 1 and 2 with respect to alternative remedy has referred to the judgment in the case of United Bank of

India Vs. Satyawati Tondon and Others, , and the relevant paragraphs are extracted hereinbelow:

"43. "Unfortunately, the High Court overlooked the settled law that the High Court will ordinarily not entertain a petition under Article 226 of the Constitution if an effective remedy is available to the aggrieved person and that this rule applies with greater rigour in matters involving recovery of taxes, cess, fees, other types of public money and the dues of banks and other financial institutions. In our view, while dealing with the petitions involving challenge to the action taken for recovery of the public dues, etc. the High Court must keep in mind that the legislations enacted by Parliament and State Legislatures for recovery of such dues are a code unto themselves inasmuch as they not only contain comprehensive procedure for recovery of the dues but also envisage constitution of quasi-judicial bodies for redressal of the grievance of any aggrieved person. Therefore, in all such cases, the High Court must insist that before availing remedy under Article 226 of the Constitution, a person must exhaust the remedies available under the relevant statute.

44. While expressing the aforesaid view, we are conscious that the powers conferred upon the High Court under Article 226 of the Constitution to issue to any person or authority, including in appropriate cases, any Government, directions, orders or writs including the five prerogative writs for the enforcement of any of the rights conferred by Part III or for any other purpose are very wide and there is no express limitation on exercise of that power but, at the same time, we cannot be oblivious of the rules of self-imposed restraint evolved by this Court, which every High Court is bound to keep in view while exercising power under Article 226 of the Constitution.

45. It is true that the rule of exhaustion of alternative remedy is a rule of discretion and not one of compulsion, but it is difficult to fathom any reason why the High Court should entertain a petition filed under Article 226 of the Constitution and pass interim order ignoring the fact that the petitioner can avail effective alternative remedy by filing application, appeal, revision, etc. and the particular legislation contains a detailed mechanism for redressal of his grievance.

46. It must be remembered that stay of an action initiated by the State and/or its agencies/instrumentalities for recovery of taxes, cess, fees, etc. seriously impedes execution of projects of public importance and disables them from discharging their constitutional and legal obligations towards the citizens. In cases relating to recovery of the dues of banks, financial institutions and secured creditors, stay granted by the High Court would have serious adverse impact on the financial health of such bodies/institutions, which (sic will) ultimately prove detrimental to the economy of the nation. Therefore, the High Court should be extremely careful and circumspect in exercising its discretion to grant stay in such matters. Of course, if the petitioner is able to show that its case falls within any of the exceptions carved out in Baburam Prakash Chandra Maheshwari v. Antarim Zila Parishad, Whirlpool Corpn. v. Registrar of Trade Marks and

Harbanslal Sahnia v. Indian Oil Corpn. Ltd. and some other judgments, then the High Court may, after considering all the relevant parameters and public interest, pass an appropriate interim order.

47. In Thansingh Nathmal v. Supdt. of Taxes the Constitution Bench considered the question whether the High Court of Assam should have entertained the writ petition filed by the appellant under Article 226 of the Constitution questioning the order passed by the Commissioner of Taxes under the Assam Sales Tax Act, 1947. While dismissing the appeal, the Court observed as under: (SCC p. 1423, para 7)

"7. ... The jurisdiction of the High Court under Article 226 of the Constitution is couched in wide terms and the exercise thereof is not subject to any restrictions except the territorial restrictions which are expressly provided in the articles. But the exercise of the jurisdiction is discretionary: it is not exercised merely because it is lawful to do so. The very amplitude of the jurisdiction demands that it will ordinarily be exercised subject to certain self-imposed limitations. Resort to that jurisdiction is not intended as an alternative remedy for relief which may be obtained in a suit or other mode prescribed by statute. Ordinarily the Court will not entertain a petition for a writ under Article 226, where the petitioner has an alternative remedy, which without being unduly onerous, provides an equally efficacious remedy. Again the High Court does not generally enter upon a determination of questions which demand an elaborate examination of evidence to establish the right to enforce which the writ is claimed. The High Court does not therefore act as a court of appeal against the decision of a court or tribunal, to correct errors of fact, and does not by assuming jurisdiction under Article 226 trench upon an alternative remedy provided by statute for obtaining relief. Where it is open to the aggrieved petitioner to move another tribunal, or even itself in another jurisdiction for obtaining redress in the manner provided by a statute, the High Court normally will not permit by entertaining a petition under Article 226 of the Constitution the machinery created under the statute to be bypassed, and will leave the party applying to it to seek resort to the machinery so set up."

48. In Titaghur Paper Mills Co. Ltd. v. State of Orissa a three-Judge Bench considered the question whether a petition under Article 226 of the Constitution should be entertained in a matter involving challenge to the order of the assessment passed by the competent authority under the Central Sales Tax Act, 1956 and corresponding law enacted by the State Legislature and answered the same in the negative by making the following observations: (SCC pp. 440-41, para 11)

"11. Under the scheme of the Act, there is a hierarchy of authorities before which the petitioners can get adequate redress against the wrongful acts complained of. The petitioners have the right to prefer an appeal before the prescribed authority under subsection (1) of Section 23 of the Act. If the petitioners are dissatisfied with the decision in the appeal, they can prefer a further appeal to the Tribunal under subsection (3) of Section 23 of the Act, and then ask for a

case to be stated upon a question of law for the opinion of the High Court under Section 24 of the Act. The Act provides for a complete machinery to challenge an order of assessment, and the impugned orders of assessment can only be challenged by the mode prescribed by the Act and not by a petition under Article 226 of the Constitution. It is now well recognised that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of. This rule was stated with great clarity by Willes, J. in *Wolverhampton New Waterworks Co. v. Hawkesford* in the following passage: (ER p. 495)

"... There are three classes of cases in which a liability may be established founded upon a statute. ... But there is a third class viz. where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it. ... The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to."

The rule laid down in this passage was approved by the House of Lords in *Neville v. London Express Newspapers Ltd.* and has been reaffirmed by the Privy Council in *Attorney-General of Trinidad and Tobago v. Gordon Grant & Co. Ltd.* and *Secy. of State v. Mask & Co.* It has also been held to be equally applicable to enforcement of rights, and has been followed by this Court throughout. The High Court was therefore justified in dismissing the writ petitions in limine."

49. The views expressed in *Titaghur Paper Mills Co. Ltd. v. State of Orissa* were echoed in *CCE v. Dunlop India Ltd.* in the following words: (SCC p. 264, para 3)

"3. ... Article 226 is not meant to short-circuit or circumvent statutory procedures. It is only where statutory remedies are entirely ill-suited to meet the demands of extraordinary situations, as for instance where the very vires of the statute is in question or where private or public wrongs are so inextricably mixed up and the prevention of public injury and the vindication of public justice require it that recourse may be had to Article 226 of the Constitution. But then the Court must have good and sufficient reason to bypass the alternative remedy provided by statute. Surely matters involving the revenue where statutory remedies are available are not such matters. We can also take judicial notice of the fact that the vast majority of the petitions under Article 226 of the Constitution are filed solely for the purpose of obtaining interim orders and thereafter prolong the proceedings by one device or the other. The practice certainly needs to be strongly discouraged."

57. What can be culled from the aforesaid judgments are that 3 circumstances have been enumerated wherein an alternative remedy will not operate as a bar. The facts of the case at hand would suggests that it comes within the criteria laid down, and in such circumstances therefore, the plea of alternative remedy available to the petitioners in terms of Article 17.3.5 of the DFA is not

entertained. Even in the case of "United Bank of India" (supra) referred to by the learned senior counsel for the respondent Nos. 1 and 2, the same does not expressly bar an application under Article 226 of the Constitution of India even when an alternative remedy is available. In "United Bank of India" (supra), the Hon'ble Supreme Court was considering the powers of the High Court in restraining the appellant from proceeding under Section 13(4) of the SARFAESI Act against the property of the respondent No. 1. It is already a settled law that the borrower can challenge the action taken under Section 13(4) of the Act by filing an application under Section 17 of the SARFAESI Act and the civil suit can be filed within the narrow scope and on the limited grounds. In such fact situation, the Hon'ble Supreme Court went on to hold that in spite of repeated pronouncements, the High Courts continued to ignore the availability of statutory remedies under the DRT Act and the SARFAESI Act and exercising jurisdiction under Article 227 of the Constitution of India. The fact situation of the case at hand with respect to alternative remedy in view of Article 17.2.5 of the DFA providing for a dispute resolution mechanism cannot be treated to be that of compulsion. Some of the criteria/conditions mentioned in the above quoted judgments do embrace the present case and since the issue is of utmost public importance and considering the entire facts of the case, the petitioners had justifiably approached this Court under Article 226 of the Constitution of India. In such circumstances, therefore, and in the context of the case, the plea of alternative remedy raised by the learned senior counsel for the respondent Nos. 1 and 2 is negated.

58. Learned senior counsel for the respondent Nos. 1 and 2 has stressed much that the questions which have been raised by the petitioners are actually disputed questions of fact which cannot be looked into in this writ application. The entire reading of the documents appended to various affidavits filed on behalf of both the sides does not lead credence to the contentions of the learned senior counsel for the respondents that the facts in question are disputed. As has been indicated in the earlier part of the judgment, there does not seem to be any dispute prior to the issuance of the letter of the Energy Department, Government of Jharkhand dated 03.07.2014 leading to the meeting of the Board of Directors dated 05.08.2014 and issuance of letter of termination dated 06.05.2015 after remaining in hibernation for about 9 months. The entire facets of the case starting from entering into the contract till issuance of the letter dated 03.07.2014 does not at all suggest about any dispute. Even if disputed questions of facts are involved, the same does not debar this Court from entering into the realms of dispute. In this context, reference may be made to the case of Smt. Gunwant Kaur and Others Vs. Municipal Committee, Bhatinda and Others, (supra) , in which the Hon'ble Supreme Court has held as follows:

"14. "The High Court observed that they will not determine disputed question of fact in a writ petition. But what facts were in dispute and what were admitted could only be determined after an affidavit in reply was filed by the State. The High Court, however, proceeded to dismiss the petition in limine. The High Court

is not deprived of its jurisdiction to entertain a petition under Article 226 merely because in considering the petitioner's right to relief questions of fact may fall to be determined. In a petition under Article 226 the High Court has jurisdiction to try issues both of fact and law. Exercise of the jurisdiction is, it is true, discretionary, but the discretion must be exercised on sound judicial principles. When the petition raises questions of fact of a complex nature, which may for their determination require oral evidence to be taken, and on that account the High Court is of the view that the dispute may not appropriately be tried in a writ petition, the High Court may decline to try a petition. Rejection of a petition in limine will normally be justified, where the High Court is of the view that the petition is frivolous or because of the nature of the claim made dispute sought to be agitated, or that the petition against the party against whom relief is claimed is not maintainable or that the dispute raised thereby is such that it would be inappropriate to try it in the writ jurisdiction, or for analogous reasons.

15. From the averments made in the petition filed by the appellants it is clear that in proof of a large number of allegations the appellants relied upon documentary evidence and the only matter in respect of which conflict of facts may possibly arise related to the due publication of the notification under Section 4 by the Collector."

59. In such circumstances, therefore, this Court has the jurisdiction to entertain this writ application in view of the judgment in the case of "Gunwant Kaur" (supra) and in view of the prevailing facts and circumstances of the case. As explained, the documents relied upon by both the sides do not suggest or give any hint that there are serious disputed questions of fact involved in the present case.

60. The next question which is under consideration by this Court is whether the principles of natural justice had been adhered to by the respondent Nos. 1 and 2 while issuing the letter of termination dated 06.05.2015. Learned senior counsel for the petitioners has repeatedly contented that Article 16.3 of the DFA has not been complied with and without resorting to Article 16.3, the authorities could not have invoked Article 2.1.8 of the DFA. Mr. Ajit Kumar, learned senior counsel for the respondent Nos. 1 and 2 had refuted this argument by submitting that the stage of invoking Article 16 had not arrived and the discretion in terms of Article 2.1.8 of the DFA has been used considering the background of the case and the dilatory tactics adopted by the petitioners in fulfilling the conditions precedent. Moreover, the direction for power point presentation would act in furtherance to show that sufficient compliance had been made while issuing the letter of termination. Mr. S. Pal, learned senior counsel for the petitioners had in course of his argument referred to the counter affidavit filed in LPA No. 247 of 2014 wherein it was stated on oath that JBVNL contemplates to issue show-cause to the respondent Nos. 1 and 2 on the issue of irregularities found in the input based Distribution Franchisee and for which the entire matter has been sent to the senior law advisor for obtaining legal opinion. It has been submitted

that the argument of the learned senior counsel for the respondent Nos. 1 and 2 is in itself contrary to the counter-affidavit filed in LPA No. 247 of 2014, inasmuch as, if there was no requirement for issuance of a show-cause notice and the authorities had only to use their discretion, there could have been no necessity in taking steps for issuance of a show-cause notice. In support of the rival contentions, the following judgments have been referred:

61. In the case of A.K. Kraipak and Others Vs. Union of India (UOI) and Others, , wherein it was held as follows:

"20. "The aim of the rules of natural justice is to secure justice or to put it negatively to prevent miscarriage of justice. These rules can operate only in areas not covered by any law validly made. In other words they do not supplant the law of the land but supplement it. The concept of natural justice has undergone a great deal of change in recent years. In the past it was thought that it included just two rules namely: (1) no one shall be a judge in his own case (*Nemo debet esse iudex propria causa*) and (2) no decision shall be given against a party without affording him a reasonable hearing (*audi alteram partem*). Very soon thereafter a third rule was envisaged and that is that quasi-judicial enquiries must be held in good faith, without bias and not arbitrarily or unreasonably. But in the course of years many more subsidiary rules came to be added to the rules of natural justice. Till very recently it was the opinion of the courts that unless the authority concerned was required by the law under which it functioned to act judicially there was no room for the application of the rules of natural justice. The validity of that limitation is now questioned. If the purpose of the rules of natural justice is to prevent miscarriage of justice one fails to see why those rules should be made inapplicable to administrative enquiries. Often times it is not easy to draw the line that demarcates administrative enquiries from quasi-judicial enquiries. Enquiries which were considered administrative at one time are now being considered as quasi-judicial in character. Arriving at a just decision is the aim of both quasi-judicial enquiries as well as administrative enquiries. An unjust decision in an administrative enquiry may have more far reaching effect than a decision in a quasi-judicial enquiry. As observed by this Court in *Suresh Koshy George v. University of Kerala* the rules of natural justice are not embodied rules. What particular rule of natural justice should apply to a given case must depend to a great extent on the facts and circumstances of that case, the framework of the law under which the enquiry is held and the constitution of the Tribunal or body of persons appointed for that purpose. Whenever a complaint is made before a court that some principle of natural justice had been contravened the court has to decide whether the observance of that rule was necessary for a just decision on the facts of that case."

62. In the case of "Arcot Textile Mills Ltd. v. Regional Provident Fund Commissioner and others" reported in (2013) 16 SCC 1, it has been held as follows:

"31. "We may state with profit that principles of natural justice should neither be

treated with absolute rigidity nor should they be imprisoned in a straitjacket. It has been held in *Ajit Kumar Nag v. Indian Oil Corpn. Ltd.* that: (SCC p. 781, para 30)

"30. ... The maxim audi alteram partem cannot be invoked if [the] import of such maxim would have the effect of paralysing the administrative process or where the need for promptitude or the urgency so demands."

It has been stated therein that the approach of the Court in dealing with such cases should be pragmatic rather than pedantic, realistic rather than doctrinaire, functional rather than formal and practical rather than precedential. The concept of natural justice sometimes requires flexibility in the application of the rule. What is required to be seen is the ultimate weighing on the balance of fairness. The requirements of natural justice depend upon the circumstances of the case.

32. In *Natwar Singh v. Director of Enforcement* this Court while discussing about the applicability of the rule had reproduced the following passage: (SCC p. 268, para 25)

"25. ... "It is not possible to lay down rigid rules as to when the principles of natural justice are to apply: nor as to their scope and extent. Everything depends on the subject-matter:" [see *R. v. Gaming Board for Great Britain*, ex p *Benaim and Khaida* at QB p. 430 C], observed Lord Denning, M.R.

"... Their application, resting as it does upon statutory implication, must always be in conformity with the scheme of the Act and with the subject-matter of the case."

33. In this context, we may fruitfully refer to the verdict in *Kesar Enterprises Ltd. v. State of U.P.* wherein the Court was considering the applicability of principles of natural justice to Rule 633(7) of the Uttar Pradesh Excise Manual. The said Rule provided that if certificate was not received within the time mentioned in the bond or pass, or if the condition of bond was infringed, the Collector of the exporting district or the Excise Inspector who granted the pass shall take necessary steps to recover from executant or his surety the penalty due under the bond. A two-Judge Bench referred to the decisions in *Swadeshi Cotton Mills v. Union of India*, *Canara Bank v. V.K. Awasthy* and *Sahara India (Firm) (1) v. CIT* and came to hold as follows: (*Kesar Enterprises Ltd. case*, p. 743, para 30)

"30. ... we are of the opinion that keeping in view the nature, scope and consequences of direction under sub-rule (7) of Rule 633 of the Excise Manual, the principles of natural justice demand that a show-cause notice should be issued and an opportunity of hearing should be afforded to the person concerned before an order under the said Rule is made, notwithstanding the fact that the said Rule does not contain any express provision for the affected party being given an opportunity of being heard."

34. Regard being had to the discussions made and the law stated in the field, we are of the considered opinion that natural justice has many facets. Sometimes,

the said doctrine applied in a broad way, sometimes in a limited or narrow manner. Therefore, there has to be a limited enquiry only to the realm of computation which is statutorily provided regard being had to the range of delay. Beyond that nothing is permissible. We are disposed to think so, for when an independent order is passed making a demand, the employer cannot be totally remediless and would have no right even to file an objection pertaining to computation. Hence, we hold that an objection can be filed challenging the computation in a limited spectrum which shall be dealt with in a summary manner by the competent authority."

63. Reference has also been made to the case of *Swadeshi Cotton Mills Vs. Union of India (UOI)*, , wherein it has been held as follows:

"33. "The next general aspect to be considered is: Are there any exceptions to the application of the principles of natural justice, particularly the audi alteram partem rule? We have already noticed that the statute conferring the power, can by express language exclude its application. Such cases do not present any difficulty. However, difficulties arise when the statute conferring the power does not expressly exclude this rule but its exclusion is sought by implication due to the presence of certain factors: such as, urgency, where the obligation to give notice and opportunity to be heard would obstruct the taking of prompt action of a preventive or remedial nature. It is proposed to dilate a little on this aspect, because in the instant case before us, exclusion of this rule of fair hearing is sought by implication from the use of the word "immediate" in Section 18-AA(1). Audi alteram partem rule may be disregarded in an emergent situation where immediate action brooks no delay to prevent some imminent danger or injury or hazard to paramount public interests. Thus, Section 133 of the Code of Criminal Procedure, empowers the Magistrates specified therein to make an ex parte conditional order in emergent cases, for removal of dangerous public nuisances. Action under Section 17 , Land Acquisition Act, furnishes another such instance. Similarly, action on grounds of public safety, public health may justify disregard of the rule of prior hearing."

64. In the case of *State of Gujarat and Others Vs. Meghji Pethraj Shah Charitable Trust and Others*, , the relevant paragraphs are extracted hereinbelow:

"22. "We are unable to see any substance in the argument that the termination of arrangement without observing the principle of natural justice (audi alteram partem) is void. The termination is not a quasi-judicial act by any stretch of imagination; hence it was not necessary to observe the principles of natural justice. It is not also an executive or administrative act to attract the duty to act fairly. It was -- as has been repeatedly urged by Shri Ramaswamy -- a matter governed by a contract/agreement between the parties. If the matter is governed by a contract, the writ petition is not maintainable since it is a public law remedy and is not available in private law field, e.g., where the matter is governed by a non-statutory contract. Be that as it may, in view of our opinion on the main question, it is not necessary to pursue this reasoning further."

65. In the case of *Ajit Kumar Nag Vs. General Manager (P.J.), Indian Oil Corporation Ltd., Haldia and Others*, , it has been concluded thus:

"44. "We are aware of the normal rule that a person must have a fair trial and a fair appeal and he cannot be asked to be satisfied with an unfair trial and a fair appeal. We are also conscious of the general principle that pre-decisional hearing is better and should always be preferred to post-decisional hearing. We are further aware that it has been stated that apart from Laws of Men, Laws of God also observe the rule of *audi alteram partem*. It has been stated that the first hearing in human history was given in the Garden of Eden. God did not pass sentence upon Adam and Eve before giving an opportunity to show cause as to why they had eaten the forbidden fruit. (See *R. v. University of Cambridge*.) But we are also aware that the principles of natural justice are not rigid or immutable and hence they cannot be imprisoned in a straitjacket. They must yield to and change with exigencies of situations. They must be confined within their limits and cannot be allowed to run wild. It has been stated: " "To do a great right" after all, it is permissible sometimes "to do a little wrong"." [Per Mukharji, C.J. in *Charan Lal Sahu v. Union of India (Bhopal Gas Disaster)*, SCC p. 705, para 124.] While interpreting legal provisions, a court of law cannot be unmindful of the hard realities of life. In our opinion, the approach of the Court in dealing with such cases should be pragmatic rather than pedantic, realistic rather than doctrinaire, functional rather than formal and practical rather than "precedential".

66. The judgments referred to above does point out that the principles of natural justice cannot be applied rigidly or imprisoned in a straitjacket formula. Availability of the rules of the natural justice depends upon the facts and circumstances of each case. Natural justice cannot be put in a water tight compartment, but at the same time the rules of fair play and gamesmanship cannot be ignored or brushed aside. Even if Article 16.1.3 of the DFA is not taken into consideration whether the respondents - authorities were imbibed with the inherent power of resorting to Article 2.1.8 of the DFA and terminating the agreement on the basis of its discretion to do so. The discretion as stated in Article 2.1.8 of the DFA does not give dictatorial powers to the respondents - authorities to cancel the agreement as and when it chooses. This can be gathered from the facts of the case which have tended to go on a straight path and only on issuance of letter dated 03.07.2014, the paths had veered leading to termination of the agreement. In such circumstances, therefore, it was incumbent upon the respondents - authorities to have given opportunity of hearing to the petitioners before arriving at any conclusion. Article 2.1.8 of the DFA gives a discretion to the respondents to terminate the agreement, but the same cannot be read in isolation as the principles of natural justice are ingrained in every State action and the said concept would also include any action taken by the respondents - authorities by invoking Article 2.1.8. Initial response in the meeting of the Board of Directors dated 05.08.2014 was to issue a show-cause after seeking the opinion of the senior legal advisor which has also been stated in the counter-affidavit filed in LPA No. 247 of 2014, but the subsequent event of

resiling from the earlier contentions do suggests that the respondents - authorities were themselves aware of the principles of natural justice to be followed. In the circumstances enumerated above, the impugned letter dated 06.05.2015 being violative of the principles of natural justice and is on the basis of an action on the part of respondents - authorities which can be termed as unreasonableness, the same is quashed and set aside.

67. Before parting with this order, reference is being made to the case of State of Jharkhand Vs. CWE-SOMA Consortium and Others , wherein while considering the Wednesbury principles of reasonableness and the way the same was followed in the case of construction of Kharkai Dam, conceptualised in the early 80s, it was held as follows:

"34. "We are conscious of the limits of judicial review in administrative action and the Court does not sit in appeal to merely review the manner in which the decision is made. However, though the Government does have a freedom of contract and in certain measures "free play in the joints" is necessary for administrative functioning, but the decision so taken is subject to be tested by the application of "Wednesbury principles of reasonableness" including other facets as have been held by the Hon"ble Supreme Court in the judgments laid down from time to time. Larger public interest, however is also one of the very important factors to be kept in mind by the Court. In the matter of entering into a contract, the State does not stand on the same footing as a private person who is free to enter into contract with any person he likes. State is supposed to act fairly and reasonably, therefore, any decision cannot afford to be irrational or irrelevant. Testing the present case on the aforesaid "Wednesbury Principles of reasonableness" and keeping in view the larger public interest, the impugned action/decision taken by the Tender Committing for re-bidding warrants our interference in exercise of judicial review. Our view is reinforced by principles laid down on the subject by Hon"ble Supreme Court in case New Horizons Limited and Another Vs. Union of India (UOI) and Others, wherein their Lordships also considered the past experience, the equipment and resources at the disposal of the company as a very important factor for entering into a contract. We have also considered that aspect in the present case where construction of dam being a specialized job cannot be undertaken by everybody. The qualifications required for such like project have to be exceptionally high as any lapse can turn out to be hazardous. All these aspects have to be examined from professional point of view which means the background of the company, the persons who are in control of the same and their capacity to execute the work. This appears to be the reason that the Chief Engineer, regarding this contract gave justification for not changing the conditions of NIT, being a specialized kind of work. Perhaps, he was right in his justification as such type of construction work cannot afford discontinuation at any stage on account of inability of the company for any reason whatsoever, may be financial or technical. Huge machinery and perfect technical know how is required to perform such like job, therefore, exceptionally high qualification/eligibility criteria is required. We consider it proper to refer to the considerations

which have to weigh upon arriving at a decision in matters of such commercial transaction even by a public body or the State as held in the case of Raunaq International Limited Vs. I.V.R. Construction Ltd. and Others, in Para-9 and 10, which read as under:--

"9. The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision, considerations which are of paramount importance are commercial considerations. These would be:

- (1) the price at which the other side is willing to do the work;
- (2) whether the goods or services offered are of the requisite specifications;
- (3) whether the person tendering has the ability to deliver the goods or services as per specifications. When large works contracts involving engagement of substantial manpower or requiring specific skills are to be offered, the financial ability of the tenderer to fulfill the requirements of the job is also important;
- (4) the ability of the tenderer to deliver goods or services or to do the work of the requisite standard and quality;
- (5) past experience of the tenderer and whether he has successfully completed similar work earlier;
- (6) time which will be taken to deliver the goods or services; and often
- (7) the ability of the tenderer to take follow-up action, rectify defects or to give post-contract services.

Even when the State or a public body enters into a commercial transaction, considerations which would prevail in its decision to award the contract to a given party would be the same. However, because the State or a public body or an agency of the State enters into such a contract, there could be, in a given case, an element of public law or public interest involved even in such a commercial transaction.

10. What are these elements of public interest? (1) Public money would be expended for the purposes of the contract. (2) The goods or services which are being commissioned could be for a public purpose, such as, construction of roads, public buildings, power plants or other public utilities. (3) The public would be directly interested in the timely fulfillment of the contract so that the services become available to the public expeditiously. (4) The public would also be interested in the quality of the work undertaken or goods supplied by the tenderer. Poor quality of work or goods can lead to tremendous public hardship and substantial financial outlay either in correcting mistakes or in rectifying defects or even at times in redoing the entire work-thus involving larger outlays of public money and delaying the availability of services, facilities or goods e.g., a delay in commissioning a power project, as in the present case, could lead to power shortages, retardation of industrial development, hardship to the general

public and substantial cost escalation."

Undoubtedly, SOMA qualifies all the criterias.

37. Another important aspect that requires to be kept in mind is that the construction of Kharkai dam, which undoubtedly is a specialized project, was given to one M/s. Hindustan Constructions Company in year 1981, a reputed company, but the same was abandoned as it failed to complete the project on account of certain naxal activities, the said area being naxal infested area. A project of construction of dam which was supposed to be completed somewhere in the 80's, has not started as yet. This project has to be completed under AIBP for which huge amount, running into crores, has been sanctioned. Although it has not been brought to our notice as to what was the estimated cost of this project when it was floated in 1981 and allotted to M/s. Hindustan Constructions Company, but one aspect is very clear that the tender which was floated in February, 2014 in which SOMA was found to be responsive was for an estimated value of Rs. 697,20,31,363.00 exactly. It is in the second tender when floated in July, 2014, the estimated value was enhanced to Rs. 738 crores approximately. As stated above, the second tender, however, stands cancelled on 7th of August, 2014. If re-tendering has to be done now, after the lapse of about 8 months, it would be certainly with enhanced estimated value which can bring the difference of another Rs. 50-60 crores (approximately) and in all, it would be touching around Rs. 100 crores, if seen from the estimated value of the first tender floated in February, 2014. It is certainly going to cause loss to the State Exchequer. We are conscious of the fact that this amount ultimately has to be adjusted from the total amount sanctioned and funded by the Central Government through AIBP, but undoubtedly, it is a public money which cannot be wasted like this. Another aspect which is worth noticing is that all the amount funded by the Central Government under the aforesaid scheme was for a limited period for which the State of Jharkhand sought extension and got it upto 31st of March, 2015 and will have to make a request now for further extension otherwise, the grant will be converted into loan which in turn, would burden the State Exchequer more. Viewed thus, we are of the view that element of public interest would be better served, if re-bidding is not allowed and the petitioner who was considered to be responsive and the other two tenderers non-responsive, the work in question is allowed to be executed by the petitioner in the right earnest as not only it would save unnecessary escalation of cost of the project by further re-tendering of the work, but the commission of the project on an expeditious basis would serve the public purposes in its true sense as the instant Kharkai Dam was conceived in 80's and not started as yet. The timely completion of the project, undoubtedly would directly be beneficial to the public at large on all counts."

68. In the facts and circumstances enumerated above, I am inclined to allow this application. Accordingly, the impugned letter of termination dated 06.05.2015 is hereby quashed and the matter is remitted back to the respondent No. 1 to

consider the issue of continuing with the petitioners as the Distribution Franchisee for Ranchi Circle. In considering the same, the respondents must take into account the entire gamut of discussions made with respect to various issues in this order. Taking a leaf out of the judgment in the case of "State of Jharkhand" (supra) and since the issue of distribution of electricity concerns the public at large and is of immense public importance, it is expected that the respondent Nos. 1 and 2 shall make every endeavour to get the distribution of electricity for Ranchi Circle started within the earliest feasible period.