2024 INSC 486

**REPORTABLE**

**IN THE SUPREME COURT OF INDIA**

**CIVIL APPELLATE JURISDICTION**

**CIVIL APPEAL NO. 6741 OF 2024**

(ARISING OUT OF SPECIAL LEAVE PETITION (C) NO. 12941 OF 2023)

SUBODH KUMAR SINGH RATHOUR **...APPELLANT**

VERSUS

THE CHIEF EXECUTIVE OFFICER & ORS .....**RESPONDENTS**



**J U D G M E N T**

**J.B. PARDIWALA, J.:**

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**1.** This appeal arises out of the final judgment and order dated 25.05.2023 passed by the High Court of Calcutta in M.A.T. No. 744 of 2023 ("**Impugned Order**"), by which the High Court upheld the decision of the respondent to cancel the tender that had been awarded to the appellant for the maintenance of two underpasses on Public-Private Partnership basis, and thereby dismissed the writ appeal filed by the appellant.

## A. FACTUAL MATRIX

**2.** The respondent floated a tender notice dated 12.05.2022 inviting bids for the maintenance of two underpasses on the Eastern Metropolitan Bypass and its abutting area against a License Fee for Advertisement Rights over designated sites at each underpass, for a period of 10-years. As per the aforesaid tender, the scope of work included the regular maintenance of the aforementioned underpasses and the upkeep of its garden area and electro-mechanical fittings. The relevant portion reads as under: -

| *Sl. No* | *Name of Work* | *License Fee of the Yearly Charge for the 1st year (Rs.)* | *Earnest Money (Rs.)* | *Allotted Time Period for License & Work* |
|---|---|---|---|---|
| *(1)* | *(2)* | *(3)* | *(4)* | *(5)* |
| *1.* | *REGULAR MAINTENANCE OF BELIAGHATA UNDERPASS INCLUDING UPKEEPING OF UNDERPASS PROPER, GARDEN AREA, AT GRADE UNDERPASS AREA AND ALL ELECTRO-MECHANICAL FITTINGS AGAINST LICENSE FEE OF ADVERTISEMENT RIGHTS OVER (10) YEARS.*<br><br>*Tender ID – 2022_KMDS_380215_1* | *TO BE QUOTED* | *5,00,000.00 [Rupees Five Lakh Only]*<br><br>*Online (Net Banking/ NEFT/RTGS)* | *10 (Ten) Years* |
| *2.* | *REGULAR MAINTENANCE OF SWABHUMI UNDERPASS* | | | |

| | | | | |
|---|---|---|---|---|
| | *INCLUDING UPKEEPING OF UNDERPASS PROPER, GARDEN AREA, AT GRADE UNDERPASS AREA AND ALL ELECTRO-MECHANICAL FITTINGS AGAINST LICENSE FEE OF ADVERTISEMENT RIGHTS OVER (10) YEARS.*<br><br>*Tender ID – 2022_KMDS_380215_1* | *TO BE QUOTED* | *5,00,000.00 [Rupees Five Lakh Only]*<br><br>*Online (Net Banking/ NEFT/RTGS)* | *10 (Ten) Years* |

**3.** Pursuant to the aforesaid, the tendering process was undertaken and the appellant herein on 13.06.2022 submitted his bid with a quotation of Rs. 29,55,555/- for the Beliaghata Underpass and Rs. 23,55,555/- for the Swabhumi Underpass. Out of the total bids received, the appellant's quotations were found to be the highest and was classified as 'H1' for both the underpasses.

**4.** Accordingly, the respondent issued two Letter of Intents dated 27.06.2022 in favour of the appellant, accepting the quotation offered by him and declaring his firm as the successful bidder for the aforementioned tender, and a formal Memorandum of Tender for Work was executed and issued to the appellant.

**5.** As per the Memorandum of Tender for Work, the detailed 'Scope of Work' *inter-alia* included (i) the sweeping of floors & cleaning of the walls, stairwell, escalators, railings and glass-fixtures, (ii) regular emptying of dustbins and removal / processing of waste trash, (iii) upkeep of the garden and plants and (iv) the maintenance of light-fittings, escalators, water pumps and other electro-mechanical fixtures.

**6.** Furthermore, the Special Terms & Conditions of the Memorandum, more particularly Clause 35 therein stipulated that the contract would be liable to be terminated *inter-alia* in the event of any failure, breach or non-compliance of any of the obligations or terms delineated in the tender by the successful bidder.

**7.** Upon completion of all the formalities, the Work Orders dated 18.10.2022 were issued by the Executive Engineer, pursuant to which the appellant commenced his work in terms of the contract.

**8.** On 01.12.2022, the Urban Development and Municipal Affairs Department, Government of West Bengal issued an Order directing that the maintenance of the roads and drainage of the E.M. Bypass including the two subject underpasses shall be handed over by the Kolkata Metropolitan Development Authority (KMDA) i.e., the respondent herein to the Kolkata Municipal Corporation (KMC). The said order reads as under: -

*"**Government of West Bengal***
***Urban Development and Municipal Affairs Department***
***NAGARYAN, DF-8, Sector-I***
***Salt Lake, Kolkata - 700 064***

***Memo No. 5783 – UDMA-22012(14)/11/2022***

***Date : 01.12.2022***

***ORDER***

*KMDA was the custodian for the maintenance of the E.M Bypass connecting the northern and southern part of the city and starts from northern hub Ultadanga to Garia in the South. The road length is 15.6 Km which runs along the eastern ring of the city. After careful consideration it has been decided that the maintenance of the road alongwith the drainage be handed over from KMDA to KMC with the following scope of activities.*

*(1) The defects in carriageway would be maintained and restored by KMC henceforth.*
*(2) The existing carriageway alongwith the surface and underground drainage would be maintained by KMC. The conservancy in and around the Eastern Bypass would also be maintained by KMC.*
*(3) Subject to clearance from KMDA, KMC would issue NOC to all utility and service providers. The cost of road restoration from the charges to be levied is to be paid to KMC by all utility and service providers.*
*(4) The right of collecting revenues from the advertisement displays will remain with KMDA.*
*(5) All the structures, as the new or old Bridges, Culverts, FoBs etc. will be under the custody of KMDA.*
*(6) All development activities along the road except for the Bridges, Culverts, FoBs etc. will be taken up by KMC.*
*(7) KMC would remain custodian for illumination of the Bypass.*
*(8) The green verge along the E.M. Bypass to be maintained by KMC.*

*The order is issued in the interest of public service.*

*Sd/-*
*Principal Secretary*
*to the Govt. of West Bengal"*

**9.** As per the aforesaid Order dated 01.12.2022, the maintenance and restoration of carriageway, structures, underground drainage and development activities of the E.M. Bypass Area was taken over by the KMC. However, the Order specifically, clarified that the right of collecting revenue from advertisements displayed would continue to remain with the KMDA.

**10.** Thereafter, in light of the aforesaid order, the Executive Engineer, KMDA under instructions issued by the competent authorities sent a notice dated 24.01.2023 to the appellant herein asking him to stop all work in respect of the maintenance of the two underpasses with immediate effect in view of the handing over of the maintenance of the E.M. Bypass to the KMC.

**11.** In response to the above, the appellant sent a letter dated 25.01.2023 *inter-alia* pointing out that as per the Urban Development and Municipal Affairs Department's Order dated 01.12.2022, the custody and rights of revenue of all structures, bridges, culverts etc. including the concerned underpasses, continued to remain with the respondent, and requested to recall the notice dated 24.01.2023 asking him to stop the work.

**12.** However, on 07.02.2023, the respondent issued one another notice to the appellant stating that the tender for work of maintenance has been cancelled on account of a technical fault in the tender. It was stated therein that the tender was found to be 'non-specific' & 'not well defined' and that had created ambiguity resulting in financial losses to the respondent. The said Notice of Cancellation reads as under: -

*"Date: 07.02.2023*

*To,*
*V.S. Advertising,*
*65/268, M.N. Sarkar Road,*
*Siliguri, West Bengal 7340001*

*Sub: Cancellation of Work/Tender*

*Sir,*

*The cited tender is hereby cancelled by the Authority in KMDA. We would state with regret that the tender has been found having technical fault, non-specific and not well defined thus creating ambiguity for obvious reasons. By this, the Authority is incurring financial loss as well.*

*We regret for the inconvenience caused to you and are ready to reimburse the cost you have so far incurred in the work. This has been decided that the license fee deposited by you and the cost incurred for construction activity and maintenance work would be refunded as per*

*actual assessment by the divisional engineers based upon the approved drawing and execution.*

*This is for your information with kind compliance please.*

*Sd/-*
*Chief Engineer-II (Bridge)*
*Roads & Bridges Sector, KMDA"*

**13.** It is pertinent to note from the aforesaid that, no reference was made as regards handing over of the maintenance to KMC which was previously alluded to, for stopping all work pertaining to the tender.

## B. IMPUGNED ORDER

**14.** Aggrieved by the aforesaid, the appellant preferred a writ petition being WPA No. 3381 of 2023 before the High Court of Calcutta assailing the respondent's Notice dated 07.02.2023 cancelling the tender for work of maintenance of the two underpasses.

**15.** The aforesaid writ petition referred to above came to be rejected by the High Court vide its order dated 24.04.2023, wherein the Ld. Single Judge held that the decision to cancel the tender had to be taken on account of the administrative exigencies and also due to the 'change in policy'. It was further held that the decision to cancel the tender was not borne out of any ulterior motives on the part of the respondent. The decision of the learned Single Judge is based on two grounds: -

**(i)** ***First,*** the High Court took the view that the decision to cancel the tender cannot be termed as an arbitrary action on the part of the respondent.

The appellant was put to prior notice as regards the change of hands of the management of the concerned underpasses, much before the ultimate cancellation notice was issued. It further observed that, since the notice of cancellation dated 07.02.2023 specifically provided the reasons for cancelling the tender i.e., the technical faults found in the tender that was floated, there was no element of arbitrariness in the said action. The relevant observations read as under: -

> *"11. [...] The effect of the administrative decision was reiterated in the stop-work request of 24.01.2023 where the reason given for the stop-work was also the "changed scenario" of handover of the maintenance work of E.M. Bypass to KMC from KMDA. Hence, the reason for the stop-work and the impugned cancellation is a change of policy for administrative convenience simpliciter.*
>
> *xxx xxx xxx*
>
> *18. In the present case, the impugned cancellation of 07.02.2023 cannot be described as a bolt from the blue since the petitioner was put on notice of the impending change in circumstance on 24.01.2023 where the reason for the change was also conveyed to the petitioner. The order dated 01.12.2022 of the Urban Development and Municipal Affairs Department stating that the maintenance of the E.M. Bypass would be handed over from the KMDA to KMC provides the rationale for the impugned cancellation. Seen in this backdrop, it cannot be said that the impugned letter of cancellation of the tender /work was issued with an ulterior motive or for extraneous considerations. In fact, the letter of cancellation provides further reasons, namely, that the tender has been found to be non-specific and having technical faults. This would also be borne out from clauses 10 and 14 of the Special Terms and Conditions of the tender document which give rise to conflicting interpretations on the placement of the signboards. Hence, besides the administrative decision to hand over the maintenance of E.M. Bypass from KMDA to KMC, the respondent KMDA as the tendering authority, has a right to rectify the ambiguities in the bid document by cancelling the same."*
>
> (Emphasis supplied)

**(ii)** ***Secondly,*** the appellant could not have redressed his grievances by invoking the writ jurisdiction of the High Court under Article 226 of the Constitution, as there was no failure of any statutory duty or public law element involved. Moreover, since the relief sought was essentially in the nature of specific performance, it could have been prayed for only under ordinary civil law and not by way of a writ petition. The relevant observations read as under: -

> *"20. It is well settled that a contractual dispute with a public law element would be amenable to writ jurisdiction. The present dispute however arises out of a private contract for maintenance of underpasses in the E.M. Bypass and advertisement rights over certain spaces within the contracted area. The rights following out of the contract are purely private in nature and there is nothing to show that the performance of the contract or the consequence therefrom would affect the public at large or even a sizeable section of the public. A public law element is generally understood to mean the reach of an obligation to a large section of the public or the obligation affecting the lives and livelihood of the general public by its very nature. M.P. Power sounded a cautionary note in such cases where the State cites monetary gains or losses as reason for termination of a contract. This is also not' the case at hand since the reasons given for cancellation were on a wholly different plane."*
>
> *21. The above reasons persuade this Court to hold that the remedy available to the petitioner is in the realm of private law and not under Article· 226 of the Constitution which contemplates certain tests including that the dispute must have a public law element. The complaint of the petitioner is essentially for the specific performance of the contractual obligation of the respondent KMDA. Doubtless, the petitioner can avail of appropriate civil remedies for redress which would include damages for breach of the contractual terms.*
>
> (Emphasis supplied)

**16.** Aggrieved with the aforesaid, the appellant went in appeal before a Division Bench of the High Court by way of M.A.T. No. 744 of 2023, wherein the appeal court finding no fault in the decision of the learned Single Judge, dismissed the appeal and thereby affirmed the judgment of the learned Single Judge referred to above.

**17.** In view of the aforesaid, the appellant is here before this Court with the present appeal.

## C. DEVELOPMENTS THAT OCCURRED DURING THE PENDENCY OF THE PRESENT APPEAL.

**18.** During the pendency of the present appeal, the appellant herein preferred a RTI seeking further information on the respondent's internal note-file pertaining to the cancellation of the subject tender.

**19.** The Public Information Officer, KMDA vide its reply dated 18.08.2023 provided the internal file-notings of the respondent on the aforesaid tender. In the internal file-notings of the respondent, the following entries / notes are relevant: -

**a)** As per Note #91 dated 30.12.2022, the respondent in view of the maintenance of the concerned underpasses being handed over to KMC, was contemplating the possibility of cancelling the tender for work. The relevant noting reads as under: -

"***Note # 91***
*Recently maintenance of EM Bye pass has been handed over to KMC. Thus, in this changed scenario we may cancel the work order.*

***03/01/2023 11:51 AM*** ***FIRHAD HAKIM***
***CHRMN (KMDA)***"

**b)** As per Note #95 dated 10.01.2023, the respondent instructed that the tender be cancelled in view of the maintenance of the concerned underpasses being handed over to KMC. However, since the respondent was in doubt as regards the legality & validity of such decision, it opined that the opinion of the Legal Department may be sought first before any action of cancellation is taken. However, as an interim measure, it decided to issue a notice to stop all work in respect of the tender. The relevant noting reads as under: -

"***Note # 95***
*[...] Now, as instructed by the competent authority of KMDA keeping in view of the recent changed scenario of handing over of maintenance of E.M. Bypass from KMDA to KMC, cancelling the work order as instructed may require judicious action towards implementing the same and to make it lawful, legal advice from Law-Cell, KMDA may be required so that, KMDA doesn't fall in any legal obligation. However, for immediate compliance of the order, a notice to stop the works in all respect with regards to the two above-mentioned tenders may be served to the agency for immediately stopping his all activities at site till further notice. As instructed, a draft Letter is attached herewith for his kind perusal and direction in this regard. [...]*

***10/01/2023 02:55 PM*** ***PARTHA PROTIM GHOSH***
***EE (RBBRDG) (KMDA)***"

**c)** Again, in Note #96, it was noted that since the competent authority of the respondent was desirous to cancel the tender, the respondent was of the view that the opinion of its legal cell be obtained first before such action is taken. The relevant noting reads as under: -

"***Note # 96***

*[...]*

- *As per **Note#91**¸Competent Authority desires to cancel the Work Order.*
- *In **Note#95**¸a draft letter has been attached for approval towards issuance to the agency to stop any type of work related to this project.*

*Considering the Chronological development and acceptance by Authority, the matter may kindly be viewed lawfully, so that, if it is cancelled by this end, no legal action is taken by the Agency.*

*Submitted for necessary action.*

***13/01/2023 02:13 PM*** ***SANTANU PATRA***
***SE (RBBRDG) (KMDA)***"

**d)** In Note #97 dated 16.01.2023, the respondent has noted that since the competent authority had decided to cancel the work tender there was no option but to cancel it. However, the respondent once again insisted that a legal opinion may be sought first, in order to avoid further litigations. The relevant noting reads as under: -

"***Note # 97***

***Sub: Cancellation of Work Order of Maintenance of two Underpasses***

*A concurrence of Law Cell, KMDA may kindly be obtained before cancelling the Work Order of the existing agency. There is no different opinion than to get this cancelled, once this has been decided by the Authority but a legal opinion may be sought for avoiding further litigations. [...]*

***16/01/2023 04:38 PM*** ***SUBHANKAR BHATTACHARYA***
***CE (RBBRDG) (KMDA)***"

**e)** Thereafter, it could be seen from Note #101 dated 19.01.2023, that the other officials of the authority also concurred with the respondent's opinion to first seek advice of its legal cell on the possible consequences in the event the tender for work is cancelled. The relevant observations read as under: -

"***Note # 101***

*As concurred by the Authority the legal aspects and the possible consequences may be reviewed and opined back prior to cancelling the Work Order. The draft of order for stopping work further is enclosed, which may kindly be seen and commented.*

*For kind concern of Law Cell with request to revert back with further advice and opinion on above please.*

***19/01/2023 02:28 PM SUBHANKAR BHATTACHARYA CE (RBBRDG) (KMDA)***"

**f)** However, before the legal cell of the respondent could give any definite opinion on the legal implications of cancelling the tender, it appears from the records, more particularly Note #108 dated 24.01.2023 that the concerned minister during his visit instructed the officials of the respondent on his own to cancel the tender, upon which the respondent undertook the steps to duly comply with such instructions. The relevant noting reads as under: -

"***Note # 108***

*For immediate compliance of HMIC's instruction. This is as per the instruction given during his visit to Unnanyan Bhavn today in presence of KMDA Officials.*

***24/01/2023 05:16 PM SUBHANKAR BHATTACHARYA CE (RBBRDG) (KMDA)***"

**g)** Pursuant to the above, as per Note #109 dated 02.02.2023, the Tender Committee of the respondent convened a meeting wherein the proposal for cancellation of the aforesaid tender was finalized and placed for approval. The relevant noting reads as under: -

"***Note # 109***

*As per the discussion held in the 5th meeting of Tender Committee, KMDA, proposal for cancellation of this tender, as per the Note #91 for this changed scenario vide memo : 5783-UDMA-22012(14)/11/2022 Dt. 01-12-2022 maintenance of*

*E.M. Bypass has been handed over to KMC from KMDA, is placed herewith for approval please. [...]*

***02/02/2024 02:31 PM*** ***SANTANU PATRA***
***SE (RBBRDG) (KMDA)***"

**h)** Thereafter, as per the last entry in the internal notings – Note #110 dated 03.02.2023, the respondent floated one another proposal seeking approval to cancel the tender, which culminated into the final notice of cancellation dated 07.02.2023 which is the subject matter of challenge in the present litigation.

**20.** During the course of hearing of this appeal, it was brought to the notice of this Court that after the work order issued in favour of the appellant was cancelled, the respondent floated a fresh tender dated 15.05.2023 for the work of maintenance of the very same underpasses, the selection process for which stood completed and that the tender had been awarded along with the work order(s) to one another third-party agency.

**21.** This Court was further apprised of the order dated 16.09.2023 passed by the Urban Development and Municipal Affairs Department, Government of West Bengal, modifying its earlier order dated 01.12.2022 to the extent that both **i)** the operation & maintenance of 37 bridges, flyovers, underpasses, etc. including the concerned two underpasses **along with** **ii)** the right to collect revenue towards the advertisement rights for the said structures, shall be taken over by KMC from KMDA. The said letter reads as under: -

*"**Government of West Bengal***
***Urban Development and Municipal Affairs Department***
***NAGARYAN, DF-8, Sector-I***
***Salt Lake, Kolkata - 700 064***

***Memo No. 5271 – UDMA-22012(14)/11/2022***

***Date : 16.09.2023***

***ORDER***

*In continuation with the order issued vide no. 5783-UDMA-22012(14)/11/2022 dated 01.12.2022, it has been further decided that the operation and maintenance of the 37 bridges, flyovers, foot over bridges, under pass & culverts attached herewith to be taken over by KMC from KMDA. In that case the revenues earned from advertisements and displays erected on these assets (including the piers of the bridges) to be accrued to KMC.*

*This order shall take immediate effect.*

*Sd/-*
***Principal Secretary***
***to the Govt. of West Bengal***"

**22.** In view of the fact that a fresh tender had already been awarded to a third-party, coupled with the fact that the right to collect revenue from the advertisements for the concerned underpasses had been handed over to KMC, the counsel for the respondent submitted that the matter had since become infructuous.

## D. SUBMISSIONS ON BEHALF OF THE APPELLANT

**23.** Mr. Shyam Divan, the learned Senior Counsel appearing for the appellant submitted that the impugned notice of cancellation dated 07.02.2023 is manifestly arbitrary and tainted with extraneous considerations. He submitted that though the impugned notice purports to cancel the tender on the ground

of being ambiguous and non-specific, but in reality the said action was at the behest of the concerned Minister-In-Charge who directed such cancellation without any justifiable cause. In this regard he placed strong reliance on the internal-file notings of the respondent.

**24.** He submitted that the reasons assigned for cancelling the tender in the impugned notice are not to be found in the entire file of notings maintained by the respondent. He further pointed out that the file of the internal notings indicate that, before the respondent could take a judicious call the concerned minister issued a specific direction on the basis of which the cancellation was undertaken & that to without any application of mind.

**25.** Mr. Divan also submitted that no orders to stop the work could have been issued by the respondent on account of handing over of the maintenance to another authority, because even after the handover, the respondent continued to operate & maintain the underpasses including the licensing rights for advertisements.

**26.** He further submitted that, although the terms of the contract provided for assigning cogent grounds for termination, yet the same was not followed and instead the respondent arbitrarily proceeded to cancel the tender.

**27.** In the last, Mr Divan submitted that the contention as regards the financial losses being suffered is erroneous, as the respondent voluntarily accepted the

bid that was submitted by the appellant, and even as per the notings in the file the tender was generating more revenue than earlier.

## E. SUBMISSIONS ON BEHALF OF THE RESPONDENT

**28.** Mr. Rakesh Dwivedi, the learned Senior Counsel appearing for the respondent submitted that the present matter being purely a contractual dispute was rightly not entertained by the High Court in exercise of its writ jurisdiction under Article 226 of the Constitution of India.

**29.** He further submitted, that the decision to cancel the tender was *bona fide* and had to be taken considering the technical faults in the same. He submitted, that there was ambiguity in the tender as regards whether it was lawful to put up advertisements at the places outside the underpasses, due to which, many interested bidders might not have participated in the tender. The respondent was of the view that a higher license fee could be fetched by rectifying such ambiguity.

**30.** Mr. Dwivedi also submitted that the decision to cancel the tender had to be taken to enable the respondent to float separate tenders, one for the maintenance of the underpasses and the other for the licensing advertisement rights. Thus, the decision was taken in public interest. He submitted that the decision to cancel the tender was on the basis of a change in the policy, and thus cannot be said to be arbitrary.

**31.** He further submitted that no reliance could have been placed on the notings in the file maintained by the respondent, as the file notings are only internal deliberations. Such notings cannot be construed as decisions of the respondent and thus, creates no right in favour of the appellant.

**32.** In the last, Mr Dwivedi submitted that since during the pendency of the present appeal, the operation, maintenance and the licensing rights for the advertisements have been taken over by a third party, the present appeal has been rendered infructuous.

## F. POINTS FOR DETERMINATION

**33.** Having heard the learned counsel appearing for the parties and having gone through the materials on record, the two pivotal questions that fall for our consideration are as under: -

**I)** What is the scope of judicial review of the actions of the State in the matters relating to contract / tender disputes under writ jurisdiction?

**II)** Whether the action on the part of the respondent herein in cancelling the tender vide its notice dated 07.02.2023 was amenable to the writ jurisdiction of the High Court? If so, whether the said action could be termed as arbitrary or unfair and in consequence of violation of Article 14 of the Constitution of India?

## G. ANALYSIS

### i. Scope of Judicial Review of the actions of the State in matters relating to Contract / Tender under Writ Jurisdiction.

#### a. Earlier Position of Law and Misconception of the State as a Largesse.

**34.** Over the years, the scope of judicial review and the extent to which a Court can interfere in disputes arising out of contracts or tenders has seen a significant development, marked by a nuanced understanding of the critical role of administrative discretion. The judicial quest in administrative matters has always been to find a right balance between **i)** allowing leeway to the States in deciding the exercise of their administrative discretion in matters pertaining to policy and **ii)** the need to ensure fairness and propriety in such administrative actions.

***35.*** Earlier, the position of law was that any dispute arising out of a contract entered into with the State or its instrumentalities could not be adjudicated by the court under its writ jurisdiction, as in all such cases, it could be said that the 'real grievance' was essentially only one being that of breach of a contract for which the appropriate remedy would be an ordinary suit and not a writ petition. One of the earliest judicial pronouncements in this regard is the decision of this Court in ***Radhakrishna Agarwal & Ors. v. State of Bihar &***

***Ors.*** reported in **(1977) 3 SCC 457** wherein the following relevant observations were made: -

> "*19. [...] None of these cases lays down that, when the State or its officers purport to operate within the contractual field and the only grievance of the citizen could be that the contract between the parties is broken by the action complained of, the appropriate remedy is by way of a petition under Article 226 of the Constitution and not an ordinary suit. There is a formidable array of authority against any such a proposition. [...]*"
>
> (Emphasis supplied)

**36.** It was further explained by this Court in ***Radhakrishna Agarwal*** (supra) that once the State or its instrumentalities enter into a contract, any dispute arising out of that contract cannot be decided in writ jurisdiction as their relations no longer remain governed by the constitutional provisions, and it is only the contract which thereafter determines the rights and obligations of the parties. Any claim to a right flowing from a contract cannot be redressed through the writ jurisdiction except where some statute steps in and confers some special statutory power or obligation on the State in the contractual field or if the agreement is in the nature of a statutory contract. The relevant observations read as under: -

> *"10. [...] 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 talking 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*."
>
> (Emphasis supplied)

**37.** Similar view as above, was reiterated by this Court in ***Premji Bhai Parmar & Ors. v. Delhi Development & Ors.*** reported in **(1980) 2 SCC 129** at para 8 and in ***Divisional Forest Officer v. Bishwanath Tea Co. Ltd.*** reported in **(1981) 3 SCC 238** wherein it was held that any right to relief flowing from a breach of contract cannot be entertained under the extraordinary writ jurisdiction of the court, even if the action of the State or its instrumentality was unauthorized in law. The relevant observations read as under: -

> *"9. Ordinarily, where a breach of contract is complained of, a party complaining of such breach may sue for specific performance of the contract, if contract is capable of being specifically performed, or the party may sue for damages. Such a suit would ordinarily be cognizable by the civil court. The High Court in its extraordinary jurisdiction would not entertain a petition either for specific performance of contract or for recovering damages. A right to relief flowing from a contract has to be claimed in a civil court where a suit for specific performance of contract or for damages could be filed. This is so well-settled that no authority is needed.*

> *10. In substance, this was a suit for refund of a royalty alleged to be unauthorisedly recovered and that could hardly be entertained in exercise of the writ jurisdiction of the High Court."*
>
> (Emphasis supplied)

**38.** We do not propose to dwell any further, on the position of law that existed earlier, and leave it at rest with one last reference to the decision of this Court in ***Bareilly Development Authority & Anr. v. Ajai Pal Singh & Ors.*** reported in **(1989) 2 SCC 116**, wherein this Court once again reiterated that no writ can be issued in contractual disputes between the State and an aggrieved party where the rights or claims arise or stem only from the terms of the contract. The relevant observations read as under: -

> *"22. There is a line of decisions where the contract entered into between the State and the persons aggrieved is non-statutory and purely contractual and the rights are governed only by the terms of the contract, no writ or order can be issued under Article 226 of the Constitution of India so as to compel the authorities to remedy a breach of contract pure and simple [...]"*
>
> (Emphasis supplied)

**39.** Thus, for a period of time the courts recognized that there was a clear brightline distinction between when a State or its instrumentalities could be said to be acting in its executive capacity and when it could be said to be acting in its private capacity, with the existence of a 'contractual relation' *inter-se* the parties being the determinative factor. Wherever, there was a contract, the State's relations and all its actions were said to be within the field of a contract i.e., within the realm of private law, and the courts would resile from

interfering with the same under their writ jurisdiction or embarking upon a judicial review of such actions.

**40.** Such reluctance on the part of the courts stemmed from its understanding that State or any of its instrumentalities must have the flexibility or the discretion to take decisions that are in the best interest of the public and efficient governance. Government being the decision-maker of the State is said to be the best judge of when a contract or an agreement is in its interest and by its extension in the interest of the public, and as such the courts should not interfere in the State's discretion to award or terminate contracts. One another reason why contractual disputes were precluded from being espoused under the writ jurisdiction of the courts was due to the summary nature of such proceedings, which do not allow for an exhaustive review unlike civil suits. [See: ***Radhakrishna Agarwal*** (supra) at para 11]

**41.** This simplistic approach of the courts in deeming every act and action of the State which was complained of as nothing more than a 'contractual dispute' or a case of 'breach of contract' often led to the State abusing its position and acting unfairly under the misconceived notion, that all its actions such as award of contracts or tenders were nothing but a 'largess' – a generosity bestowed upon its citizens, which it can at its own whims choose to deny, alter, modify, or take away without any consequences. This often led to a conflation

of power with duty, and resulted in every arbitrary exercise of power by the State under the guise of a 'contractual dispute' to remain unchecked and undisputable before the courts and out of the reach of judicial review, undermining the rights of the citizen to have their interests safeguarded and protected. We may in this regard refer to ***M/s Indian Medicines Pharmaceuticals Corp Ltd. v. Kerala Ayurvedic Co-operative Society Ltd.*** reported in **(2023) SCC OnLine SC 5** wherein this Court speaking eruditely through one of us, Dr. D.Y. Chandrachud, CJI made the following pertinent observations: -

> *"11 The welfare State plays a crucial role in aiding the realisation of the socioeconomic rights which are recognised by the Constitution. Social welfare benefits provided by the State under the rubric of its constitutional obligations are commonly understood in the language of 'largesse', a term used to describe a generous donation. Terming all actions of government, ranging from social security benefits, jobs, occupational licenses, contracts and use of public resources – as government largesse results in doctrinal misconceptions. The reason is that this conflates the State's power with duty. The Constitution recognises the pursuit of the well-being of citizens as a desirable goal. In doing this the Constitution entrusts the State with a duty to ensure the well-being of citizens. Government actions aimed at ensuring the well-being of citizens cannot be perceived through the lens of a 'largess'. The use of such terminology belittles the sanctity of the social contract that the 'people of India' entered into with the State to protect and safeguard their interests.*
>
> *xxx xxx xxx*
>
> *13. In the early 1950s', judicial review of the process of concluding contracts by government was limited. The courts allowed the State due deference on the ground of governmental policy. In C.K Achuthan v. State of Kerala, AIR 1959 SC 490 a Constitution Bench of this Court held that it is open to the Government 'to choose a person to their liking, to fulfil contracts which they wish to be performed.' The Court observed that when one party is chosen over another, the aggrieved*

*party cannot claim the protection of Article 14 since the government has the discretion to choose with whom it will contract."*

(Emphasis supplied)

**42.** Before proceeding further to discuss how the scope of judicial review came to be evolved, we would like to refer to the observations made by this Court in ***M.C. Mehta v. Union of India*** reported in **(1987) 1 SCC 395** which are significant, and read as under: -

*"31. [...] Law has to grow in order to satisfy the needs of the fast changing society and keep abreast with the economic developments taking place in the country. As new situations arise the law has to be evolved in order to meet the challenge of such new situations. Law cannot afford to remain static. We have to evolve new principles and lay down new norms which would adequately deal with the new problems which arise in a highly industrialised economy. [...]"*

(Emphasis supplied)

**b. Concept of 'Public Law' Element: Scope of Judicial Review in Contractual Matters.**

**43.** Over a period of time the courts recognized the crucial role of judicial oversight in preventing the abuse of power and maintaining public confidence in the administrative process. Courts developed various doctrines and principles to guide their review, such as the principles of natural justice, reasonableness and proportionality. These principles ensured that the administrative actions are not arbitrary, discriminatory or capricious. By enforcing such standards, the courts also ensured that the rule of law was maintained and the individual rights were protected.

**44.** The interplay between judicial review and administrative discretion has been a dynamic process. As new challenges and complexities kept on arising before the courts as regards the State's actions and governance, it continued to refine its approach. This ongoing dialogue between the courts and the executive branch contributed to the development of a more accountable and transparent administrative framework, paving the way for the exercise of judicial review even in the realm of contractual disputes to achieve a fine balance between efficiency and fairness in policy decisions on the one hand and the rights of individuals and overall public interest on the other.

**45.** In ***Mahabir Auto Stores & Ors. v. Indian Oil Corporation*** reported in **(1990) 3 SCC 752**, this Court expressed doubts over the correctness of the earlier position of law, that actions of the State in the private contractual field cannot be questioned in writ jurisdiction. This Court further held that even if the *inter-se* relation of parties with the State is governed purely by a contract, the method, motive and decision of the State would be subject to judicial review on the grounds of relevance and reasonableness, fair play, natural justice, equality and non-discrimination. The relevant observations read as under: -

> *"12. [...] It appears to us that rule of reason and rule against arbitrariness and discrimination, rules of fair play and natural justice are part of the rule of law applicable in situation or action by State instrumentality in dealing with citizens in a situation like the present one. Even though the rights of the citizens are in the nature of contractual rights, the manner, the method and motive of a decision of entering or not entering into a contract, are subject to judicial review on the touchstone of relevance and reasonableness, fair play, natural*

*justice, equality and non-discrimination in the type of the transactions and nature of the dealing as in the present case.*

*13. The existence of the power of judicial review however depends upon the nature and right involved in the facts and circumstances of the particular case. It is well settled that there can be "malice in law". Existence of such "malice in law" is part of the critical apparatus of a particular action in administrative law. Indeed "malice in law" is part of the dimension of the rule of relevance and reason as well as the rule of fair play in action.*

*xxx xxx xxx*

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

(Emphasis supplied)

[See also: ***Dwarkadas Marfatia & Sons v. Board of Trustees of the Port of Bombay*** : **(1989) 3 SCC 293** at para 27.]

**46.** In ***LIC v. Consumer Education & Research Centre*** reported in **(1995) 5 SCC 482**, the Court held that the law as it stood earlier that a State or its instrumentality whose action is hedged with public element cannot be called into question because such action was in the field of private law is no longer a good law. The relevant observations read as under: -

*"23. Every action of the public authority or the person acting in public interest or any act that gives rise to public element, should be guided by public interest. It is the exercise of the public power or action hedged*

*with public element (sic that) becomes open to challenge. If it is shown that the exercise of the power is arbitrary, unjust and unfair, it should be no answer for the State, its instrumentality, public authority or person whose acts have the insignia of public element to say that their actions are in the field of private law and they are free to prescribe any conditions or limitations in their actions as private citizens, simpliciter do in the field of private law. Its actions must be based on some rational and relevant principles. It must not be guided by irrational or irrelevant considerations. Every administrative decision must be hedged by reasons. [...]*

*xxx xxx xxx*

*26. This Court has rejected the contention of an instrumentality or the State that its action is in the private law field and would be immuned from satisfying the tests laid under Article 14. The dichotomy between public law and private law rights and remedies, though may not be obliterated by any strait-jacket formula, it would depend upon the factual matrix. The adjudication of the dispute arising out of a contract would, therefore, depend upon facts and circumstances in a given case. The distinction between public law remedy and private law field cannot be demarcated with precision. Each case will be examined on its facts and circumstances to find out the nature of the activity, scope and nature of the controversy. The distinction between public law and private law remedy has now become too thin and practicably obliterated."*

(Emphasis supplied)

**47.** This Court in ***Consumer Education & Research Centre*** (supra) further held that the writ jurisdiction of the courts cannot be shackled by technicalities and that any action of the State which has a public law element or a public character, such actions by their nature are required to be just, fair, reasonable & in the interest of public, and as such they would be amenable to judicial review. As to what is meant by actions bearing insignia of public law element, this Court held that wherever the action of a State or its instrumentality in the sphere of contractual relations is enjoined with a duty or an obligation to the

public, such actions could be said to bear the insignia of a public element. The relevant observation reads as under: -

> *"27. In the sphere of contractual relations the State, its instrumentality, public authorities or those whose acts bear insignia of public element, action to public duty or obligation are enjoined to act in a manner i.e. fair, just and equitable, after taking objectively all the relevant options into consideration and in a manner that is reasonable, relevant and germane to effectuate the purpose for public good and in general public interest and it must not take any irrelevant or irrational factors into consideration or appear arbitrary in its decision. Duty to act fairly is part of fair procedure envisaged under Articles 14 and 21. Every activity of the public authority or those under public duty or obligation must be informed by reason and guided by the public interest.*
>
> *xxx xxx xxx*
>
> *29. [...] The arms of the High Court are not shackled with technical rules or procedure. The actions of the State, its instrumentality, any public authority or person whose actions bear insignia of public law element or public character are amenable to judicial review and the validity of such an action would be tested on the anvil of Article 14. While exercising the power under Article 226 the Court would be circumspect to adjudicate the disputes arising out of the contract depending on the facts and circumstances in a given case. The distinction between the public law remedy and private law field cannot be demarcated with precision. Each case has to be examined on its own facts and circumstances to find out the nature of the activity or scope and nature of the controversy. The distinction between public law and private law remedy is now narrowed down. [. ]"*
>
> (Emphasis supplied)

***48.*** In another decision of this Court in ***Shrilekha Vidyarthi (Kumari) v. State of U.P.*** reported in **(1991) 1 SCC 212** it was held that every action of the State that has some degree of impact on the public interest, can be challenged under writ jurisdiction to the extent that they are arbitrary, unfair or unreasonable, irrespective of the fact that the dispute falls within the domain of contractual obligations. It was further held, that it is the nature of a government body's

personality which characterizes the action as having a public law element, and not the field of law where such action is taken. The relevant observation reads as under: -

> *"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.*
>
> *xxx xxx xxx*
>
> *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 pubic 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.*

*xxx xxx xxx*

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

(Emphasis supplied)

**49.** In ***Verigamto Naveen v. Govt. of A.P. & Ors.*** reported in **(2001) 8 SCC 344** this Court held that where a breach of contract involves the decision-making authority exceeding its power or violating the principles of nature justice or its decision being borne out of perversity, then such cancellation of contract can certainly be scrutinized under the writ jurisdiction. This is because such an exercise of power by the authority is apart from the contract. The relevant observation reads as under: -

*"21. [...] Though there is one set of cases rendered by this Court of the type arising in Radhakrishna Agarwal case [(1977) 3 SCC 457 : AIR 1977 SC 1496] 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. [...] 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."*
>
> (Emphasis supplied)

**50.** Similarly in ***Binny Ltd. & Anr. v. Sadasivan & Ors.*** reported in **(2005) 6 SCC 657** this Court in view of the increasing trend of the State and its instrumentalities to use contracts as a means for dispensing their regulatory functions, held that whenever a contract is used for a public purpose, it will be amenable to judicial review. The relevant observations read as under: -

> *"30. A contract would not become statutory simply because it is for construction of a public utility and it has been awarded by a statutory body. But nevertheless, it may be noticed that the Government or government authorities at all levels are increasingly employing contractual techniques to achieve their regulatory aims. It cannot be said that the exercise of those powers are free from the zone of judicial review and that there would be no limits to the exercise of such powers, but in normal circumstances, judicial review principles cannot be used to enforce contractual obligations. When that contractual power is being used for public purpose, it is certainly amenable to judicial review. The power must be used for lawful purposes and not unreasonably."*
>
> (Emphasis supplied)

**51.** The decision of this Court in ***ABL International Ltd. v. Export Credit Guarantee Corporation of India Ltd.*** reported in **(2004) 3 SCC 553** is significant and was the turning point in the scope of judicial review in

contractual matters. In this landmark ruling, this Court decisively laid down and approved that a relief against a State or its instrumentalities in matters related to contractual obligations can be sought under the writ jurisdiction. The relevant observations read as under: -

> *"23. It is clear from the above observations of this Court, once the State or an instrumentality of the State is a party of the contract, it has an obligation in law to act fairly, justly and reasonably which is the requirement of Article 14 of the Constitution of India. Therefore, if by the impugned repudiation of the claim of the appellants the first respondent as an instrumentality of the State has acted in contravention of the abovesaid requirement of Article 14, then we have no hesitation in holding that a writ court can issue suitable directions to set right the arbitrary actions of the first respondent.*
>
> *xxx xxx xxx*
>
> *27. From the above discussion of ours, the following legal principles emerge as to the maintainability of a writ petition:*
>
> *(a) In an appropriate case, a writ petition as against a State or an instrumentality of a State arising out of a contractual obligation is maintainable.*
> *(b) Merely because some disputed questions of fact arise for consideration, same cannot be a ground to refuse to entertain a writ petition in all cases as a matter of rule.*
> *(c) A writ petition involving a consequential relief of monetary claim is also maintainable."*
>
> (Emphasis supplied)

**52.** At the same time, this Court in ***ABL*** (supra) cautioned that the power to issue writs under Article 226 being discretionary and plenary, the same should only be exercised to set right the arbitrary actions of the State or its instrumentality in matters related to contractual obligations. The relevant observations read as under: -

> *"28. However, while entertaining an objection as to the maintainability of a writ petition under Article 226 of the Constitution of India, the court*

> *should bear in mind the fact that the power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provisions 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. The Court has imposed upon itself certain restrictions in the exercise of this power. (See Whirlpool Corpn. v. Registrar of Trade Marks) And this plenary right of the High Court to issue a prerogative writ will not normally be exercised by the Court to the exclusion of other available remedies unless such action of the State or its instrumentality is arbitrary and unreasonable so as to violate the constitutional mandate of Article 14 or for other valid and legitimate reasons, for which the Court thinks it necessary to exercise the said jurisdiction."*
>
> (Emphasis supplied)

**53.** In ***Noble Resources Ltd. v. State of Orissa*** reported in **(2006) 10 SCC 236** this Court for the purposes of judicial review of contractual disputes recognized a distinction between a matter where the contract is at the threshold and at the stage of breach. It held that at the threshold, the court's scrutiny is more intrusive & expansive while at the stage of breach it is discretionary except where the action is found to be arbitrary or unreasonable. The relevant observations read as under: -

> *"15. It is trite that if an action on the part of the State is violative of the equality clause contained in Article 14 of the Constitution of India, a writ petition would be maintainable even in the contractual field. A distinction indisputably must be made between a matter which is at the threshold of a contract and a breach of contract; whereas in the former the court's scrutiny would be more intrusive, in the latter the court may not ordinarily exercise its discretionary jurisdiction of judicial review, unless it is found to be violative of Article 14 of the Constitution. While exercising contractual powers also, the government bodies may be subjected to judicial review in order to prevent arbitrariness or favouritism on their part. Indisputably, inherent limitations exist, but it would not be correct to opine that under no circumstances a writ will lie only because it involves a contractual matter."*
>
> (Emphasis supplied)

**54.** The law on the subject with which we are dealing was laid down exhaustively by this Court in its decision in ***Joshi Technologies International Inc. v. Union of India & Ors*.** reported in **(2015) 7 SCC 728**, and the position was summarised as under: -

> *"69. The position thus summarised in the aforesaid principles has to be understood in the context of discussion that preceded which we have pointed out above. As per this, no doubt, there is no absolute bar to the maintainability of the writ petition even in contractual matters or where there are disputed questions of fact or even when monetary claim is raised. At the same time, discretion lies with the High Court which under certain circumstances, it can refuse to exercise. It also follows that under the following circumstances, "normally", the Court would not exercise such a discretion:*
>
> *69.1. The Court may not examine the issue unless the action has some public law character attached to it.*
>
> *69.2. Whenever a particular mode of settlement of dispute is provided in the contract, the High Court would refuse to exercise its discretion under Article 226 of the Constitution and relegate the party to the said mode of settlement, particularly when settlement of disputes is to be resorted to through the means of arbitration.*
>
> *69.3. If there are very serious disputed questions of fact which are of complex nature and require oral evidence for their determination.*
>
> *69.4. Money claims per se particularly arising out of contractual obligations are normally not to be entertained except in exceptional circumstances.*
>
> *70. Further, the legal position which emerges from various judgments of this Court dealing with different situations/aspects relating to contracts entered into by the State/public authority with private parties, can be summarised as under:*
>
> *70.1. At the stage of entering into a contract, the State acts purely in its executive capacity and is bound by the obligations of fairness.*
>
> *70.2. State in its executive capacity, even in the contractual field, is under obligation to act fairly and cannot practise some discriminations.*

*70.3. Even in cases where question is of choice or consideration of competing claims before entering into the field of contract, facts have to be investigated and found before the question of a violation of Article 14 of the Constitution 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. In such cases the Court can direct the aggrieved party to resort to alternate remedy of civil suit, etc.*

*70.4. Writ jurisdiction of the High Court under Article 226 of the Constitution was not intended to facilitate avoidance of obligation voluntarily incurred.*

*70.5. Writ petition was not maintainable to avoid contractual obligation. Occurrence of commercial difficulty, inconvenience or hardship in performance of the conditions agreed to in the contract can provide no justification in not complying with the terms of contract which the parties had accepted with open eyes. It cannot ever be that a licensee can work out the licence if he finds it profitable to do so: and he can challenge the conditions under which he agreed to take the licence, if he finds it commercially inexpedient to conduct his business.*

*70.6. Ordinarily, where a breach of contract is complained of, the party complaining of such breach may sue for specific performance of the contract, if contract is capable of being specifically performed. Otherwise, the party may sue for damages.*

*70.7. Writ can be issued where there is executive action unsupported by law or even in respect of a corporation there is denial of equality before law or equal protection of law or if it can be shown that action of the public authorities was without giving any hearing and violation of principles of natural justice after holding that action could not have been taken without observing principles of natural justice.*

*70.8. If the contract between private party and the State/instrumentality and/or agency of the State is under the realm of a private law and there is no element of public law, the normal course for the aggrieved party, is to invoke the remedies provided under ordinary civil law rather than approaching the High Court under Article 226 of the Constitution of India and invoking its extraordinary jurisdiction.*

*70.9. The distinction between public law and private law element in the contract with the State is getting blurred. However, it has not been totally obliterated and where the matter falls purely in private field of contract, this Court has maintained the position that writ petition is not*

*maintainable. The dichotomy between public law and private law rights and remedies would depend on the factual matrix of each case and the distinction between the public law remedies and private law field, cannot be demarcated with precision. In fact, each case has to be examined, on its facts whether the contractual relations between the parties bear insignia of public element. Once on the facts of a particular case it is found that nature of the activity or controversy involves public law element, then the matter can be examined by the High Court in writ petitions under Article 226 of the Constitution of India to see whether action of the State and/or instrumentality or agency of the State is fair, just and equitable or that relevant factors are taken into consideration and irrelevant factors have not gone into the decision making process or that the decision is not arbitrary.*

*70.10. 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 requirements of due consideration of a legitimate expectation forms part of the principle of non-arbitrariness.*

*70.11. 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."*

(Emphasis supplied)

**55.** Thereafter, this Court in its decision in ***M.P. Power Management Co. Ltd., Jabalpur v. Sky Power Southeast Solar India Pvt. Ltd. & Ors.*** reported in **(2023) 2 SCC 703** exhaustively delineated the scope of judicial review of the courts in contractual disputes concerning public authorities. The aforesaid decision is in the following parts: -

**(i) Scope of Judicial Review in matters pertaining to Contractual Disputes: -**

This Court held that the earlier position of law that all rights against any action of the State in a non-statutory contract would be governed by the contract alone and thus not amenable to the writ jurisdiction of the

courts is no longer a good law in view of the subsequent rulings. Although writ jurisdiction is a public law remedy, yet a relief would still lie under it if it is sought against an arbitrary action or inaction of the State, even if they arise from a non-statutory contract. The relevant observations read as under: -

> *"53. [...] when the offending party is the State. In other words, the contention is that the law in this field has witnessed an evolution and, what is more, a revolution of sorts and a transformatory change with a growing realisation of the true ambit of Article 14 of the Constitution of India. The State, he points out, cannot play the Dr. Jekyll and Hyde game anymore. Its nature is cast in stone. Its character is inflexible. This is irrespective of the activity it indulges in. It will continue to be haunted by the mandate of Article 14 to act fairly. There has been a stunning expansion of the frontiers of the Court's jurisdiction to strike at State action in matters arising out of contract, based, undoubtedly, on the facts of each case. It remains open to the Court to refuse to reject a case, involving State action, on the basis that the action is, per se, arbitrary.*
>
> *[...]i. It is, undoubtedly, true that the writ jurisdiction is a public law remedy. A matter, which lies entirely within a private realm of affairs of public body, may not lend itself for being dealt with under the writ jurisdiction of the Court.*
>
> *ii. The principle laid down in Bareilly Development Authority (supra) that in the case of a non statutory contract the rights are governed only by the terms of the contract and the decisions, which are purported to be followed, including Radhakrishna Agarwal (supra), may not continue to hold good, in the light of what has been laid down in ABL (supra) and as followed in the recent judgment in Sudhir Kumar Singh (supra).*
>
> *iii. The mere fact that relief is sought under a contract which is not statutory, will not entitle the respondent-State in a case by itself to ward-off scrutiny of its action or inaction under the contract, if the complaining party is able to establish that the action/ inaction is, per se, arbitrary."*
>
> (Emphasis supplied)

**(ii) Exercise of Writ Jurisdiction in disputes at the stage prior to the Award of Contract: -**

An action under a writ will lie even at the stage prior to the award of a contract by the State wherever such award of contract is imbued with procedural impropriety, arbitrariness, favouritism or without any application of mind. In doing so, the courts may set-aside the decision which is found to be vitiated for the reasons stated above but cannot substitute the same with its own decision. The relevant observations read as under: -

> *"iv. An action will lie, undoubtedly, when the State purports to award any largesse and, undoubtedly, this relates to the stage prior to the contract being entered into [See R.D. Shetty (supra)]. This scrutiny, no doubt, would be undertaken within the nature of the judicial review, which has been declared in the decision in Tata Cellular vs. Union of India."*
>
> (Emphasis supplied)

**(iii) Exercise of Writ Jurisdiction after the Contract comes into Existence: -**

This court held that even after the contract comes into existence an action may lie by way of a writ to either **(I)** obviate an arbitrary or unreasonable action on part of the State or **(II)** to call upon it to honour its obligations unless there is a serious or genuine dispute as regards the liability of the State from honouring such obligation. Existence of an alternative remedy or a disputed question of fact may be a ground to not entertain the parties in a writ as long as it is not being used as

smokescreen to defeat genuine claims of public law remedy. The relevant observations read as under: -

> *" v. After the contract is entered into, there can be a variety of circumstances, which may provide a cause of action to a party to the contract with the State, to seek relief by filing a Writ Petition.*
>
> *vi. Without intending to be exhaustive, it may include the relief of seeking payment of amounts due to the aggrieved party from the State. The State can, indeed, be called upon to honour its obligations of making payment, unless it be that there is a serious and genuine dispute raised relating to the liability of the State to make the payment. Such dispute, ordinarily, would include the contention that the aggrieved party has not fulfilled its obligations and the Court finds that such a contention by the State is not a mere ruse or a pretence.*
>
> *vii. The existence of an alternate remedy, is, undoubtedly, a matter to be borne in mind in declining relief in a Writ Petition in a contractual matter. Again, the question as to whether the Writ Petitioner must be told off the gates, would depend upon the nature of the claim and relief sought by the petitioner, the questions, which would have to be decided, and, most importantly, whether there are disputed questions of fact, resolution of which is necessary, as an indispensable prelude to the grant of the relief sought. Undoubtedly, while there is no prohibition, in the Writ Court even deciding disputed particularly when questions the dispute of fact, surrounds demystifying of documents only, the Court may relegate the party to the remedy by way of a civil suit.*
>
> *viii. The existence of a provision for arbitration, which is a forum intended to quicken the pace of dispute resolution, is viewed as a near bar to the entertainment of a Writ Petition (See in this regard, the view of this Court even in ABL (supra) explaining how it distinguished the decision of this Court in State of U.P. and others v. Bridge & Roof Co., by its observations in paragraph-14 in ABL (supra)].*
>
> *ix. The need to deal with disputed questions of fact, cannot be made a smokescreen to guillotine a genuine claim raised in a Writ Petition, when actually the resolution of a disputed question of fact is unnecessary to grant relief to a writ applicant.*
>
> *x. The reach of Article 14 enables a Writ Court to deal with arbitrary State action even after a contract is entered into*

> *by the State. A wide variety of circumstances can generate causes of action for invoking Article 14. The Court's approach in dealing with the same, would be guided by, undoubtedly, the overwhelming need to obviate arbitrary State action, in cases where the Writ remedy provides an effective and fair means of preventing miscarriage of justice arising from palpably unreasonable action by the State."*
>
> (Emphasis supplied)

**(iv) Exercise of Writ Jurisdiction after Termination or Breach of the Contract: -**

A relief by way of a writ under Article 226 of the Constitution will also lie against a termination or a breach of a contract, wherever such action is found to either be palpably unauthorized or arbitrary. Before turning away the parties to the remedy of civil suit, the courts must be mindful to see whether such termination or breach was within the contractual domain or whether the State was merely purporting to exercise powers under the contract for any ulterior motive. Any action of the State to cancel or terminate a contract which is beyond the terms agreed thereunder will be amenable to the writ jurisdiction to ascertain if such decision is imbued with arbitrariness or influenced by any extraneous considerations. The relevant observations read as under: -

> *" xi. Termination of contract can again arise in a wide variety of situations. If for instance, a contract is terminated, by a person, who is demonstrated, without any need for any argument, to be the person, who is completely unauthorised to cancel the contract, there may not be any necessity to drive the party to the unnecessary ordeal of a prolix and avoidable round of litigation. The intervention by the High Court, in such a case, where there is no dispute to be resolved, would also be*

*conducive in public interest, apart from ensuring the Fundamental Right of the petitioner under Article 14 of the Constitution of India. When it comes to a challenge to the termination of a contract by the State, which is a non-statutory body, which is acting in purported exercise of the powers/rights under such a contract, it would be over simplifying a complex issue to lay down any inflexible Rule in favour of the Court turning away the petitioner to alternate Fora. Ordinarily, the cases of termination of contract by the State, acting within its contractual domain, may not lend itself for appropriate redress by the Writ Court. This is, undoubtedly, so if the Court is duty-bound to arrive at findings, which involve untying knots, which are presented by disputed questions of facts. Undoubtedly, in view of ABL Limited (supra), if resolving the dispute, in a case of repudiation of a contract, involves only appreciating the true scope of documentary material in the light of pleadings, the Court may still grant relief to an applicant. We must enter a caveat. The Courts are today reeling under the weight of a docket explosion, which is truly alarming. If a case involves a large body of documents and the Court is called upon to enter upon findings of facts and involves merely the construction of the document, it may not be an unsound discretion to relegate the party to the alternate remedy. This is not to deprive the Court of its constitutional power as laid down in ABL (supra). It all depends upon the facts of each case as to whether, having regard to the scope of the dispute to be resolved, whether the Court will still entertain the petition.*

xii. *In a case the State is a party to the contract and a breach of a contract is alleged against the State, a civil action in the appropriate Forum is, undoubtedly, maintainable. But this is not the end of the matter. Having regard to the position of the State and its duty to act fairly and to eschew arbitrariness in all its actions, resort to the constitutional remedy on the cause of action, that the action is arbitrary, is permissible (See in this regard Kumari Shrilekha Vidyarthi and others v. State of U.P. and others). However, it must be made clear that every case involving breach of contract by the State, cannot be dressed up and disguised as a case of arbitrary State action. While the concept of an arbitrary action or inaction cannot be cribbed or confined to any immutable mantra, and must be laid bare, with reference to the facts of each case, it cannot be a mere allegation of breach of*

> *contract that would suffice. What must be involved in the case must be action/inaction, which must be palpably unreasonable or absolutely irrational and bereft of any principle. An action, which is completely malafide, can hardly be described as a fair action and may, depending on the facts, amount to arbitrary action. The question must be posed and answered by the Court and all we intend to lay down is that there is a discretion available to the Court to grant relief in appropriate cases."*
>
> (Emphasis supplied)

**(v) Other relevant considerations for Exercise of Writ Jurisdiction: -**

Lastly, this Court held that the courts may entertain a contractual dispute under its writ jurisdiction where **(I)** there is any violation of natural justice or **(II)** where doing so would serve the public interest or **(III)** where though the facts are convoluted or disputed, but the courts have already undertaken an in-depth scrutiny of the same provided that the it was pursuant to a sound exercise of its writ jurisdiction. The relevant observations read as under: -

> *"xiii. A lodestar, which may illumine the path of the Court, would be the dimension of public interest subserved by the Court interfering in the matter, rather than relegating the matter to the alternate Forum.*
>
> *xiv. Another relevant criteria is, if the Court has entertained the matter, then, while it is not tabooed that the Court should not relegate the party at a later stage, ordinarily, it would be a germane consideration, which may persuade the Court to complete what it had started, provided it is otherwise a sound exercise of jurisdiction to decide the matter on merits in the Writ Petition itself.*
>
> *xv. Violation of natural justice has been recognised as a ground signifying the presence of a public law element and can found a cause of action premised on breach of Article 14. [See Sudhir Kumar Singh and Others (supra)]."*
>
> (Emphasis supplied)

**56.** What can be discerned from the above is that there has been a considerable shift in the scope of judicial review of the court when it comes to contractual disputes where one of the parties is the State or its instrumentalities. In view of the law laid down by this Court in ***ABL*** (supra), ***Joshi Technologies*** (supra) and in ***M.P. Power*** (supra), it is difficult to accept the contention of the respondent that the writ petition filed by the appellant before the High Court was not maintainable and the relief prayed for was rightly declined by the High Court in exercise of its Writ jurisdiction. Where State action is challenged on the ground of being arbitrary, unfair or unreasonable, the State would be under an obligation to comply with the basic requirements of Article 14 of the Constitution and not act in an arbitrary, unfair and unreasonable manner. This is the constitutional limit of their authority. There is a jural postulate of good faith in business relations and undertakings which is given effect to by preventing arbitrary exercise of powers by the public functionaries in contractual matters with private individuals. With the rise of the Social Service State more and more public-private partnerships continue to emerge, which makes it all the more imperative for the courts to protect the sanctity of such relations.

**57.** It is needless to state that in matters concerning specific modalities of the contract — such as required work, execution methods, material quality, timeframe, supervision standards, and other aspects impacting the tender's

purpose — the court usually refrains from interference. State authorities, like private individuals, have a consensual element in contract formation. The stipulations or terms in the underlying contract purpose are part of the consensual aspect, which need not be entertained by the courts in writ jurisdiction and the parties may be relegated to ordinary private law remedy. Judicial review does not extend to fixing contract stipulations but ensures that the public authorities act within their authority to prevent arbitrariness.

**58.** Thus, the demarcation between a private law element and public law element in the context of contractual disputes if any, may be assessed by ascertaining whether the dispute or the controversy pertains to the consensual aspect of the contract or tender in question or not. Judicial review is permissible to prevent arbitrariness of public authorities and to ensure that they do not exceed or abuse their powers in contractual transactions and requires overseeing the administrative power of public authorities to award or cancel contracts or any of its stipulations.

**59.** Therefore, what can be culled out from the above is that although disputes arising purely out of contracts are not amenable to writ jurisdiction yet keeping in mind the obligation of the State to act fairly and not arbitrarily or capriciously, it is now well settled that when contractual power is being used for public purpose, it is certainly amenable to judicial review.

**60.** Now coming to the facts of the case at hand, the appellant has challenged the cancellation of the tender at the instance of the respondent on the ground of being manifestly arbitrary and influenced by extraneous considerations. It is evident from the notice of cancellation dated 07.02.2023, that the tender was not terminated pursuant to any terms of the contract subsisting between the parties, rather, the respondent '<u>cancelled</u>' the tender saying that there was technical fault in the tender that was floated.

**61.** Thus, the respondent could be said to have exercised powers in its executive capacity as the action to cancel the tender falls outside the purview of the terms of the contract. Hence, it cannot be said that the present matter is purely a contractual dispute. It is also not a breach of contract, as no such breach has been imputed to the appellant in terms of the contract, but rather a plain and simple exercise of the executive powers.

**62.** Thus, the present dispute even if related to a tender, cannot be termed as a pure contractual dispute, as the dispute involves a public law element. Although there is no discharge of a public function by the respondent towards the appellant yet there is a right to public law action vested in him against the respondent in terms of Article 14 of the Constitution. This is because the exercise of the executive power by it in the contractual domain i.e., the cancelling of the tender carries a corresponding public duty to act in a reasonable and rationale manner. Thus, we find that the writ petition filed by

the respondent was maintainable and the relief prayed for could have been considered by the High Court in exercise of its writ jurisdiction.

**c. Meaning and True Import of Arbitrariness of State Actions in Contractual Disputes.**

**63.** In ***Ramana Dauaram Shetty v. The International Airport Authority of India & Ors.*** reported in **AIR 1979 SC 1628** this Court held that the actions of the State in contractual matters must conform to some standard or norms which is rational, non-discriminatory and not guided by extraneous considerations, otherwise the same would be in violation of Article 14 of the Constitution. The relevant observations read as under: -

> *"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, A.I.R. 1974 S.C. 555 and Maneka Gandhi v. Union of India, A.I.R. 1978 S.C. 597 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 consideration, 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."*
>
> (Emphasis supplied)

**64.** In ***Dwarkadas Marfatia & Sons*** (supra) this Court speaking through Sabyasachi Mukherji, CJ. (as the learned Chief Justice then was) held that

every action of the State or an instrumentality of the State must be informed by reason.....actions uninformed by reason may be questioned as arbitrary. The relevant observations read as under: -

> *"22. [...] every action of the State or as instrumentality of the State, must be informed by reason. Indubitably, the respondent is an organ of the State under Article 12 of the Constitution. In appropriate cases, as was observed in the last mentioned decision, actions uninformed by reason may be questioned as arbitrary in proceedings under Article 226 or Article 32 of the Constitution. But it has to be remembered that Article 14 cannot be construed as a charter for judicial review of State action, to call upon the State to account for its actions in its manifold activities by stating reasons for such actions."*
>
> (Emphasis supplied)

**65.** The meaning and true import of arbitrariness is more easily visualized than precisely stated or defined. The question, whether an impugned action 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, the 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.

**66.** Control of administrative discretion is an important concern in the development of Rule of Law. According to Wade and Forsyth, the Rule of Law has four meanings, and one of them is that "government should be conducted within a framework of recognized rules and principles which restrict discretionary power".

**67.** To enthuse efficiency in administration, a balance between accountability and autonomy of action should be carefully maintained. Overemphasis on either would impinge upon public efficiency. But undermining the accountability would give immunity or carte blanche power to act as it pleases with the public at whim or vagary. Whether the public authority acted bona fide would be gauged from the impugned action and attending circumstances. The authority should justify the action assailed on the touchstone of justness, fairness and reasonableness. Test of reasonableness is more strict. The public authorities should be duty conscious rather than power charged. Its actions and decisions which touch the common man have to be tested on the touchstone of fairness and justice. That which is not fair and just is unreasonable. And what is unreasonable is arbitrary. An arbitrary action is ultra vires. It does not become bona fide and in good faith merely because no personal gain or benefit to the person exercising discretion has been established. An action is mala fide if it is contrary to the purpose for which it was authorised to be exercised. Dishonesty in discharge of duty vitiates the action without anything more. An

action is bad even without proof of motive of dishonesty, if the authority is found to have acted contrary to reason. [See: ***Mahesh Chandra v. Regional Manager, U.P. Financial Corporation & Ors.*** : **(1993) 2 SCC 279**]

**68.** The dictum as laid in ***Tata Cellular v. UOI*** reported in **(1994) 6 SCC 651** is that the judicial power of review is exercised to rein in any unbridled executive functioning. It was observed that the restraint has two contemporary manifestations viz. one is the ambit of judicial intervention and the other covers the scope of the court's ability to quash an administrative decision on its merits. These restraints bear the hallmarks of judicial control over administrative action. It was held that the principle of judicial review is concerned with reviewing not the merits of the decision in support of which the application for judicial review is made, but the decision-making process itself. It was held that the principle of judicial review would apply to the exercise of contractual powers by the Government bodies in order to prevent arbitrariness or favouritism. It was held that the duty of the court is to confine itself to the question of legality and its concern should be whether a decision-making authority exceeded its powers; whether it committed an error of law or committed a breach of the rules of natural justice or reached a decision which no reasonable tribunal would have reached or, abused its powers. The grounds upon which an administrative action can be subjected to judicial review are classified as illegality, irrationality and procedural impropriety. In

that very decision, while deducing the principles from various cases referred, it was held that the modern trend points to judicial restraint in administrative action; that the Court does not sit as a court of appeal but merely reviews the manner in which the decision was made; that the court does not have the expertise to correct the administrative decision and if a review of the administrative decision is permitted, it will be substituting its own decision, without the necessary expertise which itself may be fallible; that the terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract; and, that the government must have freedom of contract, i.e. a free-play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness, but must be free from arbitrariness not affected by bias or actuated by *mala fides*. Moreover, quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

**69.** To ascertain whether an act is arbitrary or not, the court must carefully attend to the facts and the circumstances of the case. It should find out whether the impugned decision is based on any principle. If not, it may unerringly point to arbitrariness. If the act betrays caprice or the mere exhibition of the whim of the authority it would sufficiently bear the insignia of arbitrariness. In this

regard supporting an order with a rationale which in the circumstances is found to be reasonable will go a long way to repel a challenge to State action. No doubt the reasons need not in every case be part of the order as such. If there is absence of good faith and the action is actuated with an oblique motive, it could be characterised as being arbitrary. A total non-application of mind without due regard to the rights of the parties and public interest may be a clear indicator of arbitrary action.

**70.** One another way, to assess whether an action complained of could be termed as arbitrary is by way of scrutinizing the reasons that have been assigned to such an action. It involves overseeing whether the reasons which have been cited if at all genuinely formed part of the decision-making process or whether they are merely a ruse. All decisions that are taken must earnestly be in lieu of the reasons and considerations that have been assigned to it. The Court must be mindful of the fact that it is not supposed to delve into every minute details of the reasoning assigned, it need not to go into a detailed exercise of assessing the pros and cons of the reasons itself, but should only see whether the reasons were earnest, genuine and had a rationale with the ultimate decision. What is under scrutiny in judicial review of an action is the decision-making process and whether there is any element of arbitrariness or *mala fide*.

**71.** Thus, the question to be answered in such situations is whether the decision was based on valid considerations. This is undertaken to ensure that the

reasons assigned were the true motivations behind the action and it involves checking for the presence of any ulterior motives or irrelevant considerations that might have influenced the decision. The approach of the court must be to respect the expertise and discretion of administrative authorities while still protecting against arbitrary and capricious actions. Thus, now the only question that remains to be considered is whether the action of the respondent to cancel the tender could be termed as arbitrary?

**ii. Whether the action of cancelling the tender is arbitrary or unfair and in consequence of violation of Article 14 of the Constitution?**

**72.** The principal contention of the appellant is that the notice of cancellation dated 07.02.2023 that was issued by the respondent is manifestly arbitrary, unreasonable and influenced by *mala fide* and extraneous considerations.

**73.** Before we proceed to determine whether the cancellation of tender could be termed as arbitrary, it is necessary to understand the stance of the respondent in the present litigation, as discernible from their pleadings, which has left us quite perplexed. The argument of the respondent is two-fold: -

**(i)** ***First***, that the tender had to be cancelled as there was a technical fault. The tender was found to be 'non-specific' & 'not well defined' as a result it created ambiguity resulting in financial losses to the respondent.

**(ii)** ***Secondly,*** the cancellation was also on account of a change in policy whereby, the operation & maintenance of the concerned underpasses had been handed over to another authority.

**74.** The primary thrust of the respondent's contention is that the decision to cancel the tender was taken in view of the technical faults in the same, more particularly the ambiguity as to whether the advertisement boards could be put up beyond the area of the concerned underpasses.

**75.** The learned Single Judge of the High Court in its order dated 24.04.2023 observed that there was an ambiguity in the Special Terms & Conditions of the Memorandum of Tender more particularly clauses 10 and 14 respectively which gave rise to a conflicting interpretation as to the placement of the signboards. This in the opinion of the High Court was a technical fault, which the respondent sought to rectify by way of cancelling the tender. The relevant observations read as under: -

> *"18. [...] In fact, the letter of cancellation provides further reasons, namely, that the tender has been found to be non-specific and having technical faults. This would also be borne out from clauses 10 and 14 of the Special Terms and Conditions of the tender document which give rise to conflicting interpretations on the placement of the signboards. Hence, besides the administrative decision to hand over the maintenance of E.M. Bypass from KMDA to KMC, the respondent KMDA as the tendering authority, has a right to rectify the ambiguities in the bid document by cancelling the same."*
>
> (Emphasis supplied)

**76.** However, interestingly, the Notice of Cancellation dated 07.02.2023 that came to be issued by the respondent makes no mention of any such lacuna. In fact,

there is no reference to the aforementioned clauses or any conflict in their interpretation. The aforesaid notice only states that the tender was found to be 'non-specific' and 'not well defined' which created ambiguity due to which the respondent is incurring losses, and nothing is stated either about the ambiguity in putting up the advertisement boards or for that matter which aspect of the tender is non-specific.

**77.** It is also apposite to mention that just a month prior to cancelling the tender, the respondent on 24.01.2023 issued a notice to the appellant, asking him to stop all work in respect of the tender. Remarkably, in the said notice, there is no whisper about there being any of the aforementioned technical faults in the tender floated by the respondent. In fact, a close reading of the aforesaid notice would reveal that the orders to stop the work had been issued for an altogether different reason – i.e., handing over of the operation & maintenance of the concerned underpasses to another authority i.e., KMC.

**a. Scrutiny of Internal File-Notings and Deliberations of the State.**

**78.** The appellant has in particular placed reliance on various notings made in the internal file of the respondent in respect of the tender to contend that the cancellation of the same was arbitrary and influenced by extraneous considerations. The respondent on the other hand submitted that the internal file-notings cannot be used or relied upon to impute any ill-motives to the decision of cancelling the tender as they only reflect the opinion of a particular

individual and cannot be construed or interpreted as the decision of the respondent. In this regard, reliance has been placed on the following decisions: -

i. ***Pimpri Chinchwad New Township Development Authority v. Vishnudev Coop. Housing Society*** : **(2018) 8 SCC 215**.
ii. ***Shanti Sports Club v. Union of India*** : **(2009) 15 SCC 705.**

**79.** This Court in its decision in ***Bachhittar Singh v. State of Punjab & Anr.*** reported in **AIR 1963 SC 395** held that merely because something was written in the internal files and notesheet does not amount to an order, it at best is an expression of opinion which may be changed, and it only becomes an order when such opinion is formally made into a decision. The relevant observations read as under: -

> *"9. The question, therefore, is whether he did in fact make such an order. Merely writing something on the file does not amount to an order. Before something amounts to an order of the State Government two things are necessary. The order has to be expressed in the name of the Governor as required by clause (1) of Article 166 and then it has to be communicated. As already indicated, no formal order modifying the decision of the Revenue Secretary was ever made. Until such an order is drawn up the State Government cannot, in our opinion, be regarded as bound by what was stated in the file. [...]*
>
> *10. The business of State is a complicated one and has necessarily to be conducted through the agency of a large number of officials and authorities. The Constitution, therefore, requires and so did the Rules of Business framed by the Rajpramukh of PEPSU provide, that the action must be taken by the authority concerned in the name of the Rajpramukh. It is not till this formality is observed that the action can be regarded as that of the State or here, by the Rajpramukh. [...] Indeed, it is possible that after expressing one opinion about a particular matter at a particular stage a Minister or the Council of*

> *Ministers may express quite a different opinion, one which may be completely opposed to the earlier opinion. Which of them can be regarded as the "order" of the State Government? Therefore, to make the opinion amount to a decision of the Government it must be communicated to the person concerned."*
>
> (Emphasis supplied)

[See also: ***Delhi Development Authority v. Hello Home Education Society*** : **(2024) 3 SCC 148** at para 17 ***Mahadeo & Ors. v. Sovan Devi & Ors.*** : **(2023) 10 SCC 807** at paras 15-17; ***Municipal Committee, Barwala v. Jai Narayan and Co. & Anr.*** : **(2022) SCC OnLine 376** at para 16]

**80.** In ***Sethi Auto Service Station*** **v.** ***DDA*** reported in ***(2009) 1 SCC 180*** this Court held that notings in a departmental file are nothing more than an opinion by an officer for internal use and consideration of other officials for the final decision making. The relevant observations read as under: -

> "*14. It is trite to state that notings in a departmental file do not have the sanction of law to be an effective order. A noting by an officer is an expression of his viewpoint on the subject. It is no more than an opinion by an officer for internal use and consideration of the other officials of the department and for the benefit of the final decision-making authority. Needless to add that internal notings are not meant for outside exposure. Notings in the file culminate into an executable order, affecting the rights of the parties, only when it reaches the final decision-making authority in the department, gets his approval and the final order is communicated to the person concerned.*"
>
> (Emphasis supplied)

**81.** In ***Shanti Sports Club*** (supra) several representations were made by the landowners requesting to release their land from acquisition. After considering those representations, the concerned minister recorded in the note file that the

land should be denotified on suitable terms and left the final decision to his successor. The new minister, however, rejected the request for denotification. Consequently, writ petitions were filed, seeking the release of the land based on the note file. This Court held that the notings recorded in the official files do not become decisions and confer no right unless the same are sanctified, authenticated and communicated in the prescribed manner. It further held that any recording in the note-file can always be reviewed, reversed or overruled. The relevant observations read as under: -

> *"43. A noting recorded in the file is merely a noting simpliciter and nothing more. It merely represents expression of opinion by the particular individual. By no stretch of imagination, such noting can be treated as a decision of the Government. Even if the competent authority records its opinion in the file on the merits of the matter under consideration, the same cannot be termed as a decision of the Government unless it is sanctified and acted upon by issuing an order in accordance with Articles 77(1) and (2) or Articles 166(1) and (2). The noting in the file or even a decision gets culminated into an order affecting right of the parties only when it is expressed in the name of the President or the Governor, as the case may be, and authenticated in the manner provided in Article 77(2) or Article 166(2). A noting or even a decision recorded in the file can always be reviewed/reversed/overruled or overturned and the court cannot take cognizance of the earlier noting or decision for exercise of the power of judicial review.*
>
> *xxx xxx xxx*
>
> *52. As a result of the above discussion, we hold that the notings recorded in the official files by the officers of the Government at different levels and even the Ministers do not become decisions of the Government unless the same is sanctified and acted upon by issuing an order in the name of the President or Governor, as the case may be, authenticated in the manner provided in Articles 77(2) and 166(2) and is communicated to the affected persons. The notings and/or decisions recorded in the file do not confer any right or adversely affect the right of any person and the same can neither be challenged in a court nor made basis for seeking relief. Even if the competent authority records*

> *a noting in the file, which indicates that some decision has been taken by the authority concerned, the same can always be reviewed by the same authority or reversed or overturned or overruled by higher functionary/authority in the Government."*
>
> (Emphasis supplied)

[See also: ***State of Uttaranchal v. Sunil Kumar Vaish*** : **(2011) 8 SCC 670** at para 24]

**82.** In ***Pimpri Chinchwad*** (supra), a revenue minister passed an order for deletion of the land of the respondent therein from acquisition proceeding, but the said order was never communicated, however, the same was mentioned in the internal note file. Sometime later, the government decided to reconsider all uncommunicated orders. As a result the respondents therein filed a writ seeking implementation of the order as mentioned in the internal note-file. This Court held that the notings in official files of the government are an internal matter and carry no legal sanctity unless they are approved and duly communicated as per the prescribed procedure. It is only when such notings are translated into formal decisions, they would create some right or claim in favour of a person. The relevant observations read as under: -

> *"36. [...] first, a mere noting in the official files of the Government while dealing with any matter pertaining to any person is essentially an internal matter of the Government and carries with it no legal sanctity; second, once the decision on such issue is taken and approved by the competent authority empowered by the Government in that behalf, it is required to be communicated to the person concerned by the State Government. In other words, so long as the decision based on such internal deliberation is not approved and communicated by the competent authority as per the procedure prescribed in that behalf to*

> *the person concerned, such noting does not create any right in favour of the person concerned nor it partake the nature of any legal order so as to enable the person concerned to claim any benefit of any such internal deliberation. Such noting(s) or/and deliberation(s) are always capable of being changed or/and amended or/and withdrawn by the competent authority."*
>
> (Emphasis supplied)

**83.** We are of the view that the reliance on the part of the respondent on the decisions of this Court in ***Pimpri Chinchwad*** (supra) and ***Shanti Sports Club*** (supra) to assert that no reference could be made to the internal-file notings for the purposes of judicial review of its decision is completely misplaced. In ***Shanti Sports Club*** (supra) the question before the Court was as to when an internal noting can be used to confer or claim a right. Whereas in ***Pimpri Chinchwad*** (supra) the issue for consideration before the Court was whether any internal-note or deliberation once written in the files was capable of being reconsidered, changed, modified or withdrawn.

**84.** None of the aforementioned decisions lay down that the courts are completely precluded from appraising or scrutinizing the internal file notings and deliberations for the purposes of judicial review of a decision. This Court in ***Pimpri Chinchwad*** (supra) and ***Shanti Sports Club*** (supra) only went so far as to say that as long as the deliberations in the internal file notings have not been formalized into an official decision, the same cannot be relied upon to claim any right.

**85.** We are of the considered opinion that once a decision has been officially made through proper means and channel, any internal deliberations or file notings that formed a part of that decision-making process can certainly be looked into by the Court for the purposes of judicial review in order to satisfy itself of the impeccability of the said decision.

**86.** In the aforesaid context, we may refer to the decision of this Court in ***State of Bihar v. Kripalu Shankar*** reported in **(1987) 3 SCC 34**, wherein it was held that the internal file notings reflect the views and line of thinking of a particular officer. It further held that such views would amount to disobedience or contempt of court only when they are translated into a formal decision. The relevant observations read as under: -

> *"11. After this finding, the High Court held some of the officers of the government guilty solely on the basis of the views expressed by them in the files, which were not, in fact, accepted by the Government and which were only at the stage of suggestions and views. Shri K.K. Venugopal, the learned Counsel for the State contended that it would be unsafe to initiate action in contempt merely on the strength or notings by officials on the files, expressing their views and to do so would imperil the working of various departments in a Government in a democracy and would have far-reaching consequences. Sometimes a view expressed by an officer may be incorrect. The view so expressed passes through various hands and gets translated into action only at the ultimate stage. The views so expressed are only for internal use. Such views may indicate the line of thinking of a particular officer. Until the views so expressed culminate into an executable order, the question of disobedience of court's order does not arise. Though the State Government have been found not guilty, the State has filed the appeal to protect its officers from independent and fearless expression of opinion and to see that the order under appeal does not affect the proper functioning of the Government."*
>
> (Emphasis supplied)

**87.** The above observations of this Court fortify our view that once a decision is made, all opinions and deliberations pertaining to the said decision in the internal file-notings become a part of the process by which the decision is arrived at, and can be looked into for the purposes of judicial review. In other words, any internal discussions or notings that have been approved and formalized into a decision by an authority can be examined to ascertain the reasons and purposes behind such decisions for the overall judicial review of such decision-making process and whether it conforms to the principles enshrined in Article 14 of the Constitution.

**88.** One another reason why the respondent cannot claim that its internal file-notings fall outside the purview of judicial review of the courts is in view of the inviolable rule that came to be recognized by this Court in ***Ramana Dayaram Shetty*** (supra) wherein it was held that an executive authority must be rigorously held to the standard by which it professes its actions to be judged. The relevant observations read as under: -

> *"10. [...] It is a well-settled rule of administrative law that an executive authority must be rigorously held to the standards by which it professes its actions to be judged and it must scrupulously observe those standards on pain of invalidation of an act in violation of them. [...]"*
>
> (Emphasis supplied)

**89.** The aforesaid leaves no manner of doubt in our mind that if the purported action of cancelling the tender is claimed to have been taken in view of certain

technical faults in the same or even a change in policy the same ought to be clearly reflected from its internal file notings as-well, pursuant to which the purported decision was taken.

**90.** We have gone through the internal file-notings of the respondent on the aforesaid tender wherein the entire internal deliberations of the KMDA officials as to the tender for work have been recorded. In the entire records – right from the time the Notice Inviting Tender was being formulated till the issuance of the final Notice of Cancellation dated 07.02.2023, there is no whisper of any particular clauses of the tender that was floated nor of any conflict or technical fault in the same, as claimed by the respondent.

**91.** We are in *seisin* of the fact that although the internal-file notings mention about the policy change in the operation and maintenance of the concerned underpasses, yet a careful reading of the same reveals that the cancellation of the tender for work was neither due to any technical fault nor due to the policy change in the operation and maintenance of the concerned underpasses but was for altogether a different reason.

**92.** As per Note #91 dated 30.12.2022 of the file-notings, when the Order dated 01.12.2022 of the Urban Development and Municipal Affairs Department came to be passed whereby the maintenance was handed over to KMC, it was the Minister-In-Charge as the Chairperson of the respondent authority – who

suggested that in view of the change in scenario the tender be cancelled. In the aforesaid note, the following has been recorded - "*Recently maintenance of EM Bye pass has been handed over to KMC. Thus, in this changed scenario we may cancel the work order*".

**93.** The words "*may cancel the work order*" clearly indicate, that the respondent at that stage by no means was of the opinion that the tender was required to be cancelled, as no specific reasons had been assigned as to what effect the policy change had impacted the feasibility or practicality of the tender. This is especially because, none of the officials of the respondent suggested that the tender be cancelled, rather it was the concerned minister who did so.

**94.** In Note #95 dated 10.01.2023 it has been clearly recorded by the officials of the respondent that it was the competent authority of the KMDA that instructed to cancel the tender in view of the aforesaid change in the policy. However, since the officials of the respondent were in doubt regarding the legality of such action, it insisted on first obtaining the advice or opinion from its legal cell before proceeding further. Furthermore, the aforesaid note clearly indicates that the work stop order had to be issued only with a view to comply with the instructions of the competent authority while it decided upon the aspect of cancellation of the tender.

***95.*** In Note #97, the respondent has recorded the following – "*There is no different opinion than to get this cancelled, once this has been decided by the Authority but a legal opinion may be sought for avoiding further litigations*". This also clearly indicates that as the competent authority had decided that the tender be cancelled, the officials of the respondent had no other choice but to cancel the tender. However, the respondent continued insisting on first obtaining the opinion from its legal cell before cancelling the same.

**96.** However, thereafter, as per Note #108 dated 24.01.2023 it is apparent that the concerned minister during his visit specifically instructed the officials of the respondent to cancel the tender. Pursuant to which, the respondent as per Note #109 dated 02.02.2023 immediately convened a meeting to undertake the steps for cancellation even though the advice from the legal cell had yet to be obtained. It thereafter prepared a proposal for cancellation, which culminated into the ultimate notice of cancellation dated 07.02.2023.

**97.** From the above narrated sequence of events, it is evident that it was none other but the concerned minister who suggested to cancel the tender. The respondent was reluctant to immediately cancel the tender for work and continued to insist on obtaining the opinion from its legal cell. Even though the opinion of the legal cell was yet to be obtained, the respondent, despite its initial reluctance, undertook immediate steps to cancel the tender after the concerned minister personally instructed the officials to do so.

**98.** Thus, it is evident that the Notice of Cancellation dated 07.02.2023, issued to the appellant, was at the behest of the concerned minister. The respondent clearly recorded that, because instructions for cancellation had been received from the higher-ups, there was no option but to proceed with the cancellation. Even before the respondent could properly and thoroughly explore the possibility of acceding to such request by consulting its legal cell, the tender was cancelled only at the instance and specific instructions of the concerned minister.

**99.** The aforesaid aspect can be looked at from one another angle. The concerned Minister-In-Charge had instructed to cancel the tender in view of the change in policy whereby the operation & maintenance of the underpasses was vested in another authority. To ascertain whether the decision of the concerned minister to cancel the tender was arbitrary or not, we must first consider whether the reason for such cancellation was genuinely on the basis of the aforesaid change in policy or whether it was driven by some personal discretion or motives. This can be discerned by first understanding the change in policy that took place.

**100.** The Urban Development and Municipal Affairs Department by way of its Order dated 01.12.2022 decided that the maintenance of the roads and drainage of the E.M. Bypass shall be handed over by the respondent to the KMC.

**101.** As per the Note #91 dated 30.12.2022, the concerned minister for the first time proposed cancellation of the tender in view of the aforesaid change in scenario as a result of the maintenance of the E.M. Bypass being handed over from the respondent to the KMC.

**102.** However, it is pertinent to note that in the aforesaid order of the Urban Development and Municipal Affairs Department it has been specifically stated that the right to collect revenue from the advertisements as-well as the control of the E.M. Bypass shall continue to remain with the respondent herein.

**103.** Thus, the respondent at the relevant point of time was not only in control of the two underpasses, but was also empowered to continue collecting revenue from the advertisements displayed at the underpasses. As such the respondent even after the change in policy, remained well within its rights to continue charging license fee in lieu of the advertisement rights by way of the aforesaid tender that was issued to the appellant.

**104.** When the respondent issued the work stop orders to the appellant on 24.01.2023 in view of the handing over of the maintenance of the E.M. Bypass to the KMC, the appellant in response, pointed out that the work stop orders were completely misconceived as the respondent continued to retain the custody as-well as the advertisement rights of the concerned underpasses.

**105.** It was only after the appellant highlighted why the work stop orders were misconceived and uncalled for, that the respondent immediately flipped its stance and in its notice of cancellation that was issued just 1-month later, it attributed 'technical faults' in the tender floated.

**106.** At the relevant point of time, there could have been no occasion for the respondent to cancel the tender on the basis of the Urban Development and Municipal Affairs Department's order dated 01.12.2022. We say so because:-

**(i)** ***First,*** as per the aforesaid order, it was explicitly clarified that the respondent would continue to retain the operation & maintenance as-well as the advertisement rights of the concerned underpasses.

**(ii)** ***Secondly,*** only the structural maintenance and restoration of the E.M. Bypass's carriageway, roads, underground drainage etc. were to be handed over to the KMC. Indisputably, the tender that was issued in favour of the appellant was distinct from the maintenance that was handed over to KMC inasmuch as the scope of work of tender was limited to cleaning the roads, walls, floors etc., maintaining the electric-fixtures and upkeep of the gardens.

**(iii)** ***Thirdly,*** despite the stance of the respondent of "change in scenario" due to the handing over of the maintenance, we find that after cancelling the tender and during the pendency of the present appeal, it was the respondent who floated fresh tender for the work of maintenance in respect of the

same underpasses and not KMC, thus fortifying our view that the aforesaid change in policy had no bearing on the cancellation of the tender.

**107.** It is only on 16.09.2023 i.e., much after the cancellation of the tender that the Urban Development and Municipal Affairs Department, Government of West Bengal modified its earlier order whereby both, the control along with the right to revenue for the said structures were handed over to KMC from the respondent. This leaves no manner of doubt in our mind that the concerned minister's decision to cancel the tender on account of purported 'change in policy' was without any application of mind, capricious and influenced by malice.

**b. Concept of Public Interest in Administrative Decisions.**

**108.** The reluctance on the part of the respondent to cancel the tender is also evident from Note #97, wherein the authority expressed its concern over the potential consequences of such cancellation. The respondent apprehended that in the event the tender for work was being cancelled, the routine maintenance of the underpasses would be disrupted. Due to this, the underpasses would have to be closed until some other agency could take over the maintenance. The relevant observations read as under: -

> "***Note # 97***
> *[...] Besides, the underpasses are being maintained by the bidder. Once the contract is cancel led, the routine maintenance would be an issue till the work is awarded thru tender. The E&M Sector may be asked to*

*do the maintenance by engaging one of the existing agency from their set up. 0therwise, both the underpasses should be under the lock and key or police custody.*

***16/01/2023 04:38 PM*** ***SUBHANKAR BHATTACHARYA***
***CE (REBBRDG) (KMDA)***"

**109.** From the above it is evident that the cancellation of the tender was not in public interest. It may also not be out of place to mention that as per the internal file-notings the respondent had itself acknowledged that the revenue model of the aforesaid tender for work was far more beneficial and was fetching higher rates than the existing models of other agencies on the E.M. Bypass. The relevant observations read as under: -

"***Note # 88***
*[...] In this model KMDA is saving Rs. 90.00 Lacs per year mentioned in Note#49 and earned Rs.62,67,110/- per year with 5% increment for each year. [...]*
*So it appears that the rate of this current Revenue model tender are receiving much higher rate than any hoarding installed on E.M. Bypass. [...]*

***29/12/2022 02:52 PM*** ***SANTANU PATRA***
***SE (REBBRDG) (KMDA)***

***Note # 89***
*[...] The cost of revenue generation would be enhanced at a rate 5% at the end of each year, whereas, the authority need not to bother about the routine annual maintenance cost of appurtenances and labours, security force etc. which would increase as well. By this way two simultaneous benefits go in favour of the Authority. [...]*

***30/12/2022 05:54 PM*** ***SUBHANKAR BHATTACHARYA***
***CE (REBBRDG) (KMDA)***"

**110.** Thus, the respondent's reasoning in the Notice of Cancellation dated 07.02.2023 that it was incurring financial losses from the aforesaid tender does

not hold well either. It has been contended by the respondent that due to the ambiguity in tender as regards placement of advertisements, many interested bidders might not have been able to submit their bids. Thus, the respondent formed the view that if the ambiguity is corrected a higher license fee could be fetched.

**111.** However, we are not impressed with the above submission. As discussed in the preceding paragraphs of this judgment, nothing to this effect is even remotely indicated from the internal file notings of the respondent or the materials on record. There is nothing to suggest that there was a technical fault in the tender resulting in financial losses or that there was a possibility of fetching higher license fees. On the contrary, it can be seen that the respondent itself was of the opinion that the tender for work was financially beneficial to it. This further undermines the claims of technical faults or potential financial losses, and suggests that the decision to cancel the tender was not based on genuine financial concerns but rather on other, possibly extraneous factors.

***112.*** Even assuming for a moment that there was a technical fault in the tender, which if rectified had the possibility of generating more revenue, the same by no stretch could be said to be a cogent reason for cancelling an already existing tender. In this regard reference may be made to the decision of this Court in ***Vice Chariman & Managing Director, City & Industrial Development***

***Corporation of Maharashtra Ltd. & Anr. v. Shishir Realty Pvt. Ltd. & Ors.*** reported in **(2021) SCC OnLine SC 1141** wherein it was held that mere possibility of more money in public coffers does not in itself serve 'public interest'. A blanket claim by the State claiming loss of public money cannot be used to forgo contractual obligations, especially when it is not based on any evidence or examination as the larger interest of upholding contracts is also in the play. The relevant observations read as under: -

> *"58. When a contract is being evaluated, the mere possibility of more money in the public coffers, does not in itself serve public interest. A blanket claim by the State claiming loss of public money cannot be used to forgo contractual obligations, especially when it is not based on any evidence or examination. The larger public interest of upholding contracts and the fairness of public authorities is also in play. Courts need to have a broader understanding of public interest, while reviewing such contracts."*
>
> (Emphasis supplied)

**113.** In ***Vasantkumar Radhakisan Vora (Dead) by His LRs.* v. *Board of Trustees of the Port of Bombay***, reported in **(1991) 1 SCC 761**, this Court held that wherever a public authority seeks to resile or relive itself from the enforcement of a promise made or obligation undertaken in the name of public interest, it is legally bound to first show the material or circumstances by which public interest would be jeopardised if such enforcement is insisted. The relevant observations read as under: -

> *"20. When it seeks to relieve itself from its application the government or the public authority are bound to place before the court the material, the circumstances or grounds on which it seeks to resile from the*

*promise made or obligation undertaken by insistence of enforcing the promise, how the public interest would be jeopardised as against the private interest. It is well settled legal proposition that the private interest would always yield place to the public interest. [...]"*

(Emphasis supplied)

**114.** We may again refer to the decision of this Court in ***M.P. Power Management Company Ltd.*** (supra) wherein this Court observed that merely because the rates embodied in a contract with the passage of time have become less appealing, the same cannot become a determinative criterion for either terminating the contract or for the courts to decline interference in such contractual disputes. The relevant observations read as under: -

*"88. Therefore, on a conspectus of the case law, we find that the concept of overwhelming public interest has essentially evolved in the context of cases relating to the award of contract by the State. It becomes an important consideration in the question as to whether then the State with whatever free play it has in its joints decides to award a contract, to hold up the matter or to interfere with the same should be accompanied by a careful consideration of the harm to public interest. We do not go on to say that consideration of public interest should not at all enter the mind of the court when it deals with a case involving repudiation of a claim under a contract or for that matter in the termination of the contract. However, there is a qualitative State enters into the contract, rights are created. If the case is brought to the constitutional court and it is invited to interfere with State action on the score that its action is palpably arbitrary, if the action is so found then an appeal to public interest must be viewed depending on the facts of each case. If the aspect of public interest flows entirely on the basis that the rates embodied in the contract which is arbitrarily terminated has with the passage of time become less appealing to the State or that because of the free play of market forces or other developments, there is a fall in the rate of price of the services or goods then this cannot become determinative of the question as to whether court should decline jurisdiction. In this case, it is noteworthy that the rates were in fact settled on the basis of international competitive bidding and in which as many as 182 bidders participated and the rate offered by the first respondent was undoubtedly the lowest. The fact that power has*

> *become cheaper in the market subsequently by itself should not result in non-suiting of the complaint of the first respondent, if it is found that a case of clear arbitrariness has been established by the first respondent.*
>
> *89. In other words, public interest cannot also be conflated with an evaluation of the monetary gain or loss alone."*
>
> (Emphasis supplied)

**115.** What can be discerned from the above is that this Court has consistently underscored that any decision to terminate a contract must be grounded in a real and palpable public interest, duly supported by cogent materials and circumstances in order to ensure that State actions are fair, transparent, and accountable. Public interest cannot be used as a pretext to arbitrarily terminate contracts and there must be a clear and demonstrable ramification or detriment on the public interest to justify any such action.

**116.** Considerations of public interest should not be narrowly confined to financial aspects. The courts must have a more holistic understanding of public interest wherever the fairness of public authorities is in question, giving due regard to the broader implications of such action on the stability of contractual obligations. Merely because the financial terms of a contract are less favourable over a period of time does not justify its termination. Such decisions must be based on a careful consideration of all relevant factors, including the potential harm to the integrity and sanctity of contractual relationships. The larger interest of upholding contracts cannot be discarded in the name of monetary gain labelled as public interest.

**117.** We may make a reference to the observations made by this Court in ***Har Shankar & Ors. v. Dy. Excise and Taxation Commr. & Ors.*** reported in **(1975) 1 SCC 737**, wherein this Court held that those who contract with open eyes must accept the burdens of contract along with its benefit. It further held that the enforcement of rights and obligations arising out of a contract cannot depend on whether the contracting party finds it prudent to abide by it. The relevant observations read as under: -

> *"16. [...] Those who contract with open eyes must accept the burdens of the contract along with its benefits. The powers of the Financial Commissioner to grant liquor licences by auction and to collect licence fees through the medium of auctions cannot by writ petitions be questioned by those who, had their venture succeeded, would have relied upon those very powers to found a legal claim. Reciprocal rights and obligations arising out of contract do not depend for their enforceability upon whether a contracting party finds it prudent to abide by the terms of the contract. By such a test no contract could ever have a binding force."*
>
> (Emphasis supplied)

**118.** Thus, we are of the view that the respondent's stance of a mere possibility of fetching higher license fees was no ground to cancel the tender issued to the appellant for the purposes of rectifying it, especially when the respondent completely failed to demonstrate as to how there was a technical fault in the tender or how potential interested bidders did not participate due to it or how fetching higher license fees was more than a mere possibility.

**119.** At this stage, we may also answer one another submission that was canvassed on behalf of the respondent as regards the other aspect of public interest

besides the monetary gain. It was submitted on behalf of the respondent that the decision to cancel the tender was also keeping in mind the considerations such as being able to engage experts for maintenance of critical public infrastructure. It is the case of the respondent that the tender was cancelled in order to float separate tenders, one for the maintenance work and another for licensing advertisement rights to ensure expertise in each respective field.

**120.** We are not impressed by the above submission either. We need not refer to a copious amount of documents in this regard, as just a bare perusal of the notice inviting tender shows that the eligibility criterion for participating in the tender process prescribed a comprehensive threshold of requirement of experience in structural works and successful completion of similar natured projects, thus ensuring that the bidders participating in the tender possess the necessary expertise for the work of maintenance.

**121.** Even otherwise, if at all the respondent was very much concerned about the maintenance of the underpasses due to lack of expertise of the appellant, it was always open to the respondent to terminate the contract in terms of the termination clause as envisaged in Clause 35 of the Special Terms & Conditions of the Memorandum for the breach or non-compliance of any of the obligations or terms of the tender. Mere apprehension of lack of expertise was no ground for the respondent to cancel the tender by taking recourse to its

executive powers in complete ignorance of the contractual terms that were agreed upon by them.

**122.** From the above discussion, we are of the considered opinion that the present *lis* is nothing but a classic textbook case of an arbitrary and capricious exercise of powers by the respondent to cancel the tender that was issued to the appellant on the basis of extraneous considerations and at the behest of none other but the concerned Minister-In-Charge.

### iii. Sanctity of Public-Private Partnership Tenders

**123.** Before we close this judgment, we must also address one very important aspect as regards the importance of maintaining the sanctity of tenders in public private procurement processes.

**124.** Public tenders are a cornerstone of governmental procurement processes, ensuring transparency, competition, and fairness in the allocation of public resources. It emanates from the Doctrine of Public Trust which lays down that all natural resources and public use amenities & structures are intended for the benefit and enjoyment of the public. The State is not the absolute owner of such resources and rather owns it in trust and as such it cannot utilize these resources as it pleases. As a trustee of the public resources, the State owes **i)** a duty to ensure that community resources are put to fair and proper use that enures to the benefit of the public as-well as **ii)** an obligation to not indulge in

any favouritism or discrimination with these resources. The State with whatever free play it has in its joints decides to award a contract, to hold up the matter or to interfere with the same should be accompanied by a careful consideration of the harm to public interest.

**125.** Public tenders are designed to provide a level playing field for all potential bidders, fostering an environment where competition thrives, and the best value is obtained for public funds. The integrity of this process ensures that public projects and services are delivered efficiently and effectively, benefiting society at large. The principles of transparency and fairness embedded in public tender processes also help to prevent corruption and misuse of public resources. In this regard we may refer to the observations made by this Court in ***Nagar Nigam v. Al. Farheem Meat Exporters Pvt. Ltd.*** reported in **(2006) 13 SCC 382**, which reads as under: -

> *"16. The law is well settled that contracts by the State, its corporations, instrumentalities and agencies must be normally granted through public auction/public tender by inviting tenders from eligible persons and the notification of the public auction or inviting tenders should be advertised in well-known dailies having wide circulation in the locality with all relevant details such as date, time and place of auction, subject-matter of auction, technical specifications, estimated cost, earnest money deposit, etc. The award of government contracts through public auction/public tender is to ensure transparency in the public procurement, to maximise economy and efficiency in government procurement, to promote healthy competition among the tenderers, to provide for fair and equitable treatment of all tenderers, and to eliminate irregularities, interference and corrupt practices by the authorities concerned. This is required by Article 14 of the Constitution."*
>
> (Emphasis supplied)

**126.** The sanctity of public tenders lies in their role in upholding the principles of equal opportunity and fairness. Once a contract has come into existence through a valid tendering process, its termination must adhere strictly to the terms of the contract, with the executive powers to be exercised only in exceptional cases by the public authorities and that too in loathe. The courts are duty bound to zealously protect the sanctity of any tender that has been duly conducted and concluded by ensuring that the larger public interest of upholding bindingness of contracts are not sidelined by a capricious or arbitrary exercise of power by the State. It is the duty of the courts to interfere in contractual matters that have fallen prey to an arbitrary action of the authorities in the guise of technical faults, policy change or public interest etc.

***127.*** The sanctity of contracts is a fundamental principle that underpins the stability and predictability of legal and commercial relationships. When public authorities enter into contracts, they create legitimate expectations that the State will honour its obligations. Arbitrary or unreasonable terminations undermine these expectations and erode the trust of private players from the public procurement processes and tenders. Once a contract is entered, there is a legitimate expectation, that the obligations arising from the contract will be honoured and that the rights arising from it will not be arbitrarily divested except for a breach or non-compliance of the terms agreed thereunder. In this regard we may make a reference to the decision of this Court in ***Sivanandan***

***C.T. v. High Court of Kerala*** reported in **(2024) 3 SCC 799** wherein it was held that a promise made by a public authority will give rise to a legitimate expectation that it will adhere to its assurances. The relevant portion reads as under: -

> *"18. The basis of the doctrine of legitimate expectation in public law is founded on the principles of fairness and non-arbitrariness in Government dealings with individuals. It recognises that a public authority's promise or past conduct will give rise to a legitimate expectation. The doctrine is premised on the notion that public authorities, while performing their public duties, ought to honour their promises or past practices. The legitimacy of an expectation can be inferred if it is rooted in law, custom, or established procedure*
>
> *xxx xxx xxx*
>
> *45. The underlying basis for the application of the doctrine of legitimate expectation has expanded and evolved to include the principles of good administration. Since citizens repose their trust in the State, the actions and policies of the State give rise to legitimate expectations that the State will adhere to its assurance or past practice by acting in a consistent, transparent, and predictable manner. The principles of good administration require that the decisions of public authorities must withstand the test of consistency, transparency, and predictability to avoid being regarded as arbitrary and therefore violative of Article 14."*
>
> (Emphasis supplied)

**128.** Cancellation of a contract deprives a person of his very valuable rights and is a very drastic step, often due to significant investments having already been made by the parties involved during the subsistence of the contract. Failure on the part of the courts to zealously protect the binding nature of a lawful and valid tender, would erode public faith in contracts and tenders. Arbitrary terminations of contract create uncertainty and unpredictability, thereby discouraging public participation in the tendering process. When private

parties perceive that their contractual rights can be easily trampled by the State, they would be dissuaded from participating in public procurement processes which may have a negative impact on such other public-private partnership ventures and ultimately it is the public who would have to bear the brunt thereby frustrating the very object of public interest.

**129.** We caution the public authorities to be circumspect in disturbing or wriggling out of its contractual obligations through means beyond the terms of the contract in exercise of their executive powers. We do not say for a moment that the State has no power to alter or cancel a contract that it has entered into. However, if the State deems it necessary to alter or cancel a contract on the ground of public interest or change in policy then such considerations must be *bona-fide* and should be earnestly reflected in the decision-making process and also in the final decision itself. We say so because otherwise, it would have a very chilling effect as participating and winning a tender would tend to be viewed as a situation worse than losing one at the threshold.

## H. FINAL CONCLUSION

**130.** We are of the considered opinion that the litigation at hand is nothing but a classic textbook case of an arbitrary exercise of powers by the respondent in cancelling the tender that was issued in favour of the appellant and that too at

the behest of none other than the concerned Minister-In-Charge and thereby rendering the Notice of Cancellation dated 07.02.2023 illegal.

**131.** During the course of hearing, we were informed that the appellant herein pursuant to the terms of the subject tender had erected multiple structures at different sites on the concerned underpasses for displaying advertisements at a huge personal cost. He has made significant investments pursuant to the tender.

**132.** As, we have held the Notice of Cancellation dated 07.02.2023 to be *non-est*, the issuance of a fresh tender to any third-party in respect of the same work would not defeat the vested rights that accrued in favour of the appellant. Similarly, the handing over of the operation and maintenance of the E.M. Bypass to the KMC also would have no bearing whatsoever, on the rights that stood vested in the appellant as on the date of cancellation of the tender. Such vested rights would continue to operate notwithstanding any change in the control and maintenance of the underpasses.

**133.** The order dated 16.09.2023 passed by the Urban Development and Municipal Affairs Department, Government of West Bengal merely transferred the operation and maintenance of the underpasses including the right to receive revenue from KMDA to KMC and therefore will have no effect on any rights

that accrued in favour of the appellant as such rights are independent of the authority in control of operations and maintenance.

**134.** Thus, for all the foregoing reasons, the appeal succeeds and is hereby allowed. The notice of cancellation dated 07.02.2023 is quashed and the impugned judgment and order passed by the High Court is hereby set aside.

**135.** Pending application(s), if any, also stand disposed of.

**..... CJI.**
**(Dr. Dhananjaya Y. Chandrachud)**

**..... J.**
**(J.B. Pardiwala)**

**..... J.**
**(Manoj Misra)**

**New Delhi**
**9th July, 2024.**